

**AMNESTY INTERNATIONAL**

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# **FAIR TRIAL MANUAL**

**SECOND EDITION**

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INTERNATIONAL**





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# **AMNESTY INTERNATIONAL FAIR TRIAL MANUAL SECOND EDITION**

Amnesty International Publications  
1 Easton Street  
London WC1X 0DW  
United Kingdom

[amnesty.org](http://amnesty.org)

© Amnesty International 2014

Index: POL 30/002/2014  
Original language: English

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Printed in the UK  
ISBN: 978-0-86210-484-9

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SECOND EDITION



This Manual is dedicated to Christopher Keith Hall, whose principled, learned, steadfast work to ensure justice and the rule of law is an enduring inspiration.

## ACKNOWLEDGEMENTS

The second edition of the Fair Trial Manual could not have been produced without the financial contribution of Amnesty International Netherlands, the support of Lars van Troost, and the help of many people who gave their time and expertise to assist Amnesty International in its preparation.

Jill Heine conceived of the Manual, recruited, co-ordinated and led the research effort, drafted most of the chapters, and finalized the text in the light of expert comments. Michael Bochenek was the initial project manager and drafted the chapter on fair trial rights of children. Christopher Keith Hall drafted the chapter on fair trial rights in armed conflict. Maggie Maloney drafted the chapter on the prohibition of torture and other ill-treatment and detention conditions. Elana Dallas edited the Manual. Halya Kowalsky carried out legal research, checked the citations and assisted with the editing. Saphia Crowther sub-edited the text. Lindsay Warmington worked on the design. Sara Wilbourne project-managed the production of the Manual in its final stages. Katherine Ofori provided administrative support for the project.

Amnesty International is truly grateful to the experts who provided insightful comments and advice: Ariel Dulitzky, Tomaso Falchetta, Philip Leach, Vivienne O'Connor, Jelena Pejic, Nigel Rodley, Ian Seiderman, Malcolm Smart, Stefan Trechsel and David Weissbrodt.

Members of Amnesty International's staff who contributed comments on drafts include: Avner Gidron, Lisa Gormley, Christopher Keith Hall, Jonathan O'Donohue, Kolawole Olaniyan, Matthew Pollard, Sebastien Ramu, Hugo Relva, Chiara Sangiorgio, Jan Wetzel, Jim Welsh and Livio Zilli.

The following people, organizations and law firms contributed to the research: Kym Beeston, Maria-Kyrstyna Duval, Gabriela Echeverria, Katherine Everett, Lisa Gormley, Emily Gray, Christopher Keith Hall, Aladdin Hassanin, Johannes Heiler, Anna-Karin Holmlund, Ioana Hyde, Carmi Lecker, Antonio Marchesi, Jonathan O'Donohue, Tatiana Olarte, Sara van der Pas, Mervat Rishmawi, Asa Ryberg, Marina Sharpe, Anne Weber and David Weissbrodt; a huge team organized, thanks to Kara Irwin, by Advocates for International Development (Legal Support) including Ian Clarke, Simon John, Susannah Wilks and Rebecca Wright; and teams of lawyers, trainees and paralegals at the following law firms: Clifford Chance, co-ordinated by Katharina Lewis and Roger Leese; Dechert LLP, co-ordinated by Ruth Abernethy and Brad Pollack; Herbert Smith Freehills LLP, co-ordinated by Jonathan Scott, Justin D'Agostino, Adam Johnson, Richard Brophy and Patrick FitzGerald; Linklaters LLP, co-ordinated by Kathryn Ludlow, Aalia Dato, Elisha Butler, Diana Good and Kimberley Johnston; Reed Smith LLP, co-ordinated by Alexander Moorehead and Alex Burton; students at BPP Law School through the Pro Bono Project in 2007 and 2008, co-ordinated by Kara Irwin and led by Sara van der Pas and Katherine Everett. Galina Bradley assisted in finding and gaining access to materials for the research.



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# INTRODUCTION

*“Injustice anywhere is a threat to justice everywhere.”*

**Martin Luther King**

Justice is based on respect for the human rights of every individual. As the Universal Declaration of Human Rights puts it, “recognition of the inherent dignity and the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world”.

When an individual stands trial on criminal charges, he or she is confronted by the machinery of the state. How the person is treated when accused of a crime provides a concrete demonstration of how well that state respects individual human rights and the rule of law.

Every criminal trial tests the state’s commitment to justice and respect for human rights. The commitment is tested even more when a person is accused of crimes which threaten the security of a society, such as acts of terrorism, crimes against humanity, war crimes, or crimes which threaten the security of those who hold power.

Every government has a duty to bring to justice those responsible for crimes in independent, impartial and competent courts in a manner that respects international standards of fairness. Whatever the crime, if people are subjected to unfair trials, justice is not served for the accused, the victim of the crime or the public.

The criminal justice system itself loses credibility when people are tortured or ill-treated by law enforcement officials, when trials are manifestly unfair and when proceedings are tainted by discrimination. Unless human rights are upheld during arrest, and in the police station, the interrogation room, the detention centre, the court and the prison cell, the state has failed in its duties and betrayed its responsibilities.

The right to a fair trial is a human right. It is one of the universally applicable guarantees recognized in the Universal Declaration of Human Rights, the cornerstone of the international human rights system, adopted in 1948 by the world’s governments. The right to fair trial

recognized in the Universal Declaration of Human Rights has since become legally binding on all states as part of customary international law. The fundamental principles of fair trial are applicable at all times, including during states of emergency and armed conflict.

The right to a fair trial has been reaffirmed and elaborated since 1948 in legally binding treaties such as the International Covenant on Civil and Political Rights (ICCPR), adopted by the UN General Assembly in 1966. It has been recognized and component parts (constituent rights) have been set out in numerous other international and regional treaties as well as non-treaty standards adopted by the UN and by regional intergovernmental bodies. These human rights standards were drafted to apply to legal systems throughout the world and take into account the rich diversity of legal procedures – they set out the minimum guarantees that all systems should provide to ensure justice, respect for the rule of law and respect for the right to fair criminal proceedings. They apply to investigations, arrests and detention, as well as throughout the pre-trial proceedings, trial, appeal, sentencing and punishment.

These international fair trial standards constitute a collective agreement by the international community on the criteria for assessing how governments treat people suspected, accused and convicted of crimes – from the most egregious to minor crimes. This Manual is a guide to these standards.

### THE PURPOSE OF THIS MANUAL

This Manual seeks to provide a practical guide to the relevant human rights standards for anyone involved in examining how well a criminal trial or a justice system meets international standards of fairness. It is intended for the use of trial observers and others assessing the fairness of an individual case, as well as for anyone seeking to evaluate the extent to which a country's criminal justice system guarantees respect for international standards of fair trial. It may also serve as a guide for law makers, judges, prosecutors and defence lawyers or as a training tool.

Assessing the fairness of criminal proceedings is complex and multi-faceted. Each and every case is different, and must be examined on its merits and as a whole. The assessment normally focuses on whether the conduct of the proceedings complies with national laws, whether those national laws are consistent with international minimum guarantees of fairness, and whether the manner in which those laws have been implemented is consistent with international standards. It must be emphasized that, in an individual case, the analysis of whether a trial has been fair usually requires a review of the proceedings as a whole. A fair trial may not necessarily require that there have been no errors made and no defects in the process. Sometimes a trial is flawed in one aspect alone, and this flaw may or may not taint the fairness of the proceedings as a whole. But often trials fail to meet international standards in several ways. Conversely, it should also be noted that observing each of the fair trial guarantees does not, in all cases and circumstances, ensure that a hearing has been fair. The right to a fair trial is broader than the sum of the individual guarantees. An assessment of the fairness of criminal proceedings depends on the entire conduct of the proceedings, including appeals, where breaches of standards during trial may be corrected.

The international standards against which the fairness of criminal proceedings is judged are numerous. They are found in many different instruments as well as in customary international law, and are constantly evolving. This Manual points to the international and regional human

rights standards applicable to the various stages of the criminal process. It also outlines the fair trial standards applicable in times of armed conflict. While some standards apply to all forms of detention (including administrative detention) or to trials of any nature, including non-criminal (civil) cases, this Manual focuses on standards applicable to criminal proceedings. In order to clarify what the standards require in practice, the Manual includes interpretations of particular standards by authoritative UN and regional bodies, the Inter-American Court of Human Rights, the European Court of Human Rights and some international criminal tribunals.

## SECOND EDITION

This is the second edition of Amnesty International's Fair Trial Manual. It expands on the first edition, which was published in 1998, since it includes many additional standards adopted since 1998, updated interpretations of the standards and further analysis. It covers international standards and key interpretations through 2010, and also cites key developments in 2011, 2012 and early 2013.

Among the many significant developments that it reflects are:

- increasing recognition that many fair trial rights, though not expressly identified as non-derogable in treaties, apply at all times and in all circumstances;
- challenges to fair trial rights that have arisen as a result of counter-terrorism laws and policies, in particular in the aftermath of the attacks in the USA on 11 September 2001;
- the extra-territorial application of human rights obligations where a state exercises control over people or territory;
- growing recognition that fairness requires respect for the rights of victims in a manner consistent with the rights of the accused;
- increased attention to the impact of discrimination within the criminal justice system;
- explicit recognition of the right to the assistance of counsel during questioning;
- an expansion of jurisprudence on exclusion of evidence, beyond statements elicited by torture;
- the prohibition of mandatory death sentences;
- the effects of fair trial rights on other rights, including for example the right to family and private life;
- growing recognition that the risk of unfair trial may make it unlawful to transfer a person to another state.

*We would welcome any suggestions, corrections and comments on the Manual's content. Please send any such comments to: [publishing@amnesty.org](mailto:publishing@amnesty.org)*



# INTERNATIONAL HUMAN RIGHTS STANDARDS AND BODIES

This section outlines the various types of international human rights standards relevant to fair trials, and some of the bodies that give authoritative guidance on how to interpret those standards.

1. Human rights standards
  - 1.1 Treaties
  - 1.2 Non-treaty standards
2. Universal treaty standards
  - 2.1 The International Covenant on Civil and Political Rights
  - 2.2 Other UN human rights treaties
  - 2.3 The laws of armed conflict
3. Universal non-treaty standards
  - 3.1 International non-treaty standards not yet formally adopted
4. Regional standards
  - 4.1 Africa
  - 4.2 Americas
  - 4.3 Arab States
  - 4.4 Europe
5. UN thematic mechanisms
6. International criminal courts
7. Citations

## 1. HUMAN RIGHTS STANDARDS

The standards cited in this manual differ in their legal status. Some are provisions of treaties; treaty provisions are legally binding on the states that are parties to the treaty. Others are provisions of non-treaty instruments. While non-treaty instruments are not in themselves binding, they represent the consensus of the international community on standards to which states should conform. Some of the rights recognized in these treaties and non-treaty instruments have been recognized as rules of customary international law, which is binding on all states. Together they constitute an international framework of fundamental safeguards against unfair trials.

Amnesty International, as a human rights organization, cites the most protective standards that apply. Generally, it will cite the relevant treaty, but sometimes a treaty is not applicable because the state has not agreed to be bound by it, and sometimes the issue of concern is covered in more detail in non-treaty standards. In some instances, the right has been recognized as customary international law. In all cases, Amnesty International promotes adherence to internationally recognized and agreed norms, and also works to strengthen the protection of human rights.

A list of the treaties and non-treaty standards cited in this Manual and the abbreviations used for them are set out below in **Standards cited and abbreviations used**.

## 1.1 TREATIES

The instruments called Covenant, Convention, Charter and Protocol are treaties that are legally binding on the states that are parties to them. Some treaties are open to countries all over the world. Others are open only to states that belong to a particular regional organization.<sup>1</sup>

States can agree to be bound by these treaties through a two-step process of signature and ratification, or through the single step of accession.<sup>2</sup> When a state signs a treaty, it formally declares its intention to ratify that treaty in the future, and may not engage in acts inconsistent with the object and purpose of the treaty, pending ratification.<sup>3</sup> When it ratifies or accedes to the treaty, the state becomes a party to that treaty and promises to abide by the provisions contained in the treaty and to fulfil its obligations under the treaty. When reviewing a state's obligations under a treaty, it is important to check whether the state has made any reservations that seek to modify or exclude its obligations under the treaty.<sup>4</sup> It is also important to check whether the state has temporarily restricted any of its obligations through derogation (see **Chapter 31** on states of emergency).

A protocol is a treaty attached to another treaty. It generally adds extra provisions to the original treaty, extends its scope of application or establishes a complaints mechanism. A protocol may also amend a treaty. Most protocols are open to ratification or accession only by parties to the treaty it supplements.

Authoritative guidance to interpreting treaties is provided by the comments, recommendations, findings, decisions and judgments of treaty monitoring bodies and human rights courts.<sup>5</sup> These are independent expert bodies and courts established by the treaties or by the UN or regional bodies to monitor implementation of the treaty and to investigate complaints that provisions of the treaty have been violated. General Comments, General Recommendations and reports issued by these bodies, their conclusions and recommendations issued after review of a state's implementation of a treaty, and their findings in individual cases are cited in this Manual, as are interpretations by other UN or regional experts, and intergovernmental bodies or mechanisms, such as Special Rapporteurs or Working Groups, which also provide authoritative guidance.<sup>6</sup>

## 1.2 NON-TREATY STANDARDS

Many human rights standards relevant to fair trials are contained in non-treaty instruments. Non-treaty instruments are usually called Declarations, Principles, Rules, Guidelines and so on. The Universal Declaration of Human Rights, the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment and the Standard Minimum Rules for the Treatment of Prisoners are examples of non-treaty instruments which set out important fair trial guarantees. States do not formally become parties to non-treaty standards. Although non-treaty standards do not technically have the legal power of treaties, they have the persuasive force of having been negotiated by states, and of having been adopted by political bodies such as the UN General Assembly, usually by consensus. Because of this political force they are considered authoritative, and they are cited and relied upon in rulings of regional human rights courts and national courts. Non-treaty standards sometimes reaffirm principles that have become or are already considered to be legally binding on all states under customary international law.

<sup>1</sup> These include the [African Charter on Human and Peoples' Rights](#), the [American Convention on Human Rights](#), the [Arab Charter on Human Rights](#) and the [\(European\) Convention for the Protection of Human Rights and Fundamental Freedoms](#).

<sup>2</sup> In addition, newly formed states may become a party to a treaty by accession. See [Vienna Convention on Succession of States in respect of Treaties](#).

<sup>3</sup> Article 18 of the [Vienna Convention on the Law of Treaties](#).

<sup>4</sup> States may not enter reservations when prohibited from doing so by the treaty. Reservations that are inconsistent with the object and

purpose of the treaty itself or are contrary to peremptory norms of international law or norms of customary international law or concern non-derogable rights are also prohibited. See, [Vienna Convention on the Law of Treaties](#); [HRC General Comment 24](#); [ILC Guide to Practice on Reservations to Treaties](#), [UN Doc. A/66/10/Add.1](#) (2011).

<sup>5</sup> [Republic of Guinea v Democratic Republic of the Congo](#), ICJ, (2010) §§66-68.

<sup>6</sup> Also relevant are decisions of national courts and commentaries by legal scholars and non-governmental organizations such as the International Committee of the Red Cross.

## 2. UNIVERSAL TREATY STANDARDS

The following international treaties, which are legally binding on states parties, enshrine fair trial guarantees and are cited in this Manual.

### 2.1 THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS

The **International Covenant on Civil and Political Rights** (ICCPR) was adopted in 1966 by the UN General Assembly and entered into force in 1976. There were 167 states parties as of 26 June 2013. The ICCPR protects fundamental rights including many of those at the core of Amnesty International's work: the right to life; the rights to freedom of expression, thought, conscience, and belief, assembly and association; the right to be free from arbitrary arrest or detention; the right to freedom from torture and other ill-treatment; and the right to a fair trial.

The ICCPR establishes a monitoring body of 18 experts – the Human Rights Committee. The Committee monitors the implementation of the ICCPR and its Second Optional Protocol. The General Comments of the Human Rights Committee provide authoritative guidance on interpretation of the ICCPR.

The (first) **Optional Protocol to the ICCPR**, which came into force in 1976, gives the Human Rights Committee the competence to consider complaints submitted by or on behalf of an individual claiming that a state party to the Protocol has violated rights guaranteed by the ICCPR. As of 26 June 2013, 114 states were party to this Protocol.

The **Second Optional Protocol to the ICCPR, aiming at the abolition of the death penalty**, entered into force in 1991. States parties to this protocol agree to ensure that nobody within their jurisdiction is executed<sup>7</sup> and that they will take all necessary measures to abolish the death penalty. There were 76 states parties as of 26 June 2013.

### 2.2 OTHER UN HUMAN RIGHTS TREATIES

The **Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment** (Convention against Torture) was adopted by consensus by the UN General Assembly in 1984 and entered into force in 1987. As of 26 June 2013, 153 states were parties. States parties are obliged to stop and prevent torture and other cruel, inhuman or degrading treatment or punishment. They must make torture a criminal offence in national law. They must investigate all allegations of torture and other ill-treatment and any situations where there are reasonable grounds to believe that torture or other ill-treatment has been committed. They must bring to justice suspected perpetrators, exclude evidence obtained through torture and other ill-treatment in court proceedings and ensure redress for victims. The Committee against Torture, established by the treaty and composed of 10 experts, monitors the implementation of the Convention. The Committee issues conclusions and recommendations on states parties' implementation of the treaty and General Comments providing authoritative guidance on how to interpret the treaty. The Committee may also, if the relevant state has authorized it to do so, consider individual complaints and inter-state complaints.

The **Optional Protocol to the Convention against Torture**, which came into force in 2006, requires states parties to set up independent national prevention mechanisms and establishes the Subcommittee on the Prevention of Torture. States parties must mandate both national mechanisms and the Subcommittee to inspect all places within their jurisdiction or control where people may be deprived of their liberty.

<sup>7</sup> States Parties to this treaty may, however, make a reservation at the time of ratification or accession to apply the death penalty in times of war for serious crimes of a military nature, following fair proceedings.

The **Convention on the Rights of the Child** was adopted by the UN General Assembly in 1989 and entered into force in 1990. By 26 June 2013, 193 states were parties to the treaty. The Convention on the Rights of the Child contains fair trial guarantees for children accused of having infringed penal law. The Convention establishes the Committee on the Rights of the Child, composed of 18 independent experts, which examines the progress of states parties in fulfilling their obligations under the Convention through periodic reporting and also issues authoritative General Comments on the interpretation of treaty provisions.

The **Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)** was adopted by the UN General Assembly in 1979 and entered into force in 1981. As of 26 June 2013, there were 187 states parties. The Convention aims to provide effective protection for women against acts of discrimination. Articles 2 and 15 provide that women shall have full equality with men before the law. The Committee on the Elimination of Discrimination against Women (CEDAW Committee), composed of 23 experts, monitors implementation of the Convention and issues authoritative General Recommendations. States that are party to the Optional Protocol to CEDAW, which came into force in 2000, accept the competence of the Committee to consider complaints from individuals or groups alleging a state party's failure to implement its obligations under the Convention as well as to initiate inquiries into grave or systematic violations of women's rights.

The **International Convention on the Elimination of All Forms of Racial Discrimination** (Convention against Racism) was adopted by the UN General Assembly in 1965 and entered into force in 1969. As of 26 June 2013, there were 176 states parties. States parties to this Convention are obliged to condemn racial discrimination and to take all measures to eradicate it, including in the judicial system. The Committee on the Elimination of Racial Discrimination, composed of 18 experts, monitors implementation of this treaty, including through periodic reporting by states parties, an early-warning procedure, and the examination of inter-state complaints and individual complaints when the state concerned has authorized it to do so. It also issues authoritative General Recommendations.

The **International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families** (Migrant Workers Convention), adopted by the UN General Assembly in 1990, entered into force in July 2003. As of 26 June 2013, there were 46 states parties. The Committee on the Protection of the Rights of All Migrant Workers and Members of their Families monitors states parties' implementation of the treaty through a periodic reporting procedure and may consider complaints brought by other states or individuals in certain circumstances.

The **Convention on the Rights of Persons with Disabilities** (Convention on Persons with Disabilities) entered into force in May 2008. As of 26 June 2013, there were 130 states parties. The Committee on the Rights of Persons with Disabilities, established by the Convention, monitors the implementation of the Convention by states parties.

The **International Convention on the Protection of All Persons from Enforced Disappearance** (Convention on Enforced Disappearance), adopted in 2006, came into force in December 2010. As of 26 June 2013, there were 38 states parties, and 15 had granted the treaty monitoring body, the Committee on Enforced Disappearance, competence to consider individual and inter-state complaints.<sup>8</sup> This treaty requires states to take measures to: prevent enforced disappearance;

<sup>8</sup> In addition, Japan granted the Committee competence to consider inter-state complaints only.



criminalize acts constituting enforced disappearance; investigate enforced disappearances; and bring those responsible for enforced disappearance to justice in proceedings that meet fair trial standards. It also requires states to submit periodic reports to the Committee on measures taken to implement the treaty.

### 2.3 LAWS OF ARMED CONFLICT

The laws of armed conflict, also known as international humanitarian law, are a set of rules which seek to limit the harmful effects of armed conflict.

The four **Geneva Conventions** of 1949, which protect civilian populations and those fighting in hostilities, principally during international armed conflicts but also during internal conflicts such as civil wars, contain provisions to ensure a fair trial. There were 195 states parties as of 26 June 2013. The Conventions have been supplemented by Additional Protocol I (173 states parties) which increases the scope of protection for civilians and others during international armed conflicts, and Additional Protocol II (167 states parties) which protects civilians and others during internal (non-international) armed conflicts.

The right to a fair trial in both international and non-international armed conflict is guaranteed in both treaty law and customary international law.

## 3. UNIVERSAL NON-TREATY STANDARDS

Some international non-treaty instruments relevant to fair trials are described below. All the non-treaty instruments cited in this Manual are listed in **Standards cited and abbreviations used**.

The **Universal Declaration of Human Rights** (Universal Declaration), which was adopted by the UN General Assembly in 1948, is a universally recognized set of principles enshrining human rights which should regulate the conduct of all states. The right to fair trial as recognized in the Universal Declaration has been widely accepted as being part of customary international law, and therefore legally binding on all states.

The **Basic Principles on the Independence of the Judiciary**, endorsed by the UN General Assembly in 1985, provide guidance to states on laws and practices necessary to safeguard the independence of judges. A trial before an independent and impartial court is a fundamental requirement of a fair trial.

The **Basic Principles on the Role of Lawyers**, adopted in 1990, aim to ensure that states respect the role and the independence of lawyers. They contain provisions relevant to lawyers representing people who have been deprived of their liberty and in criminal proceedings.

The **Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment** (Body of Principles), adopted by the UN General Assembly in 1988, contains an authoritative set of internationally recognized standards, applicable to all states, on how detainees and prisoners should be treated. The principles set out basic legal and humanitarian concepts and serve as a guide for shaping national legislation.

The **Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems** (Principles on Legal Aid), adopted by the UN General Assembly in December 2012 (annexed

to resolution 67/187), set out the elements required for an effective and sustainable nationwide system of legal aid for suspects, detainees and people charged with or convicted of criminal offences, as well as victims of crime and witnesses in criminal proceedings.

The **Standard Minimum Rules for the Treatment of Prisoners** (Standard Minimum Rules), adopted by the UN Congress on the Prevention of Crime and the Treatment of Offenders in 1955 and approved by the Economic and Social Council in 1957, remain the “universally acknowledged minimum standards for the detention of prisoners”.<sup>9</sup> Since 1971 the UN General Assembly has called on member states to implement these rules.<sup>10</sup> They are frequently cited by treaty bodies and mechanisms when considering claims related to the treatment of people deprived of their liberty.<sup>11</sup> As of June 2013, a process to review the Standard Minimum Rules was continuing.

The **Standard Minimum Rules for Non-Custodial Measures** (the Tokyo Rules) were adopted by the UN General Assembly in 1990. They set out principles promoting the use of alternatives to detention and imprisonment and minimum safeguards to protect people who are subject to such alternatives.

The **UN Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders** (Bangkok Rules) were adopted by the UN General Assembly in 2010. The Rules incorporate the first UN standards specifically covering the treatment of detained or imprisoned women and girls. The Bangkok Rules supplement other non-treaty instruments such as the Standard Minimum Rules and the Tokyo Rules. Some of the rules address issues affecting both women and men, such as those relating to people with parental responsibilities, while others are gender-specific.

The **Safeguards guaranteeing protection of the rights of those facing the death penalty** (Death Penalty Safeguards), endorsed by the UN General Assembly in 1984, restrict the use of the death penalty in countries that have not yet abolished it. Among other protective measures, they provide that capital punishment may only be carried out after a legal process that guarantees all possible safeguards to ensure a fair trial, at least equal to those contained in Article 14 of the ICCPR. The UN General Assembly has repeatedly called on states that retain the death penalty to respect the guarantees set out in the Safeguards.<sup>12</sup>

Other universal non-treaty instruments cited in this Manual include:

- Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law (Basic Principles on Reparation)
- Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power
- Principles for the Prevention and Effective Investigation of Extra-Legal, Summary and Arbitrary Executions
- Declaration on the Human Rights of Individuals Who are not Nationals of the Country in which They Live (Declaration on non-Nationals).
- Standard Minimum Rules for the Administration of Juvenile Justice (the Beijing Rules).

### 3.1 UNIVERSAL NON-TREATY INSTRUMENTS NOT YET FORMALLY ADOPTED

The **Istanbul Protocol** – the Manual on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment – sets out

<sup>9</sup> UN General Assembly resolution 67/188, §4.

<sup>10</sup> UN General Assembly resolution 2858, §2; See also UN General Assembly resolution 39/118, § 3.

<sup>11</sup> For example they were cited by the HRC in *Kurbanov v Tajikistan*, UN Doc. CCPR/C/79/D/1096/2002 (2003) §7.8.

<sup>12</sup> See e.g., UN General Assembly resolution 65/206, §3a.

internationally recognized standards and procedures for the investigation and documentation of allegations of torture and other ill-treatment. The **Principles on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment** contained in the Protocol were annexed to UN General Assembly resolution 55/89 (on torture) and described as a “useful tool” by the Commission on Human Rights and the UN General Assembly.<sup>13</sup>

This Manual also draws on other sets of principles drawn up by international experts, including:

- Updated set of principles for the protection and promotion of human rights through action to combat impunity (Updated Impunity Principles)
- Draft Principles Governing the Administration of Justice Through Military Tribunals
- Siracusa Principles on the Limitation and Derogation of Provisions in the International Covenant on Civil and Political Rights
- Bangalore Principles of Judicial Conduct (which supplement the Basic Principles on the Independence of the Judiciary)
- Paris Principles: Principles and Guidelines on Children Associated with Armed Forces or Armed Groups
- The Yogyakarta Principles on the Application of International Human Rights Law in relation to Sexual Orientation and Gender Identity
- The Johannesburg Principles on National Security, Freedom of Expression and Access to Information.

## 4. REGIONAL TREATY STANDARDS

Regional intergovernmental bodies have developed regional treaties and non-treaty instruments to protect human rights. These instruments are generally applicable to states that belong to the particular regional organization. The regional standards cited in this Manual are from the following regional inter-governmental organizations: the African Union, the Organization of American States, the League of Arab States and the Council of Europe.<sup>14</sup>

### 4.1 AFRICA

The **African Charter on Human and Peoples’ Rights** (African Charter) was adopted in 1981 by the Organization of African Unity and entered into force in 1986. In 2001, the Organization of African Unity became the African Union. The African Charter remains the core human rights treaty of the African Union. As of 26 June 2013, 53 member states of the African Union were parties to the African Charter.

The African Commission on Human and Peoples’ Rights (African Commission) was established under the African Charter to monitor states parties’ implementation of the African Charter, including on the basis of reports submitted by states. It also considers complaints brought by or on behalf of individuals alleging violations of their human rights by a state party to the Charter. It has 11 members, nominated by states parties and elected by the African Union Assembly of Heads of State and Government to serve in their personal capacities.

The African Commission passed a Resolution on the Right to Recourse Procedure and Fair Trial (African Commission Resolution) in 1992. In 2001, the Commission adopted the Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa (Principles

<sup>13</sup> CHR resolution 2002/38, §8, UN Doc. [E/CN.4/2002/200](#), p176; UN General Assembly resolution [57/200](#), §3.

<sup>14</sup> Although the ASEAN Human Rights Declaration, adopted by the 10 states comprising the Association of Southeast Asian Nations (ASEAN) in 2012, contains provisions for fair trials, it is not

cited in this Manual because Amnesty International considers it is incompatible with international human rights law and standards, in particular its overarching “General Principles” which grant sweeping powers to governments to restrict rights.

on Fair Trial in Africa). These expand upon and strengthen the fair trial guarantees in the African Charter and the Commission's 1992 Resolution.

The African Court on Human and Peoples' Rights, operational since 2006, had yet to make any substantive rulings on fair trial issues in criminal cases by June 2012. This regional human rights court is to be merged with the Court of Justice of the African Union, once the Protocol on the Statute of the African Court of Justice and Human and Peoples' Rights enters into force.

## 4.2 AMERICAS

The **American Declaration of the Rights and Duties of Man** (American Declaration), adopted in 1948, is the cornerstone of the Inter-American system for human rights protection and all member states of the Organization of American States (OAS) are obliged to observe the rights it enshrines.

The **American Convention on Human Rights** (American Convention) entered into force in July 1978. As of 30 September 2013, 23 of the 35 OAS member states were parties to the Convention.<sup>15</sup> The Convention provides for the Inter-American Commission on Human Rights and the Inter-American Court of Human Rights to hear cases claiming that states parties have breached the Convention. The Commission's competence is automatically accepted by states when they ratify the Convention, but states parties must declare that they recognize the jurisdiction of the Court. As of 26 June 2013, 21 states parties had accepted the Court's jurisdiction.

The **Protocol to the American Convention on Human Rights to Abolish the Death Penalty**, adopted in 1990, prohibits states parties from applying the death penalty in their territories.<sup>16</sup> As of 26 June 2013, 13 states had ratified or acceded to the Protocol.

The **Inter-American Convention to Prevent and Punish Torture** (Inter-American Convention against Torture) entered into force in 1987. As of 26 June 2013, 18 member states of the OAS were states parties.

The **Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women ("Convention of Belém do Pará")** (Inter-American Convention on Violence against Women) entered into force in 1995. To date it is the most widely ratified treaty of the Inter-American system, with 32 states parties as of 26 June 2013.

The **Inter-American Convention on Forced Disappearance of Persons** (Inter-American Convention on Disappearance) entered into force in 1996. In contrast to most regional treaties that are open only to member states of the regional body, this Convention is open for accession by all states. As of 26 June 2013, 14 states had ratified or acceded to the Convention.

The **Inter-American Commission on Human Rights** (Inter-American Commission) carries out on-site visits at the request or with the consent of member states, prepares special studies, makes recommendations to governments on the adoption of measures to promote and protect human rights and requests governments to report on measures adopted. The Inter-American Commission also acts on complaints submitted to it by individuals, groups or non-governmental organizations alleging violations of rights enshrined in the American Declaration and, in the

<sup>15</sup> This number reflects that Venezuela withdrew as a State Party, effective on 11 September 2013.

<sup>16</sup> States parties to this treaty may, however, make a declaration at the time of ratification or accession to apply the death penalty

in times of war for serious crimes of a military nature, following fair proceedings.

case of states parties, the American Convention. It may submit cases to the Inter-American Court of Human Rights.

The Inter-American Court of Human Rights (Inter-American Court) is an international tribunal composed of seven judges, elected by member states of the OAS. The Court interprets and applies the American Convention. The Court may examine cases submitted by states parties or by the Inter-American Commission, provided the state party has recognized the jurisdiction of the Court. The judgments of the Court are binding on states. In cases of extreme urgency and to avoid further harm, the Court may order provisional measures to be taken. The Court also issues advisory opinions on the interpretation of articles of the Convention, and its 17 advisory opinions make up an important body of jurisprudence of the Inter-American system.

### 4.3 ARAB STATES

The **Arab Charter on Human Rights** (Arab Charter) was adopted by the League of Arab States in 2004 and entered into force in March 2008. As of November 2013, 13 of the 22 members of the League of Arab States were parties to the Arab Charter.

The Charter establishes the Arab Human Rights Committee, which is mandated to monitor implementation of the treaty by states parties.<sup>17</sup>

### 4.4 EUROPE

The (European) **Convention for the Protection of Human Rights and Fundamental Freedoms** (European Convention) entered into force in 1953. Becoming a party is a requirement of joining the Council of Europe. As of 26 June 2013, all 47 member states of the Council of Europe (CoE) were parties.<sup>18</sup>

Protocol 7 to the European Convention guarantees, among other rights, the right to have a conviction for a criminal offence reviewed by a higher tribunal; the right not to be tried or punished more than once for the same offence in the same jurisdiction and the right to compensation for miscarriages of justice. As of 26 June 2013, 43 states had ratified or acceded to this Protocol.

The Council of Europe has adopted two Protocols to the European Convention related to the death penalty. Protocol 6 prohibits the use of the death penalty in peacetime. As of 26 June 2013, 46 of the 47 member states of the Council of Europe had ratified this Protocol and the Russian Federation had signed it. Protocol 13 requires states parties to abolish the death penalty at all times; 43 states were party to this treaty as of 26 June 2013.

The European Court of Human Rights (European Court) is a full-time court with as many judges as there are parties to the Convention (47 as of 26 June 2013). Parties to the European Convention and individuals may petition the Court, which has jurisdiction over cases concerning the application and interpretation of the Convention. A Committee of three judges, a Chamber of seven judges or the Grand Chamber of 17 judges may rule on the merits of a case. The final judgments of the European Court are binding on the state(s) against which the case was brought. The Committee of Ministers of the Council of Europe monitors the implementation of judgments of the Court against member states.

<sup>17</sup> As of December 2012, the Arab Human Rights Committee had considered reports from Jordan and Algeria. Only conclusions and recommendations on Jordan had been published, and these were only available in Arabic at the time of writing.

<sup>18</sup> The European Union's accession to the European Convention, which had not yet taken place by June 2013, is foreseen by Article 59 of the [Convention as amended by Protocol 14](#) and required by the Lisbon Treaty.

The **European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment**, a treaty to which all 47 Council of Europe member states are party, establishes the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (the European Committee for the Prevention of Torture, known as the CPT). This body of independent experts is empowered to visit all places where people are deprived of their liberty by a public authority and to make recommendations.

The (revised) **European Prison Rules** were adopted by the Council of Europe's Committee of Ministers in 2006. Although not a legally binding treaty, the rules serve as guidelines for the treatment of individuals remanded in custody by a judge, including awaiting trial, and prisoners.

Many non-treaty standards adopted by the Council of Europe's Committee of Ministers are cited throughout the Manual.

## 5. UN THEMATIC MECHANISMS

In addition to the UN treaty monitoring bodies, guidance on the application of human rights standards is provided by experts (working groups, special rapporteurs or independent experts) appointed by the UN Human Rights Council to work on different themes. These are known variously as UN thematic mechanisms or Special Procedures with thematic mandates. They are generally mandated to follow up on complaints of a particular type of human rights violation in all countries. They can also carry out country visits, if the state concerned agrees. They can make inquiries, including on individual cases, submit reports with findings and recommendations to governments and report annually to the UN Human Rights Council or the UN General Assembly. Several UN thematic mechanisms are directly concerned with issues pertinent to fair trials:

- The **Working Group on Arbitrary Detention**, established in 1991, investigates cases of detention imposed arbitrarily or otherwise inconsistent with international standards. It covers deprivation of liberty including pre-trial detention to post-trial imprisonment.
- The **Working Group on Enforced or Involuntary Disappearances**, established in 1980, examines matters related to enforced or involuntary disappearances and acts as a channel between the families of "disappeared" people and governments.
- The mandate of the **Special Rapporteur on extrajudicial, summary or arbitrary executions** was established in 1982. The Special Rapporteur works mainly to counter violations of the right to life, including the imposition of the death penalty after unfair trials.
- The post of **Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment** was established in 1985. The Special Rapporteur is mandated to examine questions relevant to torture and other ill-treatment and to promote the implementation of international and national laws prohibiting torture and other ill-treatment.
- The post of **Special Rapporteur on the independence of judges and lawyers** was established in 1994 to report on attacks on the independence of judges and lawyers and to recommend measures to protect the independence of the judiciary.
- The **Special Rapporteur on human rights and counter-terrorism**, established in 2005, is mandated to make recommendations on the promotion and protection of human rights while countering terrorism.

## 6. INTERNATIONAL CRIMINAL COURTS

The International Criminal Tribunals for the former Yugoslavia and for Rwanda were established by the UN Security Council to bring to justice those responsible for genocide, crimes against humanity and serious violations of humanitarian law during the conflicts in the former Yugoslavia and Rwanda. The Statutes of these tribunals (Yugoslavia Statute and Rwanda Statute), and the Rules of Evidence and Procedure promulgated by them (Yugoslavia Rules and Rwanda Rules) contain important international standards that incorporate fair trial guarantees.

Many of these standards have been incorporated into the **Rome Statute of the International Criminal Court** (ICC Statute) which was adopted in 1998. The Statute entered into force on 1 July 2002. As of 26 June 2013, 122 countries were states parties to the ICC Statute. The Court, which is the first permanent international criminal court, has jurisdiction over the most serious crimes of concern to the international community: genocide, crimes against humanity and war crimes. It is a court of last resort, so will not take on a case being investigated or prosecuted by a state, unless those proceedings within the state are not genuine.

Other international criminal courts include the Special Court for Sierra Leone, and the Extraordinary Chambers in the Courts of Cambodia.

None of these international courts authorizes the death penalty as a punishment.

## 7. CITATIONS

### Standards

The treaty and non-treaty standards cited in sidebars are generally in the following order: Universal Declaration; ICCPR; other UN treaties; regional human rights treaties; UN non-treaty standards; regional non-treaty standards; international criminal tribunal standards; humanitarian law standards. The order is varied when appropriate in the particular context.

### Jurisprudence

The term “jurisprudence” in this Manual includes the rulings of human rights courts and the findings of treaty monitoring bodies on inter-state or individual complaints.

Cases decided by the European Court and the Inter-American Court are cited in the following format:

Case name (case number), decisional body (year of decision) §relevant paragraph number(s).

For example: *Medvedyev and Others v France* (3394/03), European Court Grand Chamber (2010) §§79-80.

Citations to the European Court that include the word Decision are decisions on admissibility of a case, rather than judgments on the merits of a case.

Cases decided by international criminal courts follow the same form, except that the full date of the decision (and often the title of the ruling) is included.

For views of UN treaty bodies:

Case name, decisional body, UN Document number (year issued) §relevant paragraph number(s).

For example: *A v Australia*, HRC, UN Doc. CCPR/C/59/D/560/1993 (1997) §9.5.

Where multiple documents from the same body are cited, the name of the body is listed first, followed by information about each particular document. For example:

European Court: *A.S. v Finland* (40156/07), (2010) §§53-68, *Demski v Poland* (22695/03), (2008) §§38-47, *Bocos-Cuesta v The Netherlands* (54789/00), (2005) §§64-74.

### **UN treaty body Concluding Observations**

Body name Concluding Observations: Name of state, UN Document number (year issued) §relevant paragraph number(s)

For example: HRC Concluding Observations: Ethiopia, UN Doc. CCPR/C/ETH/CO/1 (2011) §15.

### **UN treaty body General Comments and General Recommendations**

Name of body General Comment Number, §relevant paragraph number(s)

For example: HRC General Comment 32, §1.

### **Resolutions of the UN or other inter-governmental bodies**

Name of body, resolution number, §relevant paragraph number(s)

UN General Assembly resolution 65/205, §20.



# DEFINITIONS OF TERMS

**National legal systems and international standards define terms related to fair trials in various ways. The following definitions seek to clarify the meanings of some terms as used in this Manual. These definitions are not always the same as those used in international standards or national laws.**

## **Amparo**

*Amparo* is a simple, prompt procedural remedy designed to give everyone recourse to a competent court for protection against acts that violate his or her fundamental rights.<sup>19</sup>

## **Arrest**

An arrest is “the act of depriving a person of liberty under governmental authority for the purpose of taking that person into detention and charging the person with a criminal offence”.<sup>20</sup> It covers the period from the moment the person is placed under restraint up to the time the individual is brought before a competent authority that orders release or continued custody.

## **Commutation**

When a sentence is commuted it means that the penalty has been replaced with a lighter or no penalty.<sup>21</sup>

## **Courts and tribunals**

Courts and tribunals are bodies that exercise judicial functions. They are established by law to determine matters within their competence on the basis of rules of law and in accordance with proceedings conducted in a prescribed manner. A tribunal is a broader concept than a court, but the terms are not used consistently in human rights instruments.<sup>22</sup>

## **Criminal charge**

A criminal charge is the official notification given to an individual by the competent authority of an allegation that he or she has committed a criminal offence.<sup>23</sup> Criminal charges may be formalized into a complaint or an indictment.

## **Criminal offence**

For the purposes of the application of international fair trial standards, whether an act constitutes a criminal offence is determined independently of national law. The decision depends on both the nature of the act and the nature and severity of the possible penalty.<sup>24</sup> The classification of an act under national law is a consideration; however, whether the offence is classified as “criminal” in national law is not decisive. States cannot avoid applying international fair trial standards to a case by failing to classify an offence as criminal or by transferring jurisdiction from courts to administrative authorities.

<sup>19</sup> See Inter-American Court *Advisory Opinion OC-8/87*, §32.

<sup>20</sup> UN Centre for Human Rights, *Human Rights and Pre-trial Detention*, UN Doc. E.94.XIV.6 (1994). The Body of Principles states: “Arrest” means the act of apprehending a person for the alleged commission of an offence or by the action of an authority.”

<sup>21</sup> See M. Nowak, *U.N. Covenant on Civil and Political Rights: CCPR Commentary, 2nd revised edition*, Engel, 2005, p146.

<sup>22</sup> European Court: See *Sramek v Austria* (8790/79), (1984) §36, *Le Compte, Van Leuven and De Meyere v Belgium* (688/75; 7238/75), (1981) §55.

<sup>23</sup> *Eckle v Germany* (8130/78), European Court (1982) §73.

<sup>24</sup> *Engel and others v The Netherlands* (5100/71; 5101/71; 5102/71; 5354/72; 5370/72), European Court (1976) §§80-85.

## Customary international law

Customary international law is a primary source of international legal obligations that are binding on all states, independent of their treaty obligations. The rules of customary international law come from “a general practice accepted as law”.

## Deprivation of liberty

Deprivation of liberty is distinguished in international human rights law from restrictions on liberty or restrictions on the right to freedom of movement.<sup>25</sup> The distinction between a restriction on freedom of movement and deprivation of liberty may be narrow or fluid, for example, under an order assigning a person to live in a particular place (assigned residence). In determining whether a person has been deprived of their liberty, the European Court has focused on the degree and intensity of the restriction. It has considered the type, duration, effects and manner of implementation of the measure in question and the context. Relevant factors include the possibility of leaving the restricted area, the degree of supervision and control over the individual's movements, and the extent of the person's isolation.<sup>26</sup> When the facts indicate that a person has been deprived of liberty, a relatively short duration does not affect this conclusion.

## Detention and remand detention

The term detention is used in this Manual when a person has been deprived of his or her liberty by a state authority (or with the state's consent or acquiescence) for any reason other than being convicted of an offence. The person may be held in a public or private setting that they are not free to leave, including a police station, a pre-trial detention facility or under house arrest.

In criminal cases, there are different forms of pre-trial detention, including detention in a police station before being presented to a judge and **remand detention**. The term remand detention is used in this Manual to describe detention ordered by a judge before trial. It does not include deprivation of liberty for questioning by a police officer or other person authorized by law.

## Habeas corpus

The writ of habeas corpus is a judicial remedy designed to protect personal liberty or physical integrity by means of a judicial decree ordering the appropriate authorities to bring the detained person before a judge so that the lawfulness of the detention may be determined and, if appropriate, the release of the detainee ordered.<sup>27</sup> It is one of the procedures through which the legality of an individual's detention may be challenged.

## Imprisonment

The term imprisonment is used when a person has been deprived of his or her liberty as a result of being convicted of an offence. Imprisonment refers to deprivation of liberty following trial and conviction, while **detention**, in the context of the criminal justice process, refers to deprivation of liberty before and during trial.<sup>28</sup>

## Pardon

When a person receives a pardon it usually means that a prosecution, conviction and any enforceable penalty is voided in full, restoring the rights and privileges of a person. The power of pardon is usually held by the head of state.<sup>29</sup>

<sup>25</sup> The right to freedom of movement and permissible restrictions to that right are set out in Article 12 of the ICCPR, Article 12 of the African Charter, Article 22 of the American Convention and Article 2 of Protocol 4 to the European Convention.

<sup>26</sup> See European Court: *Rantsev v Cyprus and Russia* (25965/04), (2011) §314, *Guzzardi v Italy* (7367/76), (1980) (assigned residence on part of an island), *Gillan and Quinton v United Kingdom* (4158/05), (2010) §§56-57 (stop and search for 30 minutes), *Shimovolos v Russia* (30194/09), (2011) (person not suspected of a criminal offence held in a police station for 45 minutes), *Medvedyev v France*

(3394/03), Grand Chamber (2010) (detention in ship's cabin), *Austin v United Kingdom* (39692/09; 40713/09; 41008/09), Grand Chamber (2012) §§57-59. See also *HRC General Comment 27*, §7.

<sup>27</sup> See Inter-American Court *Advisory Opinion OC-8/87*, §33.

<sup>28</sup> *Body of Principles*, Use of Terms; See, Article 4(2) of the *Optional Protocol to the Convention against Torture*; CoE Definition of remand in custody (*Rec (2006) 13*), the CoE Rules on remand in custody.

<sup>29</sup> See M. Nowak, *U.N. Covenant on Civil and Political Rights: CCPR Commentary, 2nd revised edition*, Engel, 2005, p146.

### **Peremptory norm of international law (*jus cogens*)**

The Vienna Convention on the Law of Treaties (Article 53) defines a peremptory norm of international law as “a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character”. Peremptory norms are also known by the Latin term *jus cogens*.

### **Torture and other cruel, inhuman or degrading treatment or punishment**

Torture is defined in the Convention against Torture, for the purpose of applying the treaty, 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 him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him 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. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.”<sup>30</sup> Such sanctions must, however, be lawful under both national and international standards. The Declaration against Torture states: “Torture constitutes an aggravated and deliberate form of cruel, inhuman or degrading treatment or punishment.”<sup>31</sup>

Human rights instruments do not set out a definition of cruel, inhuman or degrading treatment or punishment. This is consistent with the intent to provide the greatest possible protection for individuals against violations of their right to physical and mental integrity and respect for their inherent dignity.

The Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment states that the term “cruel, inhuman or degrading treatment or punishment” should be interpreted “so as to extend the widest possible protection against abuses, whether physical or mental, including the holding of a detained or imprisoned person in conditions which deprive him, temporarily or permanently, of the use of any of his natural senses, such as sight or hearing, or of his awareness of place and the passing of time”.<sup>32</sup>

<sup>30</sup> Article 1(1) of the [Convention against Torture](#).

<sup>31</sup> Article 1(2) of the [Declaration against Torture](#).

<sup>32</sup> Footnote to Principle 6 of the [Body of Principles](#).

## FURTHER READING

The following publications are among those that may help people seeking additional information on fair trial guarantees enshrined in international standards.

### International standards

Amnesty International, *Combating Torture: a manual for action* (Index: ACT 40/001/2003).

M. Nowak, *U.N. Covenant on Civil and Political Rights: CCPR Commentary, 2nd revised edition*, Engel, 2005.

Steiner and Alston, *International Human Rights in Context, 2nd edition*, Oxford University Press, 2000.

### Fair trials

Clayton and Tomlinson, *Fair Trial Rights*, Oxford University Press, 2001.

International Commission of Jurists, *Trial Observation Manual for Criminal Proceedings*, 2009.

*Legal Digest of International Fair Trial Rights*, OSCE/ODIHR, 2012.

Open Society Foundations: *Legal Tools: International Standards on Criminal Defence Rights* (briefing papers and tool kits)

S. Trechsel, *Human Rights in Criminal Proceedings*, Oxford University Press, 2005.

UN Office of the High Commissioner for Human Rights and the International Bar Association, *Human Rights in the Administration of Justice, A Manual on Human Rights for Judges, Prosecutors and Lawyers*, 2007.

D. Weissbrodt, 'International Trial Observers' in *Stanford Journal of International Law*, Volume 18, 1982, pp27-122.

D. Weissbrodt, *The Right to a Fair Trial under the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights*, Martinus Nijhoff, 2001.

D. Weissbrodt, 'The Administration of Justice and Human Rights' in *City University of Hong Kong Law Review*, Issue 1, 2009, pp23-47.

### African Charter

Evans and Murray (eds), *The African Charter on Human and Peoples' Rights: The system in practice 1986-2006, 2nd edition*, Cambridge University Press, 2008.

Starmer and Christou (eds), *Human Rights Manual and Sourcebook for Africa*, British Institute of International and Comparative Law, 2005.

### American Convention

Buergenthal and Shelton, *Protecting Human Rights in the Americas, Cases and Materials*, Engel, Norbert Paul, Verlag, 1995.

Burgorgue-Larsen, Úbeda de Torres and Greenstein, *The Inter-American Court of Human Rights: Case Law and Commentary*, Oxford University Press, 2011.

A. Dulitzky, 'Review of the Case Law of the Inter-American Human Rights System' in *Revue québécoise de droit international*, Volume 19 no.2, 2006, p331.

R. Wilson, 'Supporting or Thwarting the Revolution? The Inter-American Human Rights System and Criminal Procedure Reform in Latin America' in *Southwest Journal of Law and Trade in the Americas*, Volume 14, 2008, p287.

### Arab Charter

M. Al-Midani, 'The Enforcement Mechanism of the Arab Charter on Human Rights and the need for an Arab Court of Human Rights' in *Journal of Human Rights and Civil Society*, Issue 3, Fall 2010, pp61-64.

M. Rishmawi, 'The Revised Arab Charter on Human Rights: A Step Forward?' in *Human Rights Law Review*, Volume 5 Issue 2, 2005, pp361-376.

M. Rishmawi, 'The Arab Charter on Human Rights and the League of Arab States: An Update' in *Human Rights Law Review*, Volume 10 Issue 1, 2010, pp169-178.

### European Convention

Guides and Fact Sheets summarizing the jurisprudence on the European Court of Human Rights are available on the website of the European Court of Human Rights.

European Commission for Democracy through Law, *The Right to a Fair Trial*, Council of Europe, 2000.

Harris, O'Boyle and Warbrick, *Law of the European Convention on Human Rights, 2nd edition*, Oxford University Press, 2009.

Interights, Legal Manuals on the Case Law of the European Convention: Article 3: the Prohibition of Torture and Inhuman or Degrading Treatment or Punishment; Article 5, the Right to Liberty and Security; Article 6: Fair Hearing, available at <http://www.interights.org/lawyers-manuals/index.html>

P. Leach, *Taking a Case to the European Court of Human Rights, 2nd edition*, Oxford University Press, 2005.

Mole and Harby, *The Right to a Fair Trial: A guide to the implementation of the European Convention on Human Rights*, Council of Europe, 2001.

### International criminal courts

Amnesty International, *The International Criminal Court: Making the right choices Part I: Defining the crimes and permissible defences and initiating a prosecution* (Index: IOR 40/001/1997) and *Part II: Organizing the court and ensuring a fair trial* (Index: IOR 40/11/1997).

Amnesty International, *The International Criminal Court: Ensuring justice for women* (Index: IOR 40/006/1998).

Amnesty International, *Rape and Sexual Violence: Human Rights Law and Standards in the International Criminal Court* (Index: IOR 53/001/2011).

Cassese, Gaeta and Jones (eds), *The Rome Statute of the International Criminal Court: A Commentary*, Oxford University Press, 2002.

Safferling, *International Criminal Procedure*, Oxford University Press, 2012.

W. Schomburg, 'The Role of International Criminal Tribunals in Promoting Respect for Fair Trial Rights' in *Northwestern Journal of International Human Rights*, Volume 8 Issue 1 (Fall 2009).

J. Temminck Tuinstra, *Defence Counsel in International Criminal Law*, Springer, 2009.

O. Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court - Observers' Notes, Article by Article, 2nd revised edition*, Hart, 2008, chapters 55-56 and 59-69.

### Rights of detainees and prisoners

Coyle, *A Human Rights Approach to Prison Management*: Handbook for prison staff, International Centre for Prison Studies, 2000.

Inter-American Commission on Human Rights, *Report on the Human Rights of Persons Deprived of Liberty in the Americas*, OAS, 2011.

Penal Reform International and UN Quaker Office, *Briefing on the Bangkok Rules*, PRI, 2011.

Rodley and Pollard, *The Treatment of Prisoners under International Law, 3rd edition*, Oxford University Press, 2009.

### Rights of children

Inter-American Commission on Human Rights, *Juvenile Justice and Human Rights in the Americas*, OAS, 2011.

UNICEF, *Implementation Handbook for the Convention on the Rights of the Child, revised 3rd edition*, 2007.

### The death penalty

Amnesty International, *International Standards on the Death Penalty* (Index: ACT 50/001/2006).

Hood and Hoyle, *The Death Penalty: A Worldwide Perspective, 4th edition*, Oxford University Press, 2008.

Inter-American Commission on Human Rights, *The Death Penalty in the Inter-American Human Rights System: From Restrictions to Abolition*, OAS, 2011.

Schabas, *The Abolition of the Death Penalty in International Law, 3rd edition*, Cambridge University Press, 2002.

### Rights of victims and witnesses

Council of Europe, *Protecting Witnesses and Victims of Crime*, 2006.

Inter-American Commission on Human Rights, *Access to Justice for Women Victims of Violence in the Americas*, OAS, 2007.

UN Office on Drugs and Crime, *Handbook on Justice for Victims*, New York, 1999.

### Military courts

Andreu-Guzmán, *Military Jurisdiction and international law: Military courts and gross human rights violations*, International Commission of Jurists, 2003.

### Human rights and counter-terrorism measures

Amnesty International, *Rights at Risk: Amnesty International's concerns regarding security legislation and law enforcement measures* (Index: ACT 30/001/2002).

H. Duffy, *"The War on Terror" and the Framework of International Law*, Cambridge University Press, 2005.

Inter-American Commission on Human Rights, *Report on Terrorism and Human Rights*, OAS, 2002.

International Commission of Jurists, *Assessing Damage, Urging Action: Report of the Eminent Jurists Panel on Terrorism, Counter-terrorism and Human Rights*, 2009.

International Commission of Jurists, E-bulletins on counter-terrorism and human rights, available at [www.icj.org](http://www.icj.org)

International Council on Human Rights Policy, *Human Rights After September 11*, Versoix, Switzerland, 2002.

P. Sands, *Lawless World: Making and Breaking Global Rules*, Allen Lane, 2005.

### Extraterritorial application

Coomans and Kamminga (eds), *Extraterritorial Application of Human Rights Treaties*, Intersentia, 2004.

**Research on international human rights law and standards**

[ASIL Guide to Electronic Resources for International Law](http://www.asil.org/resources/electronic-resource-guide-erg), available at <http://www.asil.org/resources/electronic-resource-guide-erg>

[Columbia Human Rights Research Guide](http://library.law.columbia.edu/guides/Human_Rights), available at [http://library.law.columbia.edu/guides/Human\\_Rights](http://library.law.columbia.edu/guides/Human_Rights)

[Columbia University, Human Rights and Humanitarian Affairs: Information Resources](#)

[Georgetown University Law Center, Human Rights Law Research Guide](http://www.law.georgetown.edu/library/research/guides/humanrightslaw.cfm), available at <http://www.law.georgetown.edu/library/research/guides/humanrightslaw.cfm>

[United Nations Documentation, Research Guide: Human Rights](#)

[University of California, Berkeley, Researching International Human Rights Law](#)

[University of Minnesota Human Rights Library: List of Research Guides](http://www1.umn.edu/humanrts/bibliog/biblios.htm), available at <http://www1.umn.edu/humanrts/bibliog/biblios.htm>

[University of Texas Human Rights Protection: A concise guide to researching the international protection of human rights](http://tarltonguides.law.utexas.edu/human-rights), available at <http://tarltonguides.law.utexas.edu/human-rights>



# STANDARDS CITED AND ABBREVIATIONS USED

African Charter African Charter on Human and Peoples' Rights	Violations of International Human Rights Law and Serious Violations of International Humanitarian Law
African Charter on the Rights of the Child African Charter on the Rights and Welfare of the Child	Basic Principles on the Independence of the Judiciary  Basic Principles on the Role of Lawyers
African Commission African Commission on Human and Peoples' Rights	Basic Principles on the Use of Force and Firearms by Law Enforcement Officials
African Commission Resolution African Commission Resolution on the Right to Recourse Procedure and Fair Trial	Beijing Rules Standard Minimum Rules for the Administration of Juvenile Justice
African Court African Court on Human and Peoples' Rights	Body of Principles Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment
African Youth Charter	
American Convention American Convention on Human Rights	CAT (in footnotes) Committee against Torture
American Declaration American Declaration of the Rights and Duties of Man	CEDAW Convention on the Elimination of All Forms of Discrimination against Women
Arab Charter Arab Charter on Human Rights, 2008	CEDAW Committee Committee on the Elimination of Discrimination against Women
Bangalore Principles The Bangalore Principles of Judicial Conduct (2002) adopted by the Judicial Group on Strengthening Judicial Integrity	CERD (in footnotes) Committee on the Elimination of Racial Discrimination
Bangkok Rules United Nations Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders	CERD General Recommendation XXXI (2005) on the prevention of racial discrimination in the administration and functioning of the criminal justice system
Basic Principles for the Treatment of Prisoners	CESCR (in footnotes) Committee on Economic, Social and Cultural Rights
Basic Principles on Reparation Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross	

CHR (in footnotes)	CoE Guidelines on Victims of Terrorist Acts
United Nations Commission on Human Rights	Council of Europe Guidelines on the Protection of Victims of Terrorist Acts
Code of Conduct for Law Enforcement Officials	
CoE	CoE Rules on remand in custody
Council of Europe	Council of Europe Rules on the use of remand in custody, the conditions in which it takes place and the provision of safeguards against abuse
CoE Agreement on Illicit Traffic by Sea	Committee against Torture
Agreement on Illicit Traffic by Sea, implementing Article 17 of the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances	Commission on Human Rights
	United Nations Commission on Human Rights
CoE Convention on the Prevention of Terrorism	Convention against Racism
Council of Europe Convention on the Prevention of Terrorism	International Convention on the Elimination of All Forms of Racial Discrimination
CoE Convention on Sexual Abuse of Children	Convention against Torture
Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse	Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
CoE Convention on Trafficking in Human Beings	Convention against Transnational Organized Crime
Council of Europe Convention on Action against Trafficking in Human Beings	Convention on Enforced Disappearance
CoE Convention on violence against women	International Convention for the Protection of All Persons from Enforced Disappearance
Council of Europe Convention on preventing and combating violence against women and domestic violence	Convention on Persons with Disabilities
	Convention on the Rights of Persons with Disabilities
CoE Guidelines on eradicating impunity	Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity
Guidelines of the Committee of Ministers of the Council of Europe on eradicating impunity for serious human rights violations	Convention on the Rights of the Child
CoE Guidelines on human rights and counter-terrorism	CPT (in footnotes)
Council of Europe Guidelines on human rights and the fight against terrorism	European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment
CoE Guidelines on human rights of members of the armed forces	CPT Standards
Council of Europe Guidelines on human rights of members of the armed forces	Standards of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment
	CRC (in footnotes)
	Committee on the Rights of the Child

Dakar Declaration on the Right to a Fair Trial in Africa	European Committee for the Prevention of Torture
Death Penalty Safeguards Safeguards guaranteeing protection of the rights of those facing the death penalty (1984)	European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment
Declaration against Torture Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment	European Convention (European) Convention for the Protection of Human Rights and Fundamental Freedoms
Declaration of the Rights of the Child	European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment
Declaration on Disappearance Declaration on the Protection of All Persons from Enforced Disappearance	European Convention on Extradition
Declaration on Human Rights Defenders Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms	European Convention on Migrant Workers European Convention on the Legal Status of Migrant Workers
Declaration on Justice for Victims of Crime Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power	European Convention on the Non-Applicability of Statutory Limitation to Crimes against Humanity and War Crimes
Declaration on non-Nationals Declaration on the Human Rights of Individuals Who are not Nationals of the Country in which They Live	European Convention on the Suppression of Terrorism
Declaration on the Elimination of Violence against Women	European Court European Court of Human Rights
Draft Principles Governing the Administration of Justice through Military Tribunals	European Prison Rules
ECRI General Policy Recommendation No. 11 European Commission against Racism and Intolerance General Policy Recommendation No. 11 on Combating Racism and Racial Discrimination in Policing	First Geneva Convention Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field
European Charter for Regional or Minority Languages	Fourth Geneva Convention Geneva Convention relative to the Protection of Civilian Persons in Time of War
European Commission European Commission of Human Rights	Geneva Conventions Geneva Conventions of August 12, 1949
	Genocide Convention Convention on the Prevention and Punishment of the Crime of Genocide
	Guidelines for Action on Children in the Criminal Justice System

Guidelines on Child Victims and Witnesses Guidelines on Justice in Matters involving Child Victims and Witnesses of Crime	Inter-American Commission on Human Rights Inter-American Convention against Torture Inter-American Convention to Prevent and Punish Torture
Guidelines on the Role of Prosecutors	
HRC (in footnotes) Human Rights Committee	Inter-American Convention on Disappearance Inter-American Convention on Forced Disappearance of Persons
Human Rights Council (in footnotes) United Nations Human Rights Council	Inter-American Convention on Extradition
ICC Statute Rome Statute of the International Criminal Court	Inter-American Convention on Persons with Disabilities Inter-American Convention on the Elimination of All forms of Discrimination against Persons with Disabilities
ICC Registry Regulations International Criminal Court, Regulations of the Registry	Inter-American Convention on Violence against Women Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women
ICC Regulations International Criminal Court, Regulations of the Court	
ICC Rules of Procedure and Evidence International Criminal Court, Rules of Procedure and Evidence	Inter-American Court Inter-American Court of Human Rights
ICCPR International Covenant on Civil and Political Rights	International Convention for the Suppression of Terrorist Bombings
ICESCR International Covenant on Economic, Social and Cultural Rights	Istanbul Protocol Istanbul Protocol: Manual on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
ICJ (in footnotes) International Court of Justice	Johannesburg Principles Johannesburg Principles on National Security, Freedom of Expression and Access to Information
ICTR (in footnotes) International Criminal Tribunal for Rwanda	
ICTY (in footnotes) International Criminal Tribunal for the former Yugoslavia	Migrant Workers Convention International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families
ILO Convention 169 ILO Convention 169 concerning Indigenous and Tribal Peoples in Independent Countries	OAS Convention to prevent and punish terrorism OAS Convention to Prevent and Punish Acts of Terrorism Taking the Form of Crimes against Persons and Related Extortion that are of International Significance
Inter-American Commission	

OHCHR Office of the High Commissioner for Human Rights	Principles on Legal Aid UN Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems
Optional Protocol to the Convention against Torture Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment	Principles on Persons Deprived of Liberty in the Americas Principles and Best Practices on the Protection of Persons Deprived of their Liberty in the Americas
Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict	Principles on the Investigation of Torture Principles on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
Optional Protocol to the Convention on the Rights of the Child on the sale of children Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography	Protocol I Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts
Palermo Protocol on Trafficking in Persons Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime	Protocol II Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts
Paris Minimum Standards of Human Rights Norms in a State of Emergency	Protocol 6 to the European Convention Protocol No. 6 to the Convention for the Protection of Human Rights and Fundamental Freedoms concerning the abolition of the death penalty
Paris Principles Principles and Guidelines on Children Associated with Armed Forces or Armed Groups	Protocol 7 to the European Convention Protocol No. 7 to the Convention for the Protection of Human Rights and Fundamental Freedoms
Principles for the Investigation of Arbitrary Executions Principles for the Prevention and Effective Investigation of Extra-Legal, Summary and Arbitrary Executions	Protocol 12 to the European Convention Protocol No. 12 to the Convention for the Protection of Human Rights and Fundamental Freedoms
Principles of Medical Ethics Principles of Medical Ethics relevant to the Role of Health Personnel, particularly Physicians, in the Protection of Prisoners and Detainees against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment	Protocol amending the European Convention on the Suppression of Terrorism
Principles on Fair Trial in Africa Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa	Protocol to the African Charter on the Rights of Women in Africa Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa
	Protocol to the American Convention on Human Rights to Abolish the Death Penalty

Riyadh Guidelines United Nations Guidelines for the Prevention of Juvenile Delinquency	Special Rapporteur on violence against women Special Rapporteur on violence against women, its causes and consequences
Robben Island Guidelines Guidelines and Measures for the Prohibition and Prevention of Torture, Cruel, Inhuman or Degrading Treatment or Punishment in Africa	SPT (in footnotes) Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
Rwanda Rules Rules of Procedure and Evidence, International Criminal Tribunal for Rwanda	Standard Minimum Rules Standard Minimum Rules for the Treatment of Prisoners
Rwanda Statute Statute of the International Criminal Tribunal for Rwanda	Statute of the Special Court for Sierra Leone  Subcommittee on Prevention of Torture Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
Rwanda Tribunal International Criminal Tribunal for Rwanda	
Second Geneva Convention Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea	Third Geneva Convention Geneva Convention relative to the Treatment of Prisoners of War
Second Optional Protocol to the ICCPR Second Optional Protocol to the International Covenant on Civil and Political Rights, aiming at the abolition of the death penalty	Tokyo Rules United Nations Standard Minimum Rules for Non-custodial Measures
Siracusa Principles The Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights	United Nations Rules for the Protection of Juveniles Deprived of their Liberty
Special Rapporteur on extrajudicial executions Special Rapporteur on extrajudicial, summary or arbitrary executions	Universal Declaration Universal Declaration of Human Rights
Special Rapporteur on human rights and counter-terrorism Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism	Updated Impunity Principles Updated Set of principles for the protection and promotion of human rights through action to combat impunity
Special Rapporteur on torture Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment	Vienna Convention on Consular Relations  Vienna Convention on Succession of States in respect of Treaties  Vienna Convention on the Law of Treaties
	WGAD (in footnotes) Working Group on Arbitrary Detention

WGEID (in footnotes)

Working Group on Enforced or Involuntary  
Disappearances

Worst Forms of Child Labour Convention  
(ILO Convention No. 182)

Yogyakarta Principles

Yogyakarta Principles on the Application of  
International Human Rights Law in relation to Sexual  
Orientation and Gender Identity

Yugoslavia Rules

Rules of Procedure and Evidence of the International  
Tribunal for the Prosecution of Persons Responsible  
for Serious Violations of International Humanitarian  
Law Committed in the Territory of the Former  
Yugoslavia

Yugoslavia Rules on detention

Yugoslavia Rules Governing the Detention of Persons  
Awaiting Trial or Appeal Before the Tribunal or  
Otherwise Detained on the Authority of the Tribunal

Yugoslavia Statute

Statute of the International Criminal Tribunal for the  
former Yugoslavia

Yugoslavia Tribunal

International Criminal Tribunal for the former  
Yugoslavia





# SECTION A

## PRE-TRIAL RIGHTS

<b>Chapter 1</b>	<b>Right to liberty</b>
<b>Chapter 2</b>	<b>Rights of people in custody to information</b>
<b>Chapter 3</b>	<b>Right to legal counsel before trial</b>
<b>Chapter 4</b>	<b>Right of detainees to have access to the outside world</b>
<b>Chapter 5</b>	<b>Right to be brought promptly before a judge</b>
<b>Chapter 6</b>	<b>Right to challenge the lawfulness of detention</b>
<b>Chapter 7</b>	<b>Right of detainees to trial within a reasonable time or to release</b>
<b>Chapter 8</b>	<b>Right to adequate time and facilities to prepare a defence</b>
<b>Chapter 9</b>	<b>Rights and safeguards during questioning</b>
<b>Chapter 10</b>	<b>Rights to humane detention conditions and freedom from torture and ill-treatment</b>



# CHAPTER 1

## RIGHT TO LIBERTY

Everyone has the right to personal liberty. An arrest or detention is permissible only if it is carried out for reasons that are established by law and is not arbitrary. Arrests and detentions must also be carried out in a manner that is set out within the law and by people authorized by law.

### 1.1 Right to liberty

#### 1.2 When is an arrest or detention lawful?

#### 1.3 When is an arrest or detention arbitrary?

#### 1.4 Who can lawfully deprive a person of their liberty?

## 1.1 RIGHT TO LIBERTY

Everyone has the right to personal liberty.<sup>a</sup>

People may lawfully be deprived of their liberty only in certain prescribed circumstances. International human rights standards provide protective measures to ensure that individuals are not deprived of their liberty unlawfully or arbitrarily, and to safeguard detainees against other forms of abuse. Some of these standards apply to all people deprived of their liberty, others apply only to people held in connection with criminal charges, and others apply only to particular categories of people, such as foreign nationals or children. Although this Manual covers many rights that apply to all people deprived of their liberty, it focuses on the rights that apply to people suspected of or charged with criminal offences.

People arrested on suspicion of criminal charges should not, as a general rule, be held in custody pending trial. (See **Chapter 5.3**, Presumption of release pending trial.)

## 1.2 WHEN IS AN ARREST OR DETENTION LAWFUL?

An individual may only be lawfully deprived of his or her liberty on grounds and according to procedures established by law.<sup>b</sup>

Domestic laws authorizing arrest and detention, and domestic laws setting out procedures for arrest and detention, must conform to international standards.<sup>c 33</sup>

### Universal Declaration, Article 3

“Everyone has the right to life, liberty and security of person.”

### ICCPR, Article 9(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.”

<sup>a</sup> Article 3 of the Universal Declaration, Article 9(1) of the ICCPR, Article 16(1) of the Migrant Workers Convention, Article 6 of the African Charter, Article 7(1) of the American Convention, Article 14(1) of the Arab Charter, Article 5(1) of the European Convention, Section M(1) of the Principles on Fair Trial in Africa, Article 1 of the American Declaration; See Article 37(b) of the Convention on the Rights of the Child

<sup>b</sup> Article 9(1) of the ICCPR, Article 17(2)(a) of the Convention on Enforced Disappearance, Article 37(b) of the Convention on the Rights of the Child, Article 16(4) of the Migrant Workers Convention, Article 6 of the African Charter, Articles 7(2) and 7(3) of the American Convention, Article 14(2) of the Arab Charter, Article 5(1) of the European Convention, Principle 2 of the Body of Principles, Section M(1)(b) of the Principles on Fair Trial in Africa, Article XXV of the American Declaration, Principle IV of the Principles on Persons Deprived of Liberty in the Americas

<sup>c</sup> Principle IV of the Principles on Persons Deprived of Liberty in the Americas

**33** *A v Australia*, HRC, UN Doc. CCPR/C/59/D/560/1993 (1997) §9.5; European Court: *Bozano v France* (9990/82), (1986) §54, *Lukanov v Bulgaria* (21915/93), (1997) §41, *Baranowski v Poland* (28358/95), (2000) §§50-52, *Medvedyev and Others v France*

(3394/03), Grand Chamber (2010) §§79-80; *Gangaram-Panday v Suriname*, Inter-American Court (1994) §§46-47; *Alfonso Martin Del Campo Dodd v Mexico* (12.228, Report 117/09), Inter-American Commission (2009) §22.

(See **Chapter 18.1.1**, The principle of legality, and **Chapter 11**, Right to equality before the law and courts.)

Examples of arrests and detentions that do not conform to domestic laws include arrests for offences for which the law does not permit arrest,<sup>34</sup> arrests without warrant in circumstances where a warrant is required by domestic law,<sup>35</sup> and holding individuals in custody for longer than the period authorized in national law.<sup>36</sup>

Arrests and detentions must not be based on discriminatory grounds. Policies and procedures allowing arrest and detention based on racial, ethnic or other profiling should be prohibited.<sup>37</sup>

The European Convention sets out the only permissible circumstances in which people may be deprived of their liberty by states parties to the Convention. The list in Article 5(1) is exhaustive and is narrowly interpreted in order to protect the right to liberty.<sup>38</sup>

One permissible ground for arrest under the European Convention is to bring someone before the competent legal authorities on reasonable suspicion of having committed an offence.<sup>a</sup>

<sup>a</sup> Article 5(1)(c) of the European Convention

The European Court has ruled that reasonable suspicion justifying an arrest exists when there are “facts or information which would satisfy an objective observer that the person concerned may have committed the offence”.<sup>39</sup> Furthermore, the reasonable suspicion must relate to acts that constituted an offence at the time they were committed.<sup>40</sup> (See **Chapter 18** on the prohibition of retroactive application of criminal laws.)

Where an individual was detained under a law permitting preventive detention, allegedly to prevent him from committing a crime, but no investigation was conducted and he

#### European Convention, Article 5(1)

“Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:

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

<sup>34</sup> *Latifulin v Kyrgyzstan*, HRC, UN Doc. CCPR/C/98/D/1312/2004 (2010) §8.2.

<sup>35</sup> *Tibi v Ecuador*, Inter-American Court (2004) §103.

<sup>36</sup> WGAD Opinion 10/2009 (Venezuela), UN Doc. A/HRC/13/30/Add.1 (2009) pp172-179 §§52(b)-53; *Alfonso Martin Del Campo Dodd v Mexico* (12.228, Report 117/90), Inter-American Commission (2009) §§22-25.

<sup>37</sup> CERD General Recommendation XXXI, §§III(A)(20) and (23); *Williams Lecraft v Spain* (1493/2006) HRC, (2009) §§7.2-8; ECRI General Policy Recommendation No. 11 on Combating Racism and Racial Discrimination in Policing; *The Situation of People of African Descent in the Americas*, Inter-American Commission (2011)

§§143-162; See *Gillan and Quinton v United Kingdom* (4158/05), European Court (2010) §85.

<sup>38</sup> See European Court: *Quinn v France* (18580/91), (1995) §42, *Labita v Italy* (26772/95), (2000) §170, *Medvedev and Others v France* (3394/03), Grand Chamber (2010) §78.

<sup>39</sup> European Court: *Fox, Campbell and Hartley v United Kingdom* (12244/86, 12245/86, 12383/86), (1990) §32, *Murray v United Kingdom* (14310/88) Grand Chamber, (1994) §§50-63. See also Guideline VII(1) of the CoE Guidelines on human rights and counter-terrorism; ECRI General Policy Recommendation No. 11, (2007) §3.

<sup>40</sup> European Court: *Wloch v Poland* (27785/95), (2000) §§108-109, *Kandzhov v Bulgaria* (68294/01), (2008) §§52-62.

was not charged, the European Court concluded that the detention violated his right to liberty.<sup>41</sup>

(See **Chapter 27** on the additional rights of children.)

### 1.3 WHEN IS AN ARREST OR DETENTION ARBITRARY?

International standards prohibit arbitrary arrest, detention or imprisonment.<sup>a</sup>

This prohibition is an essential corollary to the right to liberty. It applies to deprivation of liberty in all contexts, not only in connection with a criminal charge. It also applies to all forms of deprivation of liberty, including house arrest.<sup>42</sup> (See discussion of the distinction between deprivation of liberty and restriction of freedom of movement in **Definitions of Terms**.)

The UN Working Group on Arbitrary Detention, the group of experts mandated to investigate cases of arbitrary deprivation of liberty, has clarified that deprivation of liberty is arbitrary in the following contexts, among others.<sup>43</sup> An arrest or detention without a basis in law is arbitrary. In addition, an arrest or detention that is permitted under domestic law may nonetheless be arbitrary under international standards. Examples include where the law is vague, over-broad,<sup>44</sup> or incompatible with other human rights such as the rights to freedom of expression, assembly or belief<sup>45</sup> or the right to be free from discrimination.<sup>46</sup> Detention may also become arbitrary as a result of violation of the detainee's fair trial rights.<sup>47</sup>

Enforced disappearance and secret detention are arbitrary *per se*.<sup>b</sup> <sup>48</sup> (See **Chapter 4.3** on incommunicado detention and **Chapters 3.1, 4.1, 5.1, 6.1** and **10.2** on safeguards.)

The UN General Assembly has noted with concern the detention of people suspected of acts of terrorism without a legal basis or due process guarantees. It has opposed detention that resulted in people being placed outside the protection of the law.<sup>49</sup> The Working Group on Arbitrary Detention concluded that the detention of individuals captured in various countries and held in the context of the secret US Central Intelligence Agency rendition programme (in the aftermath of the 11 September 2001 attacks in the USA) was arbitrary. Individuals were held in prolonged incommunicado detention in secret locations in various "black sites", without access to the courts or lawyers, without charge or trial, and without their families being informed of their whereabouts or given access to them. (Some were subsequently charged.)<sup>50</sup>

<sup>a</sup> Article 9 of the Universal Declaration, Article 9(1) of the ICCPR, Article 37(b) of the Convention on the Rights of the Child, Article 16(4) of the Migrant Workers Convention, Article 6 of the African Charter, Article 7(3) of the American Convention, Article 14(2) of the Arab Charter, Article 5(1) of the European Convention, Article 55(1)(d) of the ICC Statute; Section M(1)(b) of the Principles on Fair Trial in Africa; Principle III(1) of the Principles on Persons Deprived of Liberty in the Americas; See Article XXV of the American Declaration

<sup>b</sup> See Articles 2 and 17(1) of the Convention on Enforced Disappearance

<sup>41</sup> *Jėčius v Lithuania* (34578/97), European Court (2000) §§47-52.

<sup>42</sup> HRC General Comment 8, §1, *Yklymova v Turkmenistan*, HRC, UN Doc. CCPR/C/96/D/1460/2006 (2009) §7.2.

<sup>43</sup> WGAD Fact Sheet No.26, Section IV(A)-(B).

<sup>44</sup> See HRC Concluding Observations: *Ethiopia*, UN Doc. CCPR/C/ETH/CO/1 (2011) §15.

<sup>45</sup> WGAD Opinion 25/2004 (*Al-Faleh et al v Saudi Arabia*) UN Doc. E/CN.4/2006/7/Add.1 pp16-20, §§13-20, WGAD, UN Doc. E/CN.4/2001/14 (2000) §§93-94; *Article 19 v Eritrea* (275/03), African Commission, 22nd Annual Report (2007) §§93-108; HRC Concluding Observations: *Canada*, UN Doc. CCPR/C/CAN/CO/5 (2005) §2, *Uzbekistan*, UN Doc. CCPR/CO/83/UZB (2005) §22; See *Jung et al v The Republic of Korea*, HRC, UN Doc. CCPR/C/98/D/1593-1603/2007 (2010) §7.4.

<sup>46</sup> *A and Others v United Kingdom* (3455/05), European Court Grand Chamber (2009) §§161-190 (nationality); See CERD Concluding Observations: *Ukraine*, UN Doc.A/56/18 (Supp) (2001) §373, *Ethiopia*, UN Doc. CERD/C/ETH/CO/15 (2007) §19, *Turkmenistan*, UN Doc. CERD/C/60/CO/15 (2002) §5 (belief), *India*,

UN Doc. CERD/C/IND/CO/19 (2007) §14 (caste), *CERD General Recommendation XXXI*, §20.

<sup>47</sup> WGAD: Deliberation No.9, UN Doc. A/HRC/22/44 (2012) §38(c), WGAD Opinion 14/2006, UN Doc. A/HRC/4/40/Add.1 (2006) §§9-15; *Article 19 v Eritrea* (275/03) African Commission, 22nd Annual Report (2007) §§93-108.

<sup>48</sup> UN Mechanisms Joint Study on secret detention, UN Doc. A/HRC/13/42 (2010) §§18-21; WGAD Opinion 14/2009 (the Gambia), UN Doc. A/HRC/13/30/Add.1 (2010) pp187-191 §§19-22; *Salem Saad Ali Bashasha v The Libyan Arab Jamahirya*, HRC, UN Doc. CCPR/C/100/D/1776/2008 (2010) §7.6; European Court: *Chitayev and Chitayev v Russia* (59334/00), (2007) §§172-173, *El-Masri v The Former Yugoslav Republic of Macedonia*, (39630/09) Grand Chamber (2012) §§230-241.

<sup>49</sup> UN General Assembly resolution 63/185, Preamble §8 and Operative §§13-14.

<sup>50</sup> WGAD Opinion 29/2006 (USA) UN Doc. A/HRC/4/40/Add.1 (2006) pp103-110 §§12, 21-22.

<sup>a</sup> See Rule 59 of the Bangkok Rules

The placement in “protective custody” of women and children who have escaped “honour killings”, domestic or other violence or trafficking in human beings, without their consent and without the supervision of judicial authorities, is arbitrary and discriminatory.<sup>a 51</sup>

The Working Group on Arbitrary Detention has concluded that the detention of individuals under laws criminalizing consensual same-sex sexual activity in private constitutes arbitrary detention. Such laws violate the right to private and family life and the prohibition of discrimination.<sup>34</sup><sup>52</sup>

(See also **Chapter 11**, Right to equality before the law and courts.)

The Human Rights Committee has clarified that the term “arbitrary” in Article 9(1) of the ICCPR must be interpreted broadly to include elements of inappropriateness, injustice and lack of predictability.<sup>53</sup>

The Inter-American Commission concluded that the arrest of a general for allegedly planning a coup, under a warrant issued by the military court which provided no detail or substantiation of the facts alleged, was an abuse of power.<sup>54</sup>

The European Court has concluded that arrest and detention for political or commercial reasons, or to put pressure on a person to withdraw an application to the Court, constitutes arbitrary detention.<sup>55</sup>

The Working Group on Arbitrary Detention has clarified that the administrative detention of foreign nationals on grounds of non-compliance with immigration legislation and of asylum-seekers is not *per se* prohibited in international law. However, it can amount to arbitrary detention if it is not necessary in the circumstances of the individual case. The Working Group considers that the criminalization of irregular entry into a country “exceeds the legitimate interest of states to control and regulate... immigration and leads to unnecessary detention”.<sup>56</sup>

Mass arrests, including in the context of peaceful protests, are frequently arbitrary under international standards.<sup>57</sup> Prolonged detention without charge or trial<sup>58</sup> and detention of relatives of a criminal suspect to put pressure on the suspect are also arbitrary.<sup>59</sup>

Detention that was initially lawful may become unlawful or arbitrary. For example, detainees whose arrest was lawful, but who are held after their release is required by law or ordered by a judicial authority, are arbitrarily detained.<sup>60</sup>

<sup>51</sup> See Special Rapporteur on the independence of judges and lawyers, UN Doc. [A/66/289](#) (2011) §70; Special Rapporteur on violence against women, UN Docs. [E/CN.4/1998/54](#) (1998) §§122-123 and [E/CN.4/2001/73/Add.2](#) (2001) §27; WGAD, UN Doc. [E/CN.4/2003/8](#) (2002) §§65-66; Concluding comments of CEDAW Committee: [Jordan](#), UN Doc. [CEDAW/C/JOR/CO/4](#) (2007) §26; See Special Rapporteur on torture, [Jordan](#), UN Doc. [A/HRC/4/33/Add.3](#) (2007) §39.

<sup>52</sup> WGAD [Opinion 7/2002](#) (Egypt) UN Doc. [E/CN.4/2003/8/Add.1](#) (2002) pp68-73, [Opinion 22/2006](#) (Cameroon), UN Doc. [A/HRC/4/40/Add.1](#) (2007) pp91-94.

<sup>53</sup> HRC: [Mukong v Cameroon](#), UN Doc. [CCPR/C/51/D/458/1991](#) (1994) §9.8, [Fongum Gorji-Dinka v Cameroon](#), UN Doc. [CCPR/C/83/D/1134/2002](#) (2005) §5.1, [Marinich v Belarus](#), UN Doc. [CCPR/C/99/D/1502/2006](#) (2010) §10.4; [Article 19 v Eritrea](#) (275/03) African Commission, 22nd Annual Report (2007) §93.

<sup>54</sup> [Gallardo Rodriguez v Mexico](#) (11.430, Report 43/96), Inter-American Commission, (1997) §§64-71, 115.

<sup>55</sup> European Court: [Gusinskiy v Russia](#) (70276/01), (2004) §§70-78,

[Cebotari v Moldova](#) (35615/06), (2007) §§46-53.

<sup>56</sup> WGAD, UN Doc. [A/HRC/7/4](#) (2008) §§46, 53; See Special Rapporteur on Migrants, UN Doc. [A/HRC/20/24](#) (2012) §§13-14, 70.

<sup>57</sup> HRC Concluding Observations: [Canada](#), UN Doc. [CCPR/C/CAN/CO/5](#) (2005) §20.

<sup>58</sup> [Inter-American Commission resolution no. 2/11](#) Regarding the Situation of the Detainees at Guantánamo Bay, United States, MC 259-02; [Al-Jedda v United Kingdom](#) (27021/08), European Court Grand Chamber (2011) §§97-110.

<sup>59</sup> CAT Concluding Observations: [Yemen](#), UN Doc. [CAT/C/YEM/CO/2/Rev.1](#) (2010) §14; Special Rapporteur on human rights and counter-terrorism, UN Doc. [A/64/211](#) (2009) §§31, 53(g).

<sup>60</sup> WGAD [Opinion 27/2008](#) (Egypt), UN Doc. [A/HRC/13/30/Add.1](#) at 78 (2009) §§81-83, [WGAD Fact Sheet No. 26](#), Section IV (B) (A) and Annex IV, §8(a); [Assanidze v Georgia](#) (71503/01), European Court Grand Chamber (2004) §173.

The African Commission and other human rights bodies have concluded that the detention of individuals following acquittal or pardon, or beyond the expiry of a sentence, constitutes arbitrary detention.<sup>61</sup>

When ruling on whether an arrest or detention is arbitrary, the European Court and the Inter-American Court and Commission examine, among other things, necessity and proportionality.<sup>62</sup>

A human rights activist travelling to an opposition rally was singled out because his name was in a database of “potential extremists” and was detained for 45 minutes on suspicion of carrying extremist literature, although he had no luggage on him. The European Court found that he had been detained arbitrarily.<sup>63</sup>

The prohibition of arbitrary detention is a norm of customary international law. It cannot be the subject of treaty reservations and must be respected at all times, including in time of war or other public emergency. The Working Group on Arbitrary Detention has affirmed that the prohibition constitutes a peremptory norm of international law.<sup>64</sup> (See **Definitions of terms** and **Chapter 31** on states of emergency.)

## 1.4 WHO CAN LAWFULLY DEPRIVE A PERSON OF THEIR LIBERTY?

Arrest, detention or imprisonment may only be carried out by people legally authorized to do so.<sup>a</sup>

This requirement prohibits a practice in some countries where branches of the security or intelligence forces carry out arrests and detentions although they have no power in law to do so.<sup>65</sup>

This requirement also means that the law should clarify any powers that have been delegated by the state to private individuals and private security companies to deprive people of their liberty.<sup>66</sup> Where a state delegates law enforcement functions to a private security company, both the state and the private security company are responsible for the conduct of the private security personnel.<sup>b</sup> This is so even when the private security company acts beyond the scope of authority delegated or contravenes instructions by the state.<sup>67</sup>

The authorities who arrest people, keep them in detention or investigate their cases may exercise only the powers granted to them under the law. The use of these powers must be subject to supervision by a judicial or other authority.<sup>c</sup> (See **Chapters 5** and **6**.)

The Special Rapporteur on human rights and counter-terrorism has cautioned that laws permitting intelligence services to arrest or detain should be limited to cases where there is reasonable suspicion that the individual has committed or is about to commit a

<sup>a</sup> Article 17(2)(b) of the Convention on Enforced Disappearance, Principle 2 of the Body of Principles, Article 12 of the Declaration on Disappearance, Section M(1)(c-d) and (g) of the Principles on Fair Trial in Africa

<sup>b</sup> See Rule 88 of the European Prison Rules

<sup>c</sup> Principle 9 of the Body of Principles

<sup>61</sup> African Commission: *Constitutional Rights Project and Civil Liberties Organisation v Nigeria* (148/96), 13th Annual Report (1999) §§12-16, *Annette Pagnouille (on behalf of Abdoulaye Mazou) v Cameroon* (39/90), 10th Annual Report (1997); CAT Concluding Observations: *Yemen*, UN Doc. CAT/C/CR/31/4 (2004) §6(h); *WGAD Fact Sheet No. 26*, Section IV (B) (A) and Annex IV, p21, §8(a).

<sup>62</sup> European Court: *Saadi v United Kingdom* (13229/03), Grand Chamber (2008) §§67-70, *Ladent v Poland* (11036/03), (2008) §§54-55; *Servellón-García et al v Honduras*, Inter-American Court (2006) §§86-96 (particularly §90); *Peirano Basso v Uruguay* (Report 86/09), Inter-American Commission (2009) §§93-100.

<sup>63</sup> *Shimovolos v Russia* (30194/09), European Court (2011) §§56-57.

<sup>64</sup> HRC *General Comment 24*, §8, *HRC General Comment 29*, §11; WGAD Deliberation No.9, UN Doc. *A/HRC/22/44* (2012) §§37-75.

<sup>65</sup> Special Rapporteur on human rights and counter-terrorism, UN Doc. *A/HRC/14/46* (2010) p24, Practice 27; See CAT Concluding Observations: *Yemen*, UN Doc. CAT/C/YEM/CO/2/Rev.1 (2010) §13, *Uganda*, UN Doc. CAT/C/CR/34/UGA (2005) §§6(d), 10(h).

<sup>66</sup> See UN Expert Group on Civilian Private Security Services, UN Doc. *UNODC/CCPCJ/EG.5/2011/CPR.1* (2011) §§8(c), 16, 18.

<sup>67</sup> *Cabal and Pasini Bertran v Australia*, HRC, UN Doc. CCPR/C/78/D/1020/2001 (2003) §7.2; Articles 5 and 7 of the *Articles on State Responsibility for Internationally Wrongful Acts*, International Law Commission (2001), (commended to governments by UN General Assembly *resolution 65/19*); *CAT General Comment 2*, §15.

<sup>a</sup> **Guideline IV(4) of the CoE Guidelines on eradicating impunity**

crime. Laws should not permit intelligence services to detain individuals solely in order to gather information. Anyone detained by intelligence services retains the right to judicial review of the lawfulness of their detention.<sup>68</sup>

Those carrying out arrests or otherwise depriving people of their liberty must be identifiable, for example by wearing their names or identifying numbers visibly.<sup>a 69</sup>

**Convention on Enforced Disappearance, Article 17(2)**

“Without prejudice to other international obligations of the State Party with regard to the deprivation of liberty, each State Party shall, in its legislation:

- (a) Establish the conditions under which orders of deprivation of liberty may be given,
- (b) Indicate those authorities authorized to order the deprivation of liberty, ...”

**Body of Principles, Principle 9**

“The authorities which arrest a person, keep him under detention or investigate the case shall exercise only the powers granted to them under the law and the exercise of these powers shall be subject to recourse to a judicial or other authority.”

<sup>68</sup> Special Rapporteur on human rights and counter-terrorism, UN Doc. [AHRC/14/46](#), (2010) p24, Practice 28.

<sup>69</sup> *Hristovi v Bulgaria* (42697/05), European Court (2011) §§92-93.



# CHAPTER 2

## RIGHTS OF PEOPLE IN CUSTODY TO INFORMATION

When anyone is arrested or detained, they must be notified of the reasons for their arrest or detention and of their rights, including their right to counsel. They must be informed promptly of any charges against them. This information is essential to allow the person to challenge the lawfulness of their arrest or detention and, if they are charged, to start preparing their defence.

### 2.1 Right to be informed of the reasons for arrest or detention

#### 2.1.1 When must the reasons for arrest be provided?

### 2.2 Notification of rights

#### 2.2.1 Notification of the right to legal counsel

#### 2.2.2 Notification of the right to remain silent

### 2.3 Right to be informed promptly of any charges

### 2.4 Notification in a language the person understands

### 2.5 Additional notification rights of foreign nationals

## 2.1 RIGHT TO BE INFORMED OF THE REASONS FOR ARREST OR DETENTION

Anyone who is arrested or detained must be informed of the reasons why they are being deprived of their liberty.<sup>a</sup> This right should apply at all times. (See **Chapter 31** on states of emergency.)

A key purpose of this requirement is to enable an individual to challenge their detention if they believe it is unlawful or unfounded. (See **Chapter 6**, Right to challenge the lawfulness of detention.) Therefore, the reasons given must be specific. They must include a clear explanation of both the legal provision under which the individual is being held and the essential factual basis for the arrest or detention.<sup>70</sup>

For example, the Human Rights Committee concluded that it was not sufficient simply to inform detainees that they were being arrested on security grounds without any indication of the substance of the alleged offence.<sup>71</sup>

The Special Rapporteur on human rights and counter-terrorism noted that military orders governing arrest and detention of Palestinians in the West Bank do not require

<sup>a</sup> Article 9(2) of the ICCPR, Article 7(4) of the American Convention, Article 14(3) of the Arab Charter, Article 5(2) of the European Convention, Principle 10 of the Body of Principles, Section M(2)(a) of the Principles on Fair Trial in Africa, Principle V of the Principles on Persons Deprived of Liberty in the Americas; See Articles 55(2) and 60(1) of the ICC Statute, Rule 117(1) of the ICC Rules of Procedure and Evidence, Rule 53 *bis* of the Rwanda Rules, Rule 59 *bis* (B) of the Yugoslavia Rules

### ICCPR, Article 9(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.”

<sup>70</sup> European Court: *Shamayev and Others v Georgia* (36378/02), (2005) §413, *Kortesis v Greece* (60593/10), (2012) §§58-62, *Nechiporuk and Yonkalo v Ukraine* (42310/04), (2011) §§209-211; *Kelly v Jamaica* (253/1987), HRC, UN Doc. CCPR/C/41/D/253/1987 (1991) §5.8.

<sup>71</sup> *Adolfo Drescher Caldas v Uruguay* (43/1979), HRC, UN Doc. A/38/40 Supp. 40 at 192 (1983) §13.2; See HRC Concluding Observations: *Sudan*, UN Doc. CCPR/C/79/Add.85 (1997) §13; *Nechiporuk and Yonkalo v Ukraine* (42310/04), European Court (2011) §§209-211.

Israeli authorities to inform the individual of the reason for their detention at the time of arrest. The Special Rapporteur also noted that Israel had announced its intention to derogate from Article 9 of the ICCPR. In response the Special Rapporteur emphasized that derogations must be both necessary and proportionate and “there is no good reason for failing to inform a person of the reasons for their detention at the time of arrest”.<sup>72</sup>

The Inter-American Court has clarified that the right to be informed requires both the accused and their lawyer to be informed.<sup>73</sup>

The reasons for arrest must be given in a language the person understands. This means that interpreters should be provided for those who do not speak the language used by the authorities. As the European Court has explained, it also means that every person arrested should “be told, in simple, non-technical language that he can understand, the essential legal and factual grounds for his arrest”. However, this does not require a complete description of all the charges by the arresting officer at the moment of arrest.<sup>74</sup> If an individual is suspected of more than one criminal act, then the authorities must provide at least a minimum of information about each of the crimes being investigated which could serve as the basis for the detention.<sup>75</sup> (See **Chapter 27.6** on children.)

When reviewing a case in which information had been withheld from the detainee and his lawyer, purportedly to prevent the suspect from tampering with evidence, the European Court clarified that information essential for assessing the lawfulness of detention should be made available in an appropriate manner to the suspect’s lawyer.<sup>76</sup>

If the reasons for arrest or detention are provided orally, the information should be given in writing subsequently.<sup>77</sup>

### 2.1.1 WHEN MUST THE REASONS FOR ARREST BE PROVIDED?

An individual must be notified of the reasons for arrest at the time of arrest.<sup>a</sup>

Article 5(2) of the European Convention and Principle V of the Principles on Persons Deprived of Liberty in the Americas require prompt notification of reasons for arrest.

The timeliness of the notification is generally assessed in light of the circumstances of the case. Some unavoidable delay may be tolerated, for example to find an interpreter, provided the person arrested is sufficiently aware of the reasons for arrest and no questioning takes place before the reasons are given.

The Human Rights Committee found no undue delay when two accused, who did not speak the language used by the police, were informed of the reasons for arrest seven and eight hours after their arrest. They were notified when the interpreter arrived and police formalities were suspended until then.<sup>78</sup>

In a case in Northern Ireland where people were informed upon arrest that they were arrested under a particular law on suspicion of terrorism and some four hours later were questioned about specific crimes, the European Court stated that intervals of a few

<sup>a</sup> Article 9(2) of the ICCPR, Article 14(3) of the Arab Charter, Principle 10 of the Body of Principles, Section M(2)(a) of the Principles on Fair Trial in Africa, Guideline 25 of the Robben Island Guidelines

<sup>72</sup> Special Rapporteur on human rights and counter-terrorism, *Israel and the Occupied Palestinian Territories*, UN Doc. A/HRC/6/17/Add.4 (2007) §22.

<sup>73</sup> *Tibi v Ecuador*, Inter-American Court (2004) §109.

<sup>74</sup> European Court: *Fox, Campbell and Hartley v United Kingdom* (12244/86, 12245/86, 12383/86), (1990) §§40-41, *Dikme v Turkey* (20869/92), (2000) §§53-57, *H.B. v Switzerland* (26899/95), (2001) §§47-50, *Shamayev and Others v Georgia* (36378/02), (2005) §§413-428.

<sup>75</sup> *Lutsenko v Ukraine* (6492/11), European Court (2012) §77.

<sup>76</sup> *Garcia Alva v Germany* (23541/94), European Court (2001) §42.

<sup>77</sup> See: HRC Concluding Observations: *Sudan*, UN Doc. CCPR/C/79/Add.85 (1997) §13; *Boyle v United Kingdom* (55434/00), European Court (2008) §38.

<sup>78</sup> HRC: *Hill v Spain*, UN Doc. CCPR/C/59/D/526/1993 (1997) §12.2; See *Griffin v Spain*, UN Doc. CCPR/C/53/D/493/1992 (1995) §9.2.

hours “cannot be regarded as falling outside the constraints of time imposed by the notion of promptness in Article 5(2)”.<sup>79</sup>

However, the Human Rights Committee found that there was a violation of Article 9(2) of the ICCPR in a case in which a lawyer was held for 50 hours without being informed of the reasons for his arrest.<sup>80</sup>

Where the accused was not informed of the reasons for his arrest at the time of arrest and not informed of the charges until some two months later, the African Commission concluded that his rights to a fair trial were violated.<sup>81</sup>

## 2.2 NOTIFICATION OF RIGHTS

In order to exercise one’s rights, one must know that they exist. International standards require that anyone arrested or detained is informed of their rights and is provided with an explanation of how they may avail themselves of such rights.<sup>a 82</sup>

These standards variously require notification of rights including:

- the right to notify a third person,
- the right to legal counsel,
- the right to medical assistance,
- the right to challenge the lawfulness of detention,
- the right not to incriminate oneself, including the right to remain silent, and
- the right to complain and recourse for complaints about ill-treatment or conditions.

In addition, international standards require foreign nationals to be informed of their rights to communicate with consular officials or an appropriate international organization.

The Inter-American Court has made clear that a detained person should be notified of their rights, including to counsel, before they make their first statement before the authorities.<sup>83</sup> (See **Chapter 9** on rights during questioning.)

The Human Rights Committee and the Subcommittee on the Prevention of Torture have stated that the right to notification about rights should be guaranteed by law.<sup>84</sup>

Some states have provided people arrested or detained with written materials about their rights. Such written information should not be a substitute for oral notification. The written material should be made available in all places where people are deprived of their liberty, in all languages spoken by detained people. Interpreters should be provided for people who do not understand or read the language used by the authorities. The information should also be provided in a manner that meets the needs of people who do not read, individuals with

### Body of Principles, Principle 13

“Any person shall, at the moment of arrest and at the commencement of detention or imprisonment, or promptly thereafter, be provided by the authority responsible for his arrest, detention or imprisonment, respectively, with information on and an explanation of his rights and how to avail himself of such rights.”

<sup>a</sup> Principles 13 and 14 of the Body of Principles, Guidelines 2 §42(c) and 3 §43(i) of the Principles on Legal Aid, Guideline 20(d) of the Robben Island Guidelines, Section M(2)(b) of the Principles on Fair Trial in Africa; See Articles 55(2) and 60(1) of the ICC Statute

<sup>79</sup> *Fox, Campbell and Hartley v United Kingdom* (12244/86, 12245/86, 12383/86), European Court (1990) §§40-42.

<sup>80</sup> *Portorreal v Dominican Republic*, HRC, UN Doc. CCPR/C/31/D/188/1984 (1987) §§9.2, 11.

<sup>81</sup> *Media Rights Agenda v Nigeria* (224/98), African Commission, 14th Annual Report (2000) §§42-44.

<sup>82</sup> *CAT General Comment 2*, §13; CPT Standards, *CPT/Inf (96) 21* (1996) §16, *CPT/Inf(92)3* (1992) §§36-37; See also *Prosecutor v*

*Ruto, Kosgey and Sang*, (ICC-01/09-01/11-16), *Decision of Pre-Trial Chamber II, ensuring the rights of the Defence for the purposes of the initial appearance hearing*, (30 March 2011), §5.

<sup>83</sup> *Tibi v Ecuador*, Inter-American Court (2004) §112.

<sup>84</sup> HRC Concluding Observations: *Algeria*, UN Doc. CCPR/C/DZA/CO/3 (2007) §18; SPT: *Maldives*, UN Doc. CAT/OP/MDV/1 (2009) §97.

<sup>a</sup> Guideline 2 §42(d) of the Principles on Legal Aid

<sup>b</sup> Principle 5 of the Basic Principles on the Role of Lawyers, Principle 17(1) of the Body of Principles, Guidelines 3 §43(a) and 2 §42(c)-(d) of the Principles on Legal Aid, Guideline 20(c) of the Robben Island Guidelines, Section M(2)(b) of the Principles on Fair Trial in Africa, Articles 55(2)(c) of the ICC Statute; See Rule 98.1 of the European Prison Rules (applicable to people remanded in detention), Article 60 of the ICC Statute, Rule 42 of the Yugoslavia Rules

<sup>c</sup> Principle 5 of the Basic Principles on the Role of Lawyers, Principle 8 of the Principles on Legal Aid, Article 55(2)(c) of the ICC Statute, Rule 42 of the Rwanda Rules, Rule 42 of the Yugoslavia Rules

<sup>d</sup> Principle 8 and Guideline 3 §43(a) of the Principles on Legal Aid, Article 55(2) of the ICC Statute, Rule 42 of the Rwanda Rules, Rule 42 of the Yugoslavia Rules

<sup>e</sup> Guideline 3 §43(a) of the Principles on Legal Aid, Article 55(2) of the ICC Statute, Rule 42(A)(iii) of the Rwanda Rules, Rule 42(A)(iii) of the Yugoslavia Rules

<sup>f</sup> Article 9(2) of the ICCPR, Article 16(5) of the Migrant Workers Convention, Article 7(4) of the American Convention, Article 14(3) of the Arab Charter, Article 5(2) of the European Convention, Principle 10 of the Body of Principles, Section M(2)(a) of the Principles on Fair Trial in Africa, Principle V of the Principles on Persons Deprived of Liberty in the Americas, Article 60(1) of the ICC Statute, Article 117(1) of the ICC Rules of Procedure and Evidence, Article 20(4)(a) of the Rwanda Statute, Article 20(2) of the Yugoslavia Statute

disabilities, and children.<sup>a</sup> Furthermore, laws guaranteeing the right to notification, as well as the information provided to detainees orally and in writing, should include the range of rights guaranteed in international standards.<sup>85</sup>

The Subcommittee on Prevention of Torture and the European Committee for the Prevention of Torture have recommended that the detained person be given a written copy of their rights. The individual should then be asked to sign a document stating that they have been informed of their rights.<sup>86</sup>

## 2.2.1 NOTIFICATION OF THE RIGHT TO LEGAL COUNSEL

Every person who is arrested or detained must be informed of their right to have the assistance of legal counsel: either their lawyer of choice or an appointed lawyer.<sup>b 87</sup>

Notice of the right to legal counsel should be provided immediately upon arrest or detention, before any questioning and when an individual is charged.<sup>c 88</sup> Principle 17(1) of the earlier Body of Principles provides that this information should be given promptly after arrest.

The European Court held that the failure to inform a 17-year-old arrested for murder or his father of the youth's right to a lawyer before he was questioned (without his father or a lawyer present) violated his defence rights.<sup>89</sup>

The notification of the right to counsel should be repeated before a person is questioned on suspicion of a criminal offence, if they do not have counsel present.<sup>d</sup>

(See **Chapter 3** on the right to counsel pre-trial, **Chapter 9** on rights during questioning, and **Chapter 20** on the right to defend oneself.)

## 2.2.2 NOTIFICATION OF THE RIGHT TO REMAIN SILENT

Anyone suspected of a crime should be informed of their rights not to incriminate themselves or confess guilt, including their right to remain silent during questioning by police or judicial authorities.<sup>90</sup> This information should be given when individuals are arrested and before they are questioned.<sup>e</sup>

(See **Chapters 9.4** and **16.2** on the right to remain silent during pre-trial questioning and at trial.)

## 2.3 RIGHT TO BE INFORMED PROMPTLY OF ANY CHARGES

Every person arrested or detained has the right to be promptly informed of any charges against them.<sup>f</sup> The requirement to give anyone arrested or detained prompt information about criminal

### Basic Principles on the Role of Lawyers, Principle 5

“Governments shall ensure that all persons are immediately informed by the competent authority of their right to be assisted by a lawyer of their own choice upon arrest or detention or when charged with a criminal offence.”

<sup>85</sup> See SPT: Sweden, UN Doc. CAT/OP/SWE/1 (2008) §§44-49; CAT Concluding Observations: Germany, UN Doc. A/53/44 (Supp) (1998) p21, §195; Austria, UN Doc. CAT/C/AUT/CO/3 (2002) §4(b).

<sup>86</sup> SPT: Maldives, UN Doc. CAT/OP/MDV/1 (2009) §§95-98; CPT Standards, 6th General Report CPT/Inf (96) 21 §16.

<sup>87</sup> CAT General Comment 2, §13; CoE Committee of Ministers Recommendation Rec(2012)12, Appendix §21.1.

<sup>88</sup> HRC Concluding Observations: Netherlands, UN Doc. CCPR/C/NLD/CO/4 (2009) §11; CAT Report: Mexico, UN Doc. CAT/C/75 (2003) §220(e).

<sup>89</sup> European Court: *Panovits v Cyprus* (4268/04), (2008) §73, see also *Talat Tunc v Turkey* (32432/96), (2007) §61 (notification should include right to free assistance of counsel).

<sup>90</sup> HRC Concluding Observations: France, UN Doc. CCPR/C/FRA/CO/4 (2008) §14; Netherlands, UN Doc. CCPR/C/NLD/CO/4 (2009) §11; CAT: Mexico, UN Doc. CAT/C/75 (2003) §220 (e).

charges is critical to the effective exercise of the right to challenge the lawfulness of detention. Provided with this information, an individual may also be enabled to challenge and seek dismissal of the charges at an early stage.

The information about charges that is to be given promptly after arrest does not have to be as specific as the information that must be given once formal charges have been brought.<sup>91</sup> The standards applying to that later stage, which are discussed in **Chapter 8**, require an accused to be given sufficiently detailed information about the charges to enable them to prepare their defence. (See **Chapter 8.4** on right to information about charges, applicable once formal charges have been brought.)

## 2.4 NOTIFICATION IN A LANGUAGE THE PERSON UNDERSTANDS

Information about the reasons for arrest, the charges and the individual's rights must be communicated in a language the person understands.<sup>a</sup>

A number of international standards expressly require that notification of the reasons for arrest (as well as the charges) must be given in a language that the person understands.<sup>b</sup>

(See **Chapters 9.5** and **23** on rights to interpretation and translations.)

Written records should be kept of:<sup>c</sup>

- the reason for arrest,
- the time and date of arrest and of transfer to a place of detention,
- the date and time that the individual was brought before a judge or other authority,
- who arrested or detained them,
- where they are being held.

Such records should be made available to the detainee and their lawyer and the information in them should also be made available to relatives.

(See **Chapter 9.6**, Records of questioning, and **Chapter 10.2.1**, Records of detention.)

## 2.5 ADDITIONAL NOTIFICATION RIGHTS OF FOREIGN NATIONALS

Foreign nationals who are detained or arrested (regardless of their immigration status<sup>92</sup>) must also be promptly informed of their right to communicate with their embassy or consular post. If the person is a refugee or a stateless person, or is under the protection of an intergovernmental organization, they must be promptly notified of their right to communicate with an appropriate international organization or with a representative of the state where they reside.<sup>d 93</sup>

The Vienna Convention on Consular Relations,<sup>94</sup> the Migrant Workers Convention, the Principles on Legal Aid, the Principles on Persons Deprived of Liberty in the Americas and the European Prison Rules require an arrested, detained or imprisoned person to be informed of this right without delay. The Body of Principles and the Principles on Fair Trial in Africa (Section M(2)(d)) require this information to be provided promptly.

<sup>a</sup> See Guideline 2 §42(d) of the Principles on Legal Aid, Principle 14 of the Body of Principles, Guideline 20(d) of the Robben Island Guidelines, Principle V of the Principles on Persons Deprived of Liberty in the Americas

<sup>b</sup> Article 16(5) of the Migrant Workers Convention, Article 5(2) of the European Convention, Principle 14 of the Body of Principles, Section M(2)(a) of the Principles on Fair Trial in Africa, Principle V of the Principles on Persons Deprived of Liberty in the Americas; See Article 14(3) of the Arab Charter

<sup>c</sup> Articles 18-19 of the Convention on Enforced Disappearance, Principle 12 of the Body of Principles, Section M(6) of the Principles on Fair Trial in Africa; See Article XI of the Inter-American Convention on Disappearance, Guideline 30 of the Robben Island Guidelines, Principle IX of the Principles on Persons Deprived of Liberty in the Americas

<sup>d</sup> Article 36(1)(b) of the Vienna Convention on Consular Relations, Article 16(7) of the Migrant Workers Convention, Principle 16(2) of the Body of Principles, Guideline 3 §43(c) of the Principles on Legal Aid, Section M(2)(d) of the Principles on Fair Trial in Africa, Principle V of the Principles on Persons Deprived of Liberty in the Americas, Rule 27 of the CoE Rules on remand in custody

<sup>91</sup> *Kelly v Jamaica*, HRC, UN Doc. CCPR/C/41/D/253/1987 (1991) §5.8.

<sup>92</sup> UN General Assembly resolution 65/212, §4(g); Human Rights Council resolution 12/6, §4(b).

<sup>93</sup> See CoE Committee of Ministers Recommendation Rec(2012)12, Annex §§15.1-15.2, 25.1-25.2.

<sup>94</sup> ICJ: *LaGrand Case (Germany v the USA)*, (2001) §§77, 89 (Article 36.1 of the Vienna Convention creates rights for detained foreign nationals), *Ahmadou Diallo (Republic of Guinea v Democratic Republic of Congo)* (2010) §95.

The Inter-American Court has ruled that notification of the right to contact a consular official must take place at the time of arrest and, in any case, before the individual makes a first statement to the authorities.<sup>95</sup> This is now reflected in Principle V of the Principles on Persons Deprived of Liberty in the Americas.

The International Court of Justice has clarified that the arresting authorities have a duty to inform an individual of this right as soon as it is realized that a person is a foreign national or once there are grounds to think that the person is probably a foreign national.<sup>96</sup>

<sup>a</sup> See Rule 27(2) of the CoE Rules on remand in custody

This right should be extended to individuals who are nationals of both the country arresting or detaining them and another country.<sup>a</sup>

<sup>b</sup> Article 36(1)(b) of the Vienna Convention on Consular Relations, Article 16(7)(a) of the Migrant Workers Convention

If the arrested or detained foreign national asks the authorities to contact consular officials, then the authorities must do so without delay. However, they should not do so unless the individual makes the request.<sup>b</sup>

If the individual holds nationality of two foreign states, Amnesty International considers that the individual should be afforded the right to contact and receive visits from the representatives of both countries, should he or she so choose.

(See **Chapters 4.6**, and **25.8**.)

<sup>95</sup> Inter-American Court: *Chaparro Álvarez and Lapo Íñiguez v Ecuador*, (2007) §164, *Acosta-Calderón v Ecuador*, (2005) §125, *Tibi v Ecuador*, (2004) §§112, 195, *Advisory Opinion OC-16/99*, (1999) §106; See *Avena and Other Mexican Nationals, (Mexico v*

*United States of America)*, ICJ (2004) §87.

<sup>96</sup> *Avena and Other Mexican Nationals, (Mexico v United States of America)*, ICJ (2004) §88.

# CHAPTER 3

## RIGHT TO LEGAL COUNSEL BEFORE TRIAL

Everyone deprived of their liberty or facing a possible criminal charge has the right to the assistance of a lawyer to protect their rights and to help in their defence. If the person does not have a lawyer of their choice, they have the right to effective, qualified assigned counsel, when the interests of justice require. The assigned counsel must be free of charge if the person cannot afford to pay. Detainees should have access to counsel from the outset of their detention, including during questioning. Individuals must be given adequate time and facilities to communicate with their lawyer, in confidence.

- 3.1 Right to the assistance of a lawyer pre-trial
- 3.2 When does the right to access to a lawyer begin?
- 3.3 Right to choose a lawyer
- 3.4 Right to have a lawyer assigned; right to free legal assistance
- 3.5 Right to competent and effective counsel
- 3.6 Right to time and facilities to communicate with counsel
  - 3.6.1 Right to confidential communication with counsel
- 3.7 Waiver of the right to counsel

### 3.1 RIGHT TO THE ASSISTANCE OF A LAWYER PRE-TRIAL

Everyone arrested or detained – whether or not on a criminal charge – and everyone facing a criminal charge – whether or not detained – has the right to the assistance of legal counsel.<sup>97</sup> (See **Chapter 20** on the right to be assisted by counsel during trial and appeals.)

A person's right to the assistance of a lawyer in pre-trial proceedings is set out in a range of treaty and non-treaty standards.<sup>a</sup>

Although the right to assistance of a lawyer during detention, questioning and preliminary investigation is not expressly set out in the ICCPR, the African Charter, the American Convention or the European Convention, the monitoring mechanisms for each of these treaties have clarified that it is required for the meaningful exercise of the right to a fair trial.<sup>98</sup> The provisions on the right to counsel under these treaties<sup>b</sup> therefore apply to the pre-trial phase.

The right to the assistance of a lawyer without delay pre-trial enables an individual suspected of or charged with a criminal offence to protect their rights and begin to prepare their defence. For detainees such assistance is important to enable them to challenge their detention and serves as an important safeguard against torture and other ill-treatment, coerced “confessions”, enforced disappearance and other human rights violations.<sup>99</sup>

<sup>a</sup> Provisions with an asterisk apply particularly to people in detention: \*Article 17(2)(d) of the Convention on Enforced Disappearance, \*Article 37(d) of the Convention on the Rights of the Child, Article 16(4) of the Arab Charter, Principle 1 of the Basic Principles on the Role of Lawyers, \*Principle 17 of the Body of Principles, Principle 3 and \*Guideline 4 of the Principles on Legal Aid, \*Guideline 20(c) of the Robben Island Guidelines, Sections A(2)(f) and \*M(2)(f) of the Principles on Fair Trial in Africa, \*Principle V of the Principles on Persons Deprived of Liberty in the Americas, \*Guideline IV(1) of the CoE Guidelines on eradicating impunity, \*Rule 25 of the CoE Rules on remand in custody, \*Rule 98.2 of the European Prison Rules, Articles 55(2)(c) and 67(1)(d) of the ICC Statute, Rules 117(2), 121(2)(a) of the ICC Rules of Procedure and Evidence, Article 17(3) of the Rwanda Statute, Rule 42 of the Rwanda Rules, Article 18(3) of the Yugoslavia Statute, Rule 42 of the Yugoslavia Rules

<sup>b</sup> Article 14(3)(d) of the ICCPR, Article 7 of the African Charter, Article 8(2)(d) of the American Convention, Article 6(3)(c) of the European Convention

<sup>97</sup> See HRC General Comment 32, §34.

<sup>98</sup> For example, HRC Concluding Observations: Georgia, UN Doc. CCPR/C/79/Add.75 (1997) §27, Netherlands, UN Doc. CCPR/C/NLD/CO/4 (2009) §11; Liesbeth Zegveld and Mussie Ephrem v Eritrea (250/2002), African Commission, 17th Annual Report (2003) §55; Barreto Leiva v Venezuela, Inter-American Court

(2009) §62; Salduz v Turkey (36391/02), European Court Grand Chamber (2008) §§54-55.

<sup>99</sup> HRC General Comment 20, §11; UN Special Rapporteur on torture, UN Doc. E/CN.4/1992/17 (1991) §284; Salduz v Turkey (36391/02), European Court Grand Chamber (2008) §54.

<sup>a</sup> Article 16(4) of the Arab Charter, Principle 17(2) of the Body of Principles, Principle 3 and Guideline 3 §43(b) of the Principles on Legal Aid, Principle V of the Principles on Persons Deprived of Liberty in the Americas

<sup>b</sup> Principle 16 of the Basic Principles on the Role of Lawyers, Principles 2 §16 and 12 of the Principles on Legal Aid, Sections I(b) and H(e)(iii) of the Principles on Fair Trial in Africa, Principle V of the Principles on Persons Deprived of Liberty in the Americas

<sup>c</sup> Principle 9 of the Principles on Legal Aid

<sup>d</sup> Article 37(d) of the Convention on the Rights of the Child, Principle 17 of the Body of Principles, Principle 3 and Guidelines 3 §43(b) and (d) and 4 §44(a) of the Principles on Legal Aid, Guideline 20(c) of the Robben Island Guidelines, Principle V of the Principles on Persons Deprived of Liberty in the Americas

<sup>e</sup> Guideline 3 §43(b) of the Principles on Legal Aid, Principle V of the Principles on Persons Deprived of Liberty in the Americas, Article 55(2)(c) and (d) of the ICC Statute, Rule 42(A)(i) of the Rwanda Rules, Rule 42(A)(i) of the Yugoslavia Rules

The right to legal counsel pre-trial includes the rights to:

- access to a lawyer,
- time to consult the lawyer in confidence,
- have the lawyer present during questioning and be able to consult them during questioning.

For those who are not represented by counsel of choice, a lawyer should normally be appointed to represent them, free of charge if they cannot afford to pay.<sup>a</sup>

The authorities must ensure that lawyers are able to advise and represent their clients in accordance with professional standards, free from intimidation, hindrance, harassment, or improper interference from any quarter.<sup>b 100</sup>

Individuals should have an effective remedy if officials undermine, unjustifiably delay or deny access to legal aid.<sup>c</sup>

The European Court has clarified that a deliberate and systematic refusal to grant access to a defence lawyer – particularly when the person concerned is detained in a foreign country – amounts to a flagrant denial of the right to a fair trial.<sup>101</sup>

(See **Chapter 20**, Right to defend oneself in person or through counsel.)

## 3.2 WHEN DOES THE RIGHT TO ACCESS TO A LAWYER BEGIN?

All suspects and accused, whether or not detained, should have access to and assistance of counsel from the very start of a criminal investigation. A person arrested or detained should have access to a lawyer as soon as they are deprived of their liberty.<sup>d 102</sup> They should have the assistance of counsel during questioning by the police and investigating judge, even if they exercise their right to remain silent.<sup>e 103</sup>

The Committee against Torture raised particular concern that under the Criminal Procedure Code of Cambodia, the right of a detainee to consult counsel did not begin until 24 hours after being apprehended.<sup>104</sup>

### Basic Principles on the Role of Lawyers, Principle 1

“All persons are entitled to call upon the assistance of a lawyer of their choice to protect and establish their rights and to defend them in all stages of criminal proceedings.”

### Body of Principles, Principle 17(1)

“A detained person shall be entitled to have the assistance of a legal counsel. He shall be informed of his right by the competent authority promptly after arrest and shall be provided with reasonable facilities for exercising it.”

<sup>100</sup> HRC General Comment 32, §34.

<sup>101</sup> *Al-Moayad v Germany* (35865/03), (inadmissibility) Decision of the European Court (2007) §101. *Othman v United Kingdom* (8139/09), European Court (2012) §259.

<sup>102</sup> Human Rights Council resolution 13/19, UN Doc. A/HRC/RES/13/19 (2010) §6, HRC Concluding Observations: Georgia, UN Doc. CCPR/C/79/Add.75 (1997) §27, Jordan, UN Doc. CCPR/C/JOR/CO/4 (2010) §9; CAT Concluding Observations: Latvia, UN Doc. CAT/C/CR/31/3 (2004) §§6(h), 7(c); *Dayanan v Turkey* (7377/03), European Court (2009) §§30-33; CPT 12th General Report, CPT/Inf (2002) 15, §§40-41.

<sup>103</sup> Human Rights Council resolution 13/19, §6; HRC Concluding Observations: Japan, UN Doc. CCPR/C/JPN/CO/5 (2008) §18, Netherlands, UN Doc. CCPR/C/NLD/CO/4 (2009) §11; SPT: Maldives, UN Doc. CAT/OP/MDV/1(2009) §§105-107; European Court: *Dayanan v Turkey* (7377/03), (2009) §§30-33, *Simons v Belgium* (71407/10), (inadmissibility) Decision (2012) §31, *Turkan v Turkey* (33086/04), (2008) §42, *Salduz v Turkey* (36391/02), Grand Chamber (2008) §§54-55, *John Murray v United Kingdom* (18731/91), Grand Chamber (1996) §66.

<sup>104</sup> CAT Concluding Observations: Cambodia, UN Doc. CAT/C/KHM/CO/2 (2010) §14.



The Inter-American Court has stated that a suspect or accused must have access to legal assistance from the moment when an investigation related to them is ordered, and particularly when the accused makes a statement.<sup>105</sup>

The European Court considers that, as a general rule, the right to a fair trial requires an accused person to be allowed legal assistance as soon as they are placed in custody, including during the initial stages of police investigation.<sup>106</sup> It also ruled that a suspect should have access to a lawyer from the first questioning by the police, unless there are compelling and demonstrated reasons in a particular case. It warned that the rights of the defence would be irretrievably prejudiced if incriminating statements made during police questioning by a suspect who did not have access to a lawyer were used to support a conviction.<sup>107</sup> People should also have assistance of counsel during questioning by an investigating judge.<sup>108</sup> The European Court found that a law prohibiting access to counsel during police custody violated the European Convention, even though the accused, who was suspected of being a member of an illegal armed organization (Hizbullah), remained silent during police questioning.<sup>109</sup>

The European Committee for the Prevention of Torture clarified that the right of access to counsel should apply even before a person has formally been declared a suspect, including if they are called to a police station as a witness or for discussion. It recommended that people called in for questioning as witnesses, who are legally obliged to attend and remain, should also have the right to assistance of counsel.<sup>110</sup>

The International Criminal Court ruled that statements made by an accused during initial questioning by national authorities without counsel present, when he had not been fully informed of the reasons for his detention, were inadmissible as evidence before the Court.<sup>111</sup>

Even the international standards that permit access to counsel to be delayed make clear that this is permissible only in exceptional circumstances. The circumstances must be prescribed by law and limited to occasions when it is considered indispensable in the particular case, in order to maintain security and good order. The decision should be made by a judicial or other authority. However, even in such cases, access should begin no later than 48 hours from the time of arrest or detention.<sup>a</sup>

The Special Rapporteur on torture has recommended that anyone who has been arrested “should be given access to legal counsel no later than 24 hours after the arrest”.<sup>112</sup>

With the aim of minimizing the adverse effects of any judicially approved delay of access to counsel of choice on security grounds, the Special Rapporteur on torture and the European Committee for the Prevention of Torture have recommended that, in such exceptional cases, a suspect should be given access to an independent lawyer, for example from a pre-approved list, as an alternative to delayed access to the lawyer of their choice.<sup>113</sup>

<sup>a</sup> Principle 7 of the Basic Principles on the Role of Lawyers, Principle 18(3) of the Body of Principles; See Principle 15 of the Body of Principles

<sup>105</sup> *Barreto Leiva v Venezuela*, Inter-American Court (2009) §62.

<sup>106</sup> European Court: *Dayanan v Turkey* (7377/03), (2009) §§30-32; See *Salduz v Turkey* (36391/02), Grand Chamber (2008) §54.

<sup>107</sup> European Court: *Salduz v Turkey* (36391/02), Grand Chamber (2008) §55, *Nechiporuk and Yonkalo v Ukraine* (42310/04), (2011) §§262-263, *John Murray v United Kingdom* (18731/91), Grand Chamber (1996) §66.

<sup>108</sup> *Simons v Belgium* (71407/10), (inadmissibility) Decision of the European Court (2012) §31; See *Quaranta v Switzerland* (12744/87), European Court (1991) §§32-38.

<sup>109</sup> *Dayanan v Turkey* (7377/03), European Court (2009) §32-33; See *John Murray v United Kingdom* (18731/91), European Court Grand Chamber (1996) §66.

<sup>110</sup> CPT 21st General Report, CPT/Inf (2011)28 §19, CPT 12th General Report, CPT/Inf (2002)12 §41.

<sup>111</sup> *Prosecutor v Katanga and Ngudjolo*, (ICC-01/04-01/07-2635), Trial Chamber II, *Decision on the Prosecutor's Bar Table Motions* (17 December 2010) §§62-65; See also *Prosecutor v Delalic*, ICTY Trial Chamber, *Decision on motion to exclude evidence* (2 September 1997) §§38-55.

<sup>112</sup> Special Rapporteur on torture, UN Doc. E/CN.4/1990/17 (1989) §272(c); See Special Rapporteur on torture: UN Doc. E/CN.4/1995/34 (1995) §926(d), UN Doc. A/56/156 (2010) §39(f).

<sup>113</sup> Special Rapporteur on torture, UN Doc. A/56/156 (2010) §39(f); CPT 12th General Report, CPT/Inf (2002) 15 §41.

Any delay in access to counsel must be determined and justified on a case-by-case basis. There should be no systematic delays in access to counsel for certain categories of offences, whether minor or serious, including under anti-terrorism legislation. People suspected of particularly serious offences may be most at risk of torture or other ill-treatment, and most in need of access to a lawyer.<sup>114</sup> (See **Chapter 9**, Rights and safeguards during questioning.)

Concern has been expressed by a number of bodies about laws and practices delaying access to counsel to people suspected of terrorism-related offences.<sup>115</sup> For example, the Committee against Torture has raised concern that access to legal counsel was denied for 24 hours to people arrested under an anti-terrorism law in Turkey.<sup>116</sup> The Human Rights Committee recommended that “anyone arrested or detained on a criminal charge, including persons suspected of terrorism, has immediate access to a lawyer”.<sup>117</sup>

In a case where an individual arrested under anti-terrorism legislation in Northern Ireland asked to see a lawyer on arrival at a police station, but the authorities delayed his access to counsel for more than 48 hours and repeatedly questioned him during that time, the European Court considered that his rights had been violated.<sup>118</sup>

Individuals also have the right to counsel when brought before a judge for decisions on whether they will be remanded in custody (see **Chapter 5.2**).

### 3.3 RIGHT TO CHOOSE A LAWYER

The right to a lawyer, including pre-trial, generally means that a person has the right to legal counsel of their choice.<sup>119</sup> International standards expressly set out the right to the assistance of chosen counsel in the pre-trial phase.<sup>a</sup> As mentioned in **Chapter 3.1**, other standards on the right to counsel have also been deemed to apply at the pre-trial phase.<sup>b</sup> (See **Chapter 20.3.1**, Right to choose defence counsel, and **Chapter 28.6.1** on the right to counsel in death penalty cases.)

However, if a lawyer is appointed by a court, an individual does not have an unqualified right to choose who will represent them.

### 3.4 RIGHT TO HAVE A LAWYER ASSIGNED; RIGHT TO FREE LEGAL ASSISTANCE

If a person who is arrested, charged or detained does not have legal counsel of their choice, they are entitled to have a lawyer assigned whenever the interests of justice require it. If the person cannot afford to pay, assigned counsel must be provided free of charge.<sup>120</sup> The standards cited here apply expressly to the pre-trial period, and are in addition to the standards which apply during all phases of criminal proceedings (see **Chapter 20**).<sup>c</sup>

The right to legal aid for those without adequate financial resources applies at all times under Article 13 of the Arab Charter, including during emergencies.<sup>d</sup> This right is also guaranteed under international humanitarian law, applicable during armed conflict. (See **Chapter 31** on times of emergency, and **Chapter 32** on fair trial rights in armed conflict.)

<sup>a</sup> Principles 1 and 5 of the Basic Principles on the Role of Lawyers, Sections G(b), H(d) and M(2)(e)-(f) of the Principles on Fair Trial in Africa, Article 55(2)(c) of the ICC Statute; See Principle 17 of the Body of Principles

<sup>b</sup> Article 14(3)(d) of the ICCPR, Article 7 of the African Charter, Article 8(2)(d) of the American Convention, Article 6(3)(c) of the European Convention

<sup>c</sup> Articles 13(1) and 16(4) of the Arab Charter, Principle 6 of the Basic Principles on the Role of Lawyers, Principle 17(2) of the Body of Principles, Principle 3 and Guidelines 4 and 11 §55(a) of the Principles on Legal Aid, Article 55(2)(c) of the ICC Statute, Rule 42(A)(i) of the Rwanda Rules, Rule 42(A)(i) of the Yugoslavia Rules; See Section H(a) of the Principles on Fair Trial in Africa

<sup>d</sup> Article 4(2) of the Arab Charter

<sup>114</sup> CPT 21st General Report, CPT/Inf (2011)28 §21; *Salduz v Turkey* (36391/02), European Court Grand Chamber (2008) §54.

<sup>115</sup> HRC Concluding Observations: *United Kingdom*, UN Doc. CCPR/C/GBR/CO/6 (2008) §19, *Australia*, UN Doc. CCPR/C/AUS/CO/5 (2009) §11; Special Rapporteur on human rights and counter-terrorism: *Spain*, UN Doc. A/HRC/10/3/Add.2 (2008) §§15, 22 (Concerning security laws and practice); See CAT Concluding Observations: *Israel*, UN Doc. CAT/C/ISR/CO/4 (2009) §15, *Jordan*, UN Doc. CAT/C/JOR/CO/2 (2010) §12, *China*, UN Doc. CAT/C/CHN/CO/4 (2008) §16(d).

<sup>116</sup> CAT Concluding Observations: *Turkey*, UN Doc. CAT/C/TUR/CO/3 (2010) §11.

<sup>117</sup> HRC Concluding Observations: *United Kingdom*, UN Doc. CCPR/C/GBR/CO/6 (2008) §19.

<sup>118</sup> *Magee v United Kingdom* (28135/95), European Court (2000) §§42-46.

<sup>119</sup> HRC Concluding Observations: *Spain*, UN Doc. CCPR/C/ESP/CO/5 (2008) §14.

<sup>120</sup> HRC Concluding Observations: *Tajikistan*, UN Doc. CCPR/CO/84/TJK (2005) §11, *Slovenia*, UN Doc. CCPR/CO/84/SVN (2005) §9; CPT 12th General Report, CPT/Inf (2002) 15 §41.

The determination of whether the interests of justice require appointment of counsel depends primarily on the seriousness of the offence, complexity of the case and severity of the potential penalty.<sup>a 121</sup> It may also depend on particular vulnerabilities of the individual, such as those related to age, health or disability.<sup>b</sup>

The Committee against Torture has expressed concern that lawyers are only appointed in felony cases in Japan and that a Turkish law denied legal aid to suspects accused of offences that carry a sentence of less than five years' imprisonment.<sup>122</sup>

Governments must provide sufficient resources to ensure that legal counsel is available throughout the country, including to those who cannot afford to pay, as well as for people under the state's jurisdiction elsewhere.<sup>c 123</sup> The legal aid system must be organized so that free assistance is available immediately following arrest to individuals unable to pay.<sup>124</sup> If a financial means test is applied, preliminary legal aid should be granted to individuals urgently requiring legal aid pending the outcome of the means test.<sup>d</sup> (See **Chapter 20.3.2** on the right to have defence counsel assigned.)

Effectively guaranteeing the rights to a fair trial and to counsel, without discrimination, also requires that during pre-trial stages governments assign interpreters free of charge to those who do not understand or speak the language.<sup>125</sup> (See **Chapters 2.4, 8.3.2, 9.5** and **23** on the right to interpretation and translations.)

### 3.5 RIGHT TO COMPETENT AND EFFECTIVE COUNSEL

Any person arrested, detained or charged with a criminal offence is entitled to a lawyer of experience and competence commensurate with the nature of the offence.<sup>e</sup>

Defence lawyers, including assigned counsel, must act freely and diligently in accordance with the law and recognized standards and ethics of the legal profession. They must advise their clients of their legal rights and obligations, and about the legal system. They must aid their clients in every appropriate way, taking such action as is necessary to protect their clients' rights and interests. In protecting the rights of their clients and in promoting justice, lawyers must seek to uphold human rights recognized by national and international law.<sup>f</sup>

#### Body of Principles, Principle 17(2)

"If a detained person does not have a legal counsel of his own choice, he shall be entitled to have a legal counsel assigned to him by a judicial or other authority in all cases where the interests of justice so require and without payment by him if he does not have sufficient means to pay."

#### Basic Principles on the Role of Lawyers, Principle 6

"Any such persons [arrested, detained or charged] who do not have a lawyer shall, in all cases in which the interests of justice so require, be entitled to have a lawyer of experience and competence commensurate with the nature of the offence assigned to them in order to provide effective legal assistance, without payment by them if they lack sufficient means to pay for such services."

<sup>121</sup> HRC General Comment 32, §38; *Quaranta v Switzerland* (12744/87), European Court (1991) §§32-34.

<sup>122</sup> CAT Concluding Observations: *Japan*, UN Doc. CAT/C/JPN/CO/1 (2007) §15(g), *Turkey*, UN Doc. CAT/C/TUR/CO/3 (2010) §11.

<sup>123</sup> CERD General Recommendation XXI (2005) §30; HRC General Comment 32, §§7-10; Special Rapporteur on the independence of the judiciary, UN Doc. A/66/289 (2011) §78; See HRC Concluding Observations: *Rwanda*, UN Doc. CCPR/C/RWA/CO/3 (2009) §18; See also, CAT Concluding Observations: *Burundi*, UN Doc. CAT/C/BDI/CO/1 (2006) §9, *Bulgaria*, UN Doc. CAT/C/CR/32/6 (2004) §§5(d), 6(d); CERD Concluding Observations: *USA*, UN Doc. CERD/C/USA/CO/6 (2008)

§22; Inter-American Commission, *Report on Terrorism and Human Rights*, (2002), Section D §236; Inter-American Court *Advisory Opinion OC-11/90* (1990), §§22-27.

<sup>124</sup> HRC Concluding Observations: *Azerbaijan*, UN Doc. CCPR/C/AZE/CO/3 (2009) §8, *San Marino*, UN Doc. CCPR/C/SMR/CO/2 (2008) §12, *Austria*, UN Doc. CCPR/C/AUT/CO/4 (2007) §15, *Panama*, UN Doc. CCPR/C/PAN/CO/3 (2008) §13.

<sup>125</sup> *Diallo v Sweden* (13205/07), (inadmissibility) Decision of the European Court (2010) §§24-25; CoE Committee of Ministers Recommendation *Rec(2012)12*, Appendix §21.3.

<sup>a</sup> Principle 3 of the Principles on Legal Aid, Section H(b)-(c) of the Principles on Fair Trial in Africa

<sup>b</sup> Principles 3 §23 and 10 of the Principles on Legal Aid

<sup>c</sup> Principle 3 of the Basic Principles on the Role of Lawyers, Principle 10 §33 and Guidelines 11 and 12 of the Principles on Legal Aid

<sup>d</sup> Guideline 1 §41(c) of the Principles on Legal Aid

<sup>e</sup> Principle 6 of the Basic Principles on the Role of Lawyers, Principle 13 and Guidelines 5 §45(c), 13 §64, 15 §69 of the Principles on Legal Aid; See Guidelines 9 §52(b) and 11 §58(a) of the Principles on Legal Aid

<sup>f</sup> Principles 13-14 of the Basic Principles on the Role of Lawyers, Section I(i) of the Principles on Fair Trial in Africa

<sup>a</sup> Principle 8 of the Basic Principles on the Role of Lawyers, Principle 18 of the Body of Principles, Principle 7 and Guidelines 3 §43(d), 4 §44(g) and 5 §45(b) of the Principles on Legal Aid, Rule 93 of the Standard Minimum Rules, Sections M(2)(e) and N(3)(e)(i-ii) of the Principles on Fair Trial in Africa, Rules 98.2 and 23.4 of the European Prison Rules; See Article 14(3)(b) of the ICCPR, Article 18(3)(b) of the Migrant Workers Convention, Articles 8(2)(c) and 8(2)(d) of the American Convention, Article 16(3) of the Arab Charter, Article 67(1)(b) of the ICC Statute, Article 20(4)(b) of the Rwanda Statute, Article 21(4)(b) of the Yugoslavia Statute; See also Article 7(1)(c) of the African Charter, Article 6(3)(c) of the European Convention

<sup>b</sup> Principle 22 of the Basic Principles on the Role of Lawyers, Section I(c) of the Principles on Fair Trial in Africa

<sup>c</sup> Article 8(2)(d) of the American Convention, Article 16(3) of the Arab Charter, Principle 8 of the Basic Principles on the Role of Lawyers, Principle 18 of the Body of Principles, Principles 7 and 12 and Guidelines 3 §43(d), 4 §44(g) and 5 §45(b) of the Principles on Legal Aid, Section N(3)(e)(i-ii) of the Principles on Fair Trial in Africa, Rule 23.4 of the European Prison Rules, Article 67(1)(b) of the ICC Statute, Regulation 97(2) of the ICC Regulations; See Article 14(3)(b) and (d) of the ICCPR, Article 6(3)(b) and (c) of the European Convention

<sup>d</sup> Principle 8 of the Basic Principles on the Role of Lawyers, Principle 18(3) of the Body of Principles, Principles 7 and 12 and Guidelines 3 §43(d), 4 §44(g) and 5 §45(b) of the Principles on Legal Aid, Rule 93 of the Standard Minimum Rules, Section N(3)(e) of the Principles on Fair Trial in Africa, Principle V of the Principles on Persons Deprived of Liberty in the Americas; See Rules 98.2 and 23.4 of the European Prison Rules, Article 67(1)(b) of the ICC Statute

<sup>e</sup> See Principle 7 §28 of the Principles on Legal Aid

The authorities, particularly the courts, must ensure that counsel, in particular assigned counsel, provide effective representation for suspects and accused. (See **Chapter 20.5**, Right to competent and effective defence counsel, and **20.6**, The prohibition on harassment and intimidation of counsel.)

## 3.6 RIGHT TO TIME AND FACILITIES TO COMMUNICATE WITH COUNSEL

The rights of individuals charged with a criminal offence to adequate time and facilities to prepare a defence (see **Chapter 8**) and to defend themselves require that suspects and accused are given opportunities to communicate in confidence with their lawyers.<sup>a 126</sup> This right applies at all stages of the proceedings and is particularly relevant to people held in pre-trial detention.

### 3.6.1 RIGHT TO CONFIDENTIAL COMMUNICATION WITH COUNSEL

The authorities must respect the confidentiality of communications and consultations within the professional relationship between lawyers and their clients.<sup>b</sup>

The right to confidential communication with a lawyer applies to all people, including those arrested or detained on a criminal charge.<sup>c</sup>

Governments must ensure that detainees can consult and communicate with counsel without delay, interception or censorship.<sup>d 127</sup>

To that end, police stations and places of detention, including in rural areas, must provide adequate facilities for arrested and detained individuals to meet and communicate privately with their lawyers (including by telephone).<sup>128</sup> Such facilities must be organized so as to ensure the confidentiality of oral and written communications between individuals and their lawyers.<sup>129</sup>

Detainees should have the right to keep documents related to their case in their possession.<sup>e</sup>

The European Court ruled that the rights of the defence were violated in a case where the facilities in a remand detention centre required detainees to speak to their lawyers through two panes of glass with holes covered with mesh, which also did not permit documents to be passed back and forth. These barriers, the Court found, created real impediments to confidential communications between the detainee and lawyer.<sup>130</sup>

#### ICCPR, Article 14(3)(b)

“In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality:...

(b) To have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing,”

#### Body of Principles, Principle 18(1)

“A detained or imprisoned person shall be entitled to communicate and consult with his legal counsel.”

<sup>126</sup> HRC General Comment 32, §§32-34; Human Rights Council resolution 15/18, §4(f); See *Castillo Petrucci et al v Peru*, Inter-American Court (1999) §139.

<sup>127</sup> See HRC General Comment 32, §34.

<sup>128</sup> See CAT Concluding Observations: *Latvia*, UN Doc. CAT/LVA/CO/2 (2008) §7.

<sup>129</sup> CAT Concluding Observations: *Jordan*, UN Doc. CAT/C/JOR/CO/2 (2010) §12; See *Modarca v Moldova* (14437/05), European Court (2007) §§84-99.

<sup>130</sup> *Modarca v Moldova* (14437/05), European Court (2007) §§84-99.

Laws and practices that allow police or others to routinely monitor the content of communications between suspects and their lawyers are inconsistent with defence rights.<sup>131</sup>

The Human Rights Committee expressed concern that in Poland prosecutors were allowed to be present at meetings between suspects and their counsel and that a suspect's correspondence with counsel could be inspected on the order of a prosecutor.<sup>132</sup>

The Special Rapporteur on human rights and counter-terrorism has expressed concern that people charged with terrorism-related crimes in Egypt were not allowed to communicate in private with their lawyer before or even during trial.<sup>133</sup>

To ensure confidentiality, but taking security needs into account, international standards specify that consultations may take place within sight, but not within the hearing, of law enforcement officials.<sup>a 134</sup>

The European Court has held that in exceptional circumstances, the confidentiality of communications may lawfully be restricted. It clarified, however, that such restrictions must be prescribed by law and ordered by a judge. They must be proportionate to a legitimate purpose – such as to prevent a serious crime involving death or injury – and must be accompanied by adequate safeguards against abuse (see **Chapter 20.4**).<sup>135</sup> Council of Europe non-treaty standards, including the European Prison Rules, incorporate this jurisprudence.<sup>b</sup>

Communications between a detained or imprisoned person and their legal counsel are inadmissible as evidence against them, unless they are connected with the commission of a continuing or contemplated crime.<sup>c</sup> (See **Chapter 17.3** on exclusion of evidence.)

### 3.7 WAIVER OF THE RIGHT TO COUNSEL

Consistent with the right to represent oneself at trial,<sup>d</sup> accused individuals may decide not to be represented by a lawyer during questioning and pre-trial phases, and instead represent themselves.<sup>e</sup>

A person's decision to waive the right to legal representation, including during questioning, must be established in an unequivocal manner and accompanied by adequate safeguards.<sup>f</sup> For example, the ICC requires waivers of the right to presence of counsel during questioning to be recorded in writing and, if possible, to be audio or video recorded.<sup>g</sup> It must be shown that the individual could reasonably have foreseen what the consequences of such a waiver would be.<sup>136</sup>

#### Basic Principles on the Role of Lawyers, Principle 8

“All arrested, detained or imprisoned persons shall be provided with adequate opportunities, time and facilities to be visited by and to communicate and consult with a lawyer, without delay, interception or censorship and in full confidentiality. Such consultations may be within sight, but not within the hearing, of law enforcement officials.”

<sup>a</sup> Principle 8 of the Basic Principles on the Role of Lawyers, Principle 18(4) of the Body of Principles, Rule 93 of the Standard Minimum Rules

<sup>b</sup> Rule 23.5 of the European Prison Rules

<sup>c</sup> Principle 18(5) of the Body of Principles

<sup>d</sup> Article 14(3)(d) of the ICCPR, Article 7 of the African Charter, Article 8(2)(d) of the American Convention, Article 16(3) of the Arab Charter, Article 6(3)(c) of the European Convention

<sup>e</sup> See Article 55(2)(d) of the ICC Statute

<sup>f</sup> See Principle 8 §29 and Guideline 3 §43(b) of the Principles on Legal Aid

<sup>g</sup> Rule 112(1)(b) of the ICC Rules of Procedure and Evidence

<sup>131</sup> CAT Concluding Observations: *Austria*, UN Doc. CAT/C/AUT/CO/4-5 (2010) §9; See also *WGAD Opinion 33/2006 (Iraq and USA)* concerning Tariq Aziz, UN Doc. A/HRC/7/4/Add.1 (2008) pp4-9 §19; *Moiseyev v Russia* (62936/00), European Court (2008) §210; See HRC Concluding Observations: *Netherlands*, UN Doc. CCPR/C/NLD/CO/4 (2009) §14.

<sup>132</sup> HRC Concluding Observations: *Poland*, UN Doc. CCPR/C/POL/CO/6 (2010) §20; See also *Austria*, UN Doc. CCPR/C/AUT/CO/4 (2007) §16, *Gridin v Russian Federation*, UN Doc. CCPR/C/69/D/770/1997 (2000) §8.5.

<sup>133</sup> Special Rapporteur on human rights and counter-terrorism, *Egypt*, UN Doc. A/HRC/13/37/Add.2 (2009) §36; See UN Doc. A/63/223 (2008) §39; See also *Cantoral-Benavides v Peru*,

*Inter-American Court* (2000) §§127-128.

<sup>134</sup> European Court: *Öcalan v Turkey*, (46221/99) Grand Chamber (2005) §§132-133, *Brennan v United Kingdom* (39846/98), (2001) §§58-63; See *Rybacki v Poland* (52479/99), European Court (2009) §§53-62.

<sup>135</sup> *Erdem v Germany* (38321/97), European Court (2001) §§65-69, *Lanz v Austria* (24430/94), European Court (2002) §§46-53; See Guideline IX(3)(i) and (4) of the *CoE Guidelines on Human Rights and the fight against terrorism*.

<sup>136</sup> European Court: *Pishchalnikov v Russia* (7025/04), (2009) §80, *Galstyan v Armenia* (26986/03), (2007) §§90-92; See *Sejdovic v Italy* (56581/00), Grand Chamber (2006) §§86-87.

The Committee against Torture expressed concern about reports that people in police custody in Azerbaijan were forced to renounce their right to a lawyer.<sup>137</sup>

A person who has waived the right to counsel has the right to revoke the waiver.

The right to self-representation, including in pre-trial proceedings, may be subject to restrictions, in the interests of justice.<sup>a</sup> (See **Chapter 20.2**, Permissible restrictions on the right to represent oneself.)

<sup>a</sup> **Rule 45 ter of the Yugoslavia Rules**

<sup>137</sup> CAT Concluding Observations: [Azerbaijan](#), UN Doc. CAT/C/CR/30/1 (2003) §6(c).

# CHAPTER 4

## RIGHT OF DETAINEES TO HAVE ACCESS TO THE OUTSIDE WORLD

People held in custody are entitled to notify a third person that they have been arrested or detained and where they are held. Detainees have the right to prompt access to families, lawyers, doctors, a judicial official and, if the detainee is a foreign national, to consular staff or a competent international organization.

- 4.1 Right to communicate and receive visits
- 4.2 Right to inform a third person of arrest or detention
- 4.3 Incommunicado detention
- 4.4 Right of access to family
- 4.5 Right of access to doctors and health care in police custody
- 4.6 Rights of foreign nationals

### 4.1 RIGHT TO COMMUNICATE AND RECEIVE VISITS

The rights of detainees to communicate with the outside world and to receive visits are fundamental safeguards against human rights violations, including torture or other ill-treatment and enforced disappearance. They affect the ability of an accused to prepare their defence and are required to protect the right to private and family life and the right to health.

Detained and imprisoned people have a right to communicate with the outside world, subject only to reasonable conditions and restrictions that are proportionate to a legitimate aim.<sup>a</sup>

The Human Rights Committee has stated that the rights of people held in police custody and pre-trial detention to access doctors, families and lawyers should be enshrined in law.<sup>138</sup>

The Committee against Torture calls for detainees to be given access to a lawyer, a doctor and their family from the time that they are taken into custody, including police custody.<sup>139</sup>

#### Convention on Enforced Disappearance, Article 17(2)(d)

“2. ...each State Party shall, in its legislation:

(d) Guarantee that any person deprived of liberty shall be authorized to communicate with and be visited by his or her family, counsel or any other person of his or her choice, subject only to the conditions established by law, or, if he or she is a foreigner, to communicate with his or her consular authorities, in accordance with applicable international law,”

<sup>a</sup> Article 17(2)(d) of the Convention on Enforced Disappearance, Rule 26 of the Bangkok Rules, Principle 19 of the Body of Principles, Guidelines 20 and 31 of the Robben Island Guidelines; See Rule 38 of the CoE Rules on remand in custody, Rules 99 and 24 of the European Prison Rules

<sup>138</sup> HRC Concluding Observations: [Central African Republic](#), UN Doc. CCPR/C/CAF/CO/2 (2006) §14, [Sweden](#), UN Doc. CCPR/C/SWE/CO/6 (2009) §13.

<sup>139</sup> CAT Concluding Observations: [Russian Federation](#), UN Doc. CAT/C/CR/28/4 (2002) §8(b), [Uzbekistan](#), UN Doc. CAT/C/CR/28/7

(2002) §6(f), [Morocco](#), UN Doc. CAT/C/CR/31/2 (2004) §6(c); See CPT Standards, [CPT/Inf/\(92\)3](#) §36, [CPT/Inf \(2002\)15](#) §40; UN General Assembly [resolution 65/205](#), §20.

(See **Chapter 3** on access to a lawyer, **Chapter 5**, Right to be brought promptly before a judge, and **Chapter 6**, Right to challenge the lawfulness of detention.)

## 4.2 RIGHT TO INFORM A THIRD PERSON OF ARREST OR DETENTION

Anyone who is arrested, detained or imprisoned has the right to inform, or have the authorities notify, someone in the outside world that they have been taken into custody and where they are being held.<sup>140</sup> (See **Chapter 10** on conditions of detention.) They also have the right to inform a third person if they are transferred from a place of detention.<sup>a</sup> (See **Chapter 27.6.2** on parental notification in the case of children.)

The right to have a third party notified of detention should be guaranteed, in principle from the very outset of police custody. The third person is to be informed immediately, or at least promptly.<sup>141</sup> In exceptional cases, when the exceptional needs of the investigation require, notification can be delayed.<sup>b</sup> However, any exceptions should be clearly defined in law, absolutely necessary to ensure the effectiveness of the investigation and strictly limited in time. Any such delay should not exceed a matter of days.<sup>142</sup> Any delay should be accompanied by safeguards, including written records of the reasons for the delay and the approval of a senior police officer unconnected with the case, or a prosecutor<sup>143</sup> or judge.

The Human Rights Committee has clarified that the intentional failure of the authorities to disclose the fate of an arrested person for a prolonged period effectively places that person outside the protection of the law. In cases of enforced disappearance (where the state refuses to acknowledge the detention or conceals the fate or whereabouts of the individual), it concluded that such practices violate rights including the right to be recognized as a person before the law.<sup>144</sup>

The European Court has stated that unacknowledged detention “is a complete negation” and “a most grave violation” of the right to liberty.<sup>145</sup> It also concluded that the failure of a state to enact legislation guaranteeing the right of people in police custody to notify their families or others of their detention violated the right to private and family life.<sup>146</sup>

Detention registers are a further safeguard against abuse of people deprived of their liberty. Information on such registers should be available to people with a legitimate interest, including families, lawyers and judges.<sup>147</sup> (See **Chapter 10.2.1**, Records of detention.)

### Body of Principles, Principle 16(1)

“Promptly after arrest and after each transfer from one place of detention or imprisonment to another, a detained or imprisoned person shall be entitled to notify or to require the competent authority to notify members of his family or other appropriate persons of his choice of his arrest, detention or imprisonment or of the transfer and of the place where he is kept in custody.”

<sup>a</sup> Article 14(3) of the Arab Charter, Rule 2(1) of the Bangkok Rules, Principle 16(1) of the Body of Principles, Guideline 3 §43(e) of the Principles on Legal Aid, Guideline 20(a) of the Robben Island Guidelines, Rule 92 of the Standard Minimum Rules, Section M(2)(c) of the Principles on Fair Trial in Africa, Principle V of the Principles on Persons Deprived of Liberty in the Americas, Rule 24.9 of the European Prison Rules; See Articles 17(2)(d) and 18 of the Convention on Enforced Disappearance, Article 10(2) of the Declaration on Disappearance

<sup>b</sup> Principles 15, 16(1) and 16(4) of the Body of Principles, Guideline 3 §43(e) of the Principles on Legal Aid

<sup>140</sup> CAT General Comment 2, §13; CoE Committee of Ministers Recommendation Rec(2012)12, Appendix §15.2.

<sup>141</sup> HRC Concluding Observations: Thailand, UN Doc. CCPR/CO/84/THA (2005) §15.

<sup>142</sup> Special Rapporteur on torture, UN Doc. A/HRC/13/39/Add.5 (2010) §82.

<sup>143</sup> CPT 12th General Report, CPT/Inf (2002) 15 §43.

<sup>144</sup> HRC: *Grioua v Algeria*, UN Doc. CCPR/C/90/D/1327/2004 (2007) §7.8-7.9, *Djebrouni v Algeria*, UN Doc.

CCPR/C/103/D/1871/2008 (2012) §8.9; See General Comment 11 of WGEID on the right to recognition before the law §42.

<sup>145</sup> *Kurt v Turkey* (24276/94), European Court (1998) §124.

<sup>146</sup> *Sarı and Çolak v Turkey* (42596/98 and 42603/98), European Court (2006) §§32-37.

<sup>147</sup> See HRC Concluding Observations: Algeria, UN Doc. CCPR/C/DZA/CO/3 (2007) §11.



### 4.3 INCOMMUNICADO DETENTION

Detention without access to the outside world – incommunicado detention – facilitates torture or other ill-treatment and enforced disappearance. Depending on the circumstances, it can itself constitute torture or other cruel, inhuman or degrading treatment.

The Inter-American Court considers that prolonged isolation and incommunicado detention, in themselves, constitute cruel and inhuman treatment. The Court ruled that holding two individuals incommunicado – one for four days and one for five days – violated their right to humane treatment.<sup>148</sup>

The Committee against Torture expressed concern about a law permitting incommunicado detention for 48 hours before a person was brought before a judge in Cambodia.<sup>149</sup> (See **Chapter 5**, Right to be brought promptly before a judge.)

Some international human rights standards and several human rights bodies and mechanisms expressly state that incommunicado detention should be prohibited altogether.<sup>a 150</sup>

While not expressly prohibiting incommunicado detention altogether, other international standards and expert bodies only allow restrictions and delays in granting detainees access to the outside world in exceptional circumstances and for a very short time. (See, for example, **Chapter 4.2** and **Chapter 4.4**.)

As the length of incommunicado detention increases, so too does the risk of additional human rights violations. Prolonged incommunicado detention is inconsistent with the right of all detainees to be treated with respect for human dignity and the obligation to prohibit torture or other ill-treatment.<sup>151</sup>

Incommunicado detention may also violate the rights of family members.<sup>152</sup>

The African Commission concluded that detaining an individual without permitting any contact with their family, and refusing to inform the family if and where the individual is held, constitutes inhuman treatment of both the detainee and family members.<sup>153</sup>

The Inter-American Court held that the one-month incommunicado detention of a woman charged in connection with terrorism, and the subsequent restricted visiting regime, violated not only her rights, but also those of her next of kin, including her children.<sup>154</sup>

The Principles on Fair Trial in Africa state that any confession or admission made during incommunicado detention should be considered as having been obtained by coercion, and therefore must be excluded from evidence.<sup>b</sup> (See **Chapter 17**, Exclusion of evidence obtained in violation of international standards.)

<sup>a</sup> Guideline 24 of the Robben Island Guidelines, Principle III of the Principles on Persons Deprived of Liberty in the Americas

<sup>b</sup> Section N(6)(d)(i) of the Principles on Fair Trial in Africa

<sup>148</sup> Inter-American Court: *Cantoral-Benavides v Peru* (2000) §83; *Chaparro Álvarez and Lapo Íñiguez v Ecuador* (2007) §§166-172.

<sup>149</sup> CAT Concluding Observations: Cambodia, UN Doc. CAT/C/CR/31/7 (2003) §6(j).

<sup>150</sup> HRC General Comment 20 §11; Special Rapporteur on torture, UN Doc. A/56/156 (2001) §39(f); CAT Concluding Observations: Yemen, UN doc. CAT/C/YEM/CO.2/Rev.1 (2010) §12, *El Salvador*, UN Doc. CAT/C/SLV/CO/2 (2009) §20; UN Special Rapporteur on human rights and counter-terrorism: Spain, UN Doc. A/HRC/10/3/Add.2 (2008) §§32, 62; HRC Concluding Observations: Syria, UN Doc. CCPR/CO/84/SYR (2005) §9, Spain, UN Doc. CCPR/C/ESP/CO/5 (2009) §14.

<sup>151</sup> Inter-American Court: *Chaparro Álvarez and Lapo Íñiguez v Ecuador* (2007) §171, *Maritzá Urrutia v Guatemala* (2003) §87, *Cantoral-Benavides v Peru* (2000) §§83-84; See HRC: Concluding

Observations: Chile, UN Doc. CCPR/C/CHL/CO/5 (2007) §11, *Womah Mukong v Cameroon*, UN Doc. CCPR/C/51/D/458/1991 (1994) §9.4, *El-Megreisi v Libyan Arab Jamahiriya*, UN Doc. CCPR/C/50/D/440/1990 (1994) §5.4, *Polay Campos v Peru*, UN Doc. CCPR/C/61/D/577/1994 (1997) §8.4; See also, UN General Assembly resolution 65/205, §21; UN Human Rights Council resolution 8/8 §7(c), CHR resolution 1997/38 (1997) §20.

<sup>152</sup> HRC: *Bashasha v Libyan Arab Jamahiriya*, UN Doc. CCPR/C/100/D/1776/2008 (2010) §7.4-7.5, Concluding Observations: USA, UN Doc. CCPR/C/USA/CO/3/Rev.1 (2006) §12.

<sup>153</sup> *Amnesty International and Others v Sudan* (48/90, 50/91, 52/91 and 89/93), African Commission, 13th Annual Report (1999) §54.

<sup>154</sup> *De La Cruz-Flores v Peru*, Inter-American Court (2004) §§125-136.

## 4.4 RIGHT OF ACCESS TO FAMILY

Detainees, including those held in police custody or on remand pending trial, are to be given all reasonable facilities to communicate with and receive visits from family and friends.<sup>a 155</sup>

Restrictions and supervision are permitted only if necessary in the interests of justice or security and good order in the institution.<sup>b</sup>

The right to receive visits applies to all detainees, regardless of the offence of which they are suspected or accused.<sup>156</sup>

Denying visits may amount to inhuman treatment.<sup>157</sup> In addition, the European Court, the African Commission<sup>158</sup> and the Inter-American Commission<sup>159</sup> have clarified that conditions or procedures related to visits must not infringe other rights, including the right to private and family life.

The European Court has stated that insufficiently precise laws or regulations that allow unreasonable restrictions on family visits violate the right to private and family life. Restrictions must be in accordance with the law. They must be both necessary and proportionate to national security, public safety, prevention of crime or disorder, protection of health or morals, protection of the rights and freedoms of others, or the economic well-being of the country.<sup>160</sup>

The European Court found that allowing only two short visits a month in a room in which the detainee was separated from his wife and child by a glass partition violated the right to private and family life. In its rulings, the Court has taken into account whether alternatives, including supervised visits, were considered and more proportionate.<sup>161</sup>

The Inter-American Court has held that severe restrictions on family visits resulted in the violation of the rights of family members.<sup>162</sup> It has also noted the state's duty to pay special attention to ensuring that detained or imprisoned women are allowed visits from their children.<sup>163</sup>

The Bangkok Rules instruct authorities to encourage and facilitate women's contact with their families, including children, and to counterbalance disadvantages faced by women detained in institutions far from their homes.<sup>c</sup> However, the small number of detention facilities for women in most countries has led to concern that access of women detainees to their families is impeded by travelling distance and cost. (See **Chapter 10.6**, Women in custody.)

The duty to facilitate family visits requires the authorities to ensure reasonable facilities in places of detention for such visits.<sup>d</sup>

The Bangkok Rules require states to ensure that visits involving children take place in an environment that is conducive to a positive experience and allows open contact between mother and child. They also require prison staff searching children visiting detention facilities to treat them with respect and sensitivity.<sup>e</sup>

<sup>a</sup> Article 17(2)(d) of the Convention on Enforced Disappearance, Article 17(5) of the Migrant Workers Convention, Article 16(2) of the Arab Charter, Rules 26-28 of the Bangkok Rules, Guideline 31 of the Robben Island Guidelines, Rule 92 of the Standard Minimum Rules, Section M(2)(e) of the Principles on Fair Trial in Africa, Principle V of the Principles on Persons Deprived of Liberty in the Americas, Rules 24 and 99 of the European Prison Rules, Regulation 100(1) of the ICC Regulations

<sup>b</sup> Principle 19 of the Body of Principles, Rule 92 of the Standard Minimum Rules, Section M(2)(g) of the Principles on Fair Trial in Africa, Rule 24 of the European Prison Rules, Regulation 100(3) of the ICC Regulations

<sup>c</sup> Rule 26 of the Bangkok Rules

<sup>d</sup> Rule 92 of the Standard Minimum Rules

<sup>e</sup> Rules 28 and 21 of the Bangkok Rules

<sup>155</sup> CPT 2nd General Report, CPT/Inf (92) 3, §51; *Nuri Özen and Others v Turkey* (15672/08 et al), European Court (2011) §59.

<sup>156</sup> See *Marc Romulus v Haiti* (Case 1992), Inter-American Commission (1977).

<sup>157</sup> *Civil Liberties Organisation v Nigeria* (151/96), African Commission, 13th Annual Report (1999) §27.

<sup>158</sup> *Malawi African Association and Others v Mauritania* (54/91, 61/91, 98/93, 164/97 to 196/97 and 210/98), African Commission, 13th Annual Report (2000) §§123-124.

<sup>159</sup> *X and Y v Argentina* (10.506), Inter-American Commission (1996) §§98-99.

<sup>160</sup> European Court: *Gradek v Poland* (39631/06), (2010) §§45-48, *Onoufriou v Cyprus* (24407/04), (2010) §§91-97, *Kucera v Slovakia* (48666/99), (2007) §§125-134, *Bagiński v Poland* (37444/97), (2005) §§86-99.

<sup>161</sup> European Court: *Moiseyev v Russia* (62936/00), (2009) §§246-247, 252-259, Cf: *Messina v Italy (No.2)* (25498/94), (2000) §§61-74.

<sup>162</sup> *De La Cruz-Flores v Peru*, Inter-American Court (2004) §§135-136.

<sup>163</sup> *Miguel Castro-Castro Prison v Peru*, Inter-American Court (2006) §330.

## 4.5 RIGHT OF ACCESS TO DOCTORS AND HEALTH CARE IN POLICE CUSTODY

People deprived of their liberty have the right to be examined by a doctor as promptly as possible, and, when necessary, to receive health care and treatment, free of charge.<sup>a 164</sup>

This right is an integral part of the duty of the authorities to respect the right to health and ensure respect for dignity.<sup>165</sup>

The Human Rights Committee has stated that the protection of detainees requires that each person detained be afforded prompt and regular access to doctors.<sup>166</sup> The UN General Assembly and the Human Rights Council have also repeatedly underscored the importance of prompt and regular medical care in preventing torture and other ill-treatment.<sup>167</sup>

People held in police custody should be informed of their right to see a doctor.<sup>b</sup> Requests to see a doctor should not be screened by police officers.<sup>168</sup>

The Committee against Torture and the Subcommittee on Prevention of Torture have stressed that doctors carrying out compulsory examinations at police stations should be independent of the police authorities or should be a doctor of the detainee's choice.<sup>169</sup> Women have the right to be examined or treated by a female practitioner on request where possible, except in situations requiring urgent medical intervention. A woman staff member must be present if a male doctor or nurse examines the detainee against her wishes.<sup>c</sup>

The Special Rapporteur on torture has clarified that doctors should not examine detainees with a view to determining their "fitness for interrogation".<sup>d 170</sup>

In order to guarantee confidentiality, medical examinations should not, as a rule, be carried out within the sight or hearing of police officers. In an exceptional case however, if the doctor so requests, special security arrangements may be considered, such as having a police officer within call or within sight but out of hearing. Any such arrangements must be noted by the doctor in the record of the examination.<sup>171</sup>

Law enforcement officials have a duty to ensure that the health of people in their custody is protected and that assistance and medical aid are rendered to any injured or affected person whenever necessary.<sup>e</sup>

The European Court held that a state violated the right to life of a man who suffered a head injury before being arrested and who died after being held in police custody for 24 hours without a medical examination. The authorities had assumed he was drunk.<sup>172</sup>

Detainees have the right to have access to their medical records and to request a second medical opinion.<sup>f</sup>

<sup>a</sup> Article 14(4) of the Arab Charter, Principle 24 of the Body of Principles, Rule 24 of the Standard Minimum Rules, Guidelines 20(d) and 31 of the Robben Island Guidelines, Principles IX (3) and X of the Principles on Persons Deprived of Liberty in the Americas, Rule 42 of the European Prison Rules

<sup>b</sup> Section M(2)(b) of the Principles on Fair Trial in Africa, Guideline 20 of the Robben Island Guidelines; See Principles 13 and 24 of the Body of Principles

<sup>c</sup> Rule 10(2) of the Bangkok Rules

<sup>d</sup> See Principle 4 of the Principles of Medical Ethics

<sup>e</sup> Article 6 of the Code of Conduct for Law Enforcement Officials

<sup>f</sup> Principles 25 and 26 of the Body of Principles

<sup>164</sup> CAT Concluding Observations: [Cameroon](#), UN Doc. CAT/C/CR/31/6 (2004) §§4(b), 8(d).

<sup>165</sup> See [Congo v Ecuador](#) (11.427), Inter-American Commission (1998) §§47-48, 63-68.

<sup>166</sup> HRC General Comment 20, §11.

<sup>167</sup> For example, General Assembly [resolution 65/205](#), §20; [Human Rights Council resolution 13/19](#) (2010) §5.

<sup>168</sup> SPT: Sweden, UN Doc. [CAT/OP/SWE/1](#) (2008) §64.

<sup>169</sup> CAT General Comment 2, §13, CAT Concluding Observations: [Hungary](#), UN Doc. CAT/C/HUN/CO/4 (2006) §8, [Argentina](#), UN Doc.

CAT/C/CR/33/1 (2004) §§6(m) and 7(m), Report under Article 20: [Mexico](#), UN Doc. CAT/C/75 (2003) §§219(i) and 220(j); See also Second Annual Report of the SPT, UN Doc. [CAT/C/42/2](#) (2009) §24.

<sup>170</sup> Special Rapporteur on torture, UN Doc. [A/56/156](#) (2001) §39(l).

<sup>171</sup> CAT Concluding Observations: [Austria](#), UN Doc. CAT/C/AUT/CO/3 (2005) §13, [Turkey](#), UN Doc. CAT/C/TUR/CO/3 (2010) §11; SPT: [Maldives](#), UN Doc. CAT/OP/MDV/1 (2009) §111; [CPT: 12th General Report](#), CPT/Inf/(2002) 15 §42, [Lithuania](#), CPT/Inf (2009) 22 §§19-20.

<sup>172</sup> [Jasinskis v Latvia](#) (45744/08) European Court (2010) §67.

Individuals who have allegedly been tortured or ill-treated should be medically examined by an independent doctor, in a manner consistent with the Istanbul Protocol.<sup>173</sup> (See **Chapter 10.4** on the right to health and **10.11** on the right to reparation for torture and other ill-treatment.)

## 4.6 RIGHTS OF FOREIGN NATIONALS

Foreign nationals held in pre-trial detention are to be given facilities to communicate with and receive visits from representatives of their government. If they are refugees or under the protection of a competent intergovernmental organization, they have the right to communicate and receive visits from representatives of the organization or of the state where they reside.<sup>a 174</sup>

This right is also enshrined in treaties establishing duties to investigate and prosecute crimes under international law.<sup>b</sup>

Such contact is only with the consent of the detainee. (See **Chapter 2.5**.)

Consular representatives may assist the detainee with various defence measures such as providing, retaining or monitoring the quality of legal representation, obtaining evidence in the country of origin, and monitoring the conditions under which the accused is held.<sup>175</sup>

Given the assistance and protection that such representatives can provide, the right to communicate with and be visited by consular representatives should be afforded to individuals who are nationals of both the state that has arrested or detained them and a foreign state.<sup>c</sup>

If the individual is a national of two foreign states, Amnesty International considers that the individual should be afforded the facilities to communicate with and receive visits and assistance from representatives of both states, should he or she so choose.

The Inter-American Court and Inter-American Commission have concluded that the failure to respect the rights of a detained foreign national to consular assistance amounts to a serious violation of fair trial rights. In death penalty cases it constitutes a violation of the right to life.<sup>176</sup>

(See also **Chapter 25.8** on imprisoned foreign nationals.)

<sup>a</sup> Article 36 of the Vienna Convention on Consular Relations, Article 17(2)(d) of the Convention on Enforced Disappearance, Article 16(7) of the Migrant Workers Convention, Article 10 of the Declaration on non-Nationals, Rule 38 of the Standard Minimum Rules, Rule 2(1) of the Bangkok Rules, Section M(2)(e) of the Principles on Fair Trial in Africa, Principle V of the Principles on Persons Deprived of Liberty in the Americas, Rule 37 of the European Prison Rules (applicable to remand detention and imprisonment)

<sup>b</sup> For example: Article 6(3) of the Convention against Torture, Article 10(3) of the Convention on Enforced Disappearance, Article 15(3) of the CoE Convention on the Prevention of Terrorism

<sup>c</sup> See Rule 27(2) of the CoE Rules on remand in custody

<sup>173</sup> HRC Concluding Observations: [Hungary](#), UN Doc. CCPR/C/HUN/CO/5 (2010) §14; CAT Report under Article 20: [Mexico](#), UN Doc. CAT/C/75 (2003) §220(k).

<sup>174</sup> See ICJ: [LaGrand Case \(Germany v the USA\)](#) (2001), §77, [Avena and Other Mexican Nationals \(Mexico v USA\)](#) (2004) §50.

<sup>175</sup> [Advisory Opinion OC-16/99](#), Inter-American Court (1999) §86.

<sup>176</sup> [Advisory Opinion OC-16/99](#), Inter-American Court (1999) §137; [Fierro v United States](#) (11.331), Inter-American Commission (2003) §§37, 40.

# CHAPTER 5

## RIGHT TO BE BROUGHT PROMPTLY BEFORE A JUDGE

Everyone arrested or detained in connection with a criminal charge must be brought promptly before a judge or other judicial officer, so that their rights can be protected. The judge must rule on the lawfulness of the arrest or detention, and on whether the detainee should be released or detained pending trial. There is a presumption of release pending trial. The state bears the burden of proving that the initial arrest or detention was lawful and that continuing detention, if requested, is necessary and proportionate.

### 5.1 Right to be brought promptly before a judge

#### 5.1.1 Officers authorized to exercise judicial power

#### 5.1.2 What does “promptly” mean?

### 5.2 Rights during the hearing and scope of review

### 5.3 Presumption of release pending trial

### 5.4 Permissible reasons for detention pending trial

#### 5.4.1 Alternatives to detention pending trial

## 5.1 RIGHT TO BE BROUGHT PROMPTLY BEFORE A JUDGE

All forms of detention or imprisonment must be ordered by, or subject to, the effective control of a judicial authority.<sup>a 177</sup>

Judicial oversight of detention serves to safeguard the right to liberty and, in criminal cases, the presumption of innocence. It also aims to prevent human rights violations including torture or other ill-treatment, arbitrary detention and enforced disappearance. It ensures that detainees are not exclusively at the mercy of the authorities detaining them.<sup>178</sup>

International standards require that anyone arrested or detained is brought promptly before a judge or other officer authorized by law to exercise judicial power.<sup>b 179</sup>

The purposes of bringing the detainee promptly before a judge include:<sup>c</sup>

- to assess whether sufficient legal reasons exist for the arrest or detention, and to order release if not,
- to safeguard the well-being of the detainee,
- to prevent violations of the detainee’s rights,

### ICCPR, Article 9(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...”

<sup>177</sup> UN General Assembly resolution 65/205, §20; Human Rights Council resolution 15/18, §4(c); Commission on Human Rights resolution 2005/27, §4(c); See European Court Grand Chamber: *McKay v United Kingdom* (543/03), (2006) §§30-32, *Medvedyev and Others v France* (3394/03), (2010) §§117-118; Inter-American Court: *Tibi v Ecuador*, (2004) §§114-115, *Chaparro Álvarez and Lapo*

*Iniguez v Ecuador*, (2007) §81, *Bayarri v Argentina*, (2008) §63.

<sup>178</sup> *Ferrer-Mazorra et al v United States* (9903) Inter-American Commission, Report 51/01 (2001) §232; European Court: *Rigopoulos v Spain*, (37388/97) Decision (1999), *Ladent v Poland* (11036/03) (2008) §72.

<sup>179</sup> Human Rights Council resolution 21/4 (2012) §18(a).

<sup>a</sup> Principle 4 of the Body of Principles, Principle V of the Principles on Persons Deprived of Liberty in the Americas

<sup>b</sup> Applicable only in criminal cases: Article 9(3) of the ICCPR, Article 16(6) of the Migrant Workers Convention, Article 14(5) of the Arab Charter, Article 5(3) of the European Convention, Section M(3) of the Principles on Fair Trial in Africa, Article 59(2) of the ICC Statute. Applicable to all people deprived of liberty: Article 7(5) of the American Convention, Article XI of the Inter-American Convention on Disappearance, Principles 4 and 11(1) of the Body of Principles, Article 10(1) of the Declaration on Disappearance, Guideline 27 of the Robben Island Guidelines

<sup>c</sup> Section M(3) of the Principles on Fair Trial in Africa, Rule 14(1) of the CoE Rules on remand in custody

- if the initial detention or arrest was lawful, to assess:
  - whether the individual should be released from custody and if any conditions should be imposed, or
  - in criminal cases, whether detention pending trial is necessary and proportionate.

A judicial hearing with a different purpose does not satisfy this right. For example, where the purpose of a hearing was for the detainee to make a preliminary statement, and did not address the lawfulness of the detention, the Inter-American Court considered that the hearing did not meet the requirements of Article 7(5) of the American Convention.<sup>180</sup>

The European Court has clarified that both the legality of detention and the question of release or remand pending trial must be considered promptly. It stated that it is “highly desirable” for these issues to be considered in the same hearing by a judicial officer who has the competence to rule on both issues. However, it found no violation of the European Convention where the two issues were considered in separate hearings by different courts, as both hearings took place within the required time frame.<sup>181</sup>

The state has an obligation to ensure that people arrested or detained are brought before a court promptly, regardless of whether a detainee challenges their detention. This procedure is distinct from procedures initiated by or on behalf of the detainee, such as habeas corpus or *amparo*, and from regular periodic review of detention.<sup>182</sup> (See **Chapter 6.**) The availability of habeas corpus or other such procedures does not excuse a state’s failure to bring a detainee promptly before a judicial authority.<sup>183</sup>

Repeated concern has been expressed about practices that deny people suspected of crimes such as terrorism and drug trafficking prompt and automatic judicial scrutiny of the legality of their detention. The European Court has clarified that the threats of terrorism and drug trafficking on the high seas do not permit the authorities to arrest individuals for questioning free from effective control by domestic courts.<sup>184</sup>

State compliance with this right is particularly important in situations where military forces are in control of security.<sup>185</sup>

For people arrested in connection with a criminal offence, the initial hearing before a judge or judicial officer should mark the end of detention in police custody. If not released, they should be transferred to a (remand) detention centre not under the control of the investigating authorities, with conditions that meet international standards.<sup>186</sup> (See **Chapter 10.**)

### 5.1.1 OFFICERS AUTHORIZED TO EXERCISE JUDICIAL POWER

If the detainee is brought before a judicial officer other than a judge, the officer must be authorized to exercise judicial power and must be objective, impartial and independent of the executive and the parties. (See **Chapter 12.4,** Right to be heard by an independent tribunal.)

<sup>180</sup> *Bayarri v Argentina*, Inter-American Court (2008) §67; See *Moulin v France* (37104/06), European Court (2010) §§47-51.

<sup>181</sup> *McKay v United Kingdom* (543/03), European Court Grand Chamber (2006) §47.

<sup>182</sup> European Court: *McKay v United Kingdom* (543/03), Grand Chamber (2006) §34, *De Jong, Baljet and Van den Brink v the Netherlands* (8805/79 8806/79 9242/81), (1984) §§51, 57, *Jecius v Lithuania* (34578/1997), (2000) §84.

<sup>183</sup> *De Jong, Baljet and Van den Brink v the Netherlands* (8805/79, 8806/79, 9242/81), European Court (1984) §§51, 57; See *Berry v Jamaica*, HRC, UN Doc. CCPR/C/50/D/330/1988 (1994) §11.1.

<sup>184</sup> For example, UN General Assembly resolution 63/185, §§13, 14; HRC Concluding Observations: *Uzbekistan*, UN Doc.

CCPR/C/UZB/CO/3 (2010) §15; See Guideline VIII(2) of the *CoE Guidelines on human rights and the fight against terrorism; Medvedyev v France* (3394/03), European Court Grand Chamber (2010) §126.

<sup>185</sup> *Cabrera García and Montiel Flores v Mexico*, Inter-American Court (2010) §102; HRC Concluding Observations: *Kosovo (Serbia)*, UN Doc. CCPR/C/UNK/CO/1 (2006) §17.

<sup>186</sup> HRC Concluding Observations: *Azerbaijan*, UN Doc. CCPR/C/AZE/CO/3 (2009) §8, *El Salvador*, UN Doc. CCPR/C/SLV/CO/6 (2010) §14; Special Rapporteur on torture, UN Docs. *E/CN.4/2003/68* (2002) §26(g), *A/65/273* (2010) §75; CPT, 12th General Report, *CPT/Inf (2002) 15*, §46; See CAT Concluding Observations: *Japan*, UN Doc. CAT/C/JPN/CO/1 (2007) §15.

The judicial officer must have the authority to review the lawfulness of the arrest or detention and the existence of reasonable suspicion against the individual in a criminal case, and must be empowered to order release if the arrest or detention is unlawful.<sup>187</sup>

Prosecutors do not generally qualify as judicial officers for this purpose. They have repeatedly been considered not to have the necessary institutional objectivity and impartiality to act as judicial officers in determining the legality of detention.<sup>188</sup>

The European Court has found prosecutors, investigators, military officers and an investigating judge not to be sufficiently independent to exercise judicial power for this purpose, because they had been entitled to intervene in the subsequent proceedings as representatives of the prosecuting authority.<sup>189</sup>

Where a judge holding the initial hearing within 36 hours of arrest had the power to release upon a finding of unlawful detention, but not to rule on bail, the European Court held that there was no violation of Article 5(3) of the European Convention, noting that a bail hearing was held the following day.<sup>190</sup>

### 5.1.2 WHAT DOES “PROMPTLY” MEAN?

International standards require that individuals are brought before a judge promptly after arrest or detention. While the promptness is determined according to the particular circumstances of each case, the European Court has clarified that the time constraint imposed by the promptness requirement “leaves little flexibility in interpretation” and the Human Rights Committee has stated that “delays must not exceed a few days”.<sup>191</sup>

In most cases, delays of more than 48 hours following the arrest or detention have been considered excessive.<sup>a 192</sup> (But see **Chapter 27.6.1** on children.)

The Human Rights Committee has raised concern about laws in a number of countries permitting detention in police custody for 72 hours or more without presentation before a judicial officer.<sup>193</sup>

In a country where torture of detainees was found to be systematic, the Committee against Torture recommended that the law be amended to require detainees to be brought before a court within 24 hours, and judges to be available at all times for this purpose.<sup>194</sup>

Problems affecting the organization of the criminal justice system are never excuses for non-compliance with the promptness requirement.<sup>195</sup>

<sup>a</sup> Rule 14(2) of the CoE Rules on remand in custody

<sup>187</sup> European Court: *Schiesser v Switzerland* (7710/76), (1979) §§25-38, *Assenov and Others v Bulgaria* (24760/94), (1998) §§146-150, *McKay v United Kingdom* (543/03), Grand Chamber (2006) §40, *Medvedyev v France* (3394/03), Grand Chamber (2010) §§124-125; See UN Mechanisms Joint Report on detainees at Guantánamo Bay, UN Doc. E/CN.4/2006/120 (2006) §28; *Bayarri v Argentina*, Inter-American Court (2008) §63.

<sup>188</sup> HRC: *Kulomin v Hungary*, UN Doc. CCPR/C/50/D/521/1992 (1996) §11.3, *Reshetnikov v Russian Federation*, UN Doc. CCPR/C/95/D/1278/2004 (2009) §8.2, *Zheludkova v Ukraine*, UN Doc. CCPR/C/75/D/726/1996 (2002) §8.3, HRC Concluding Observations: *Tajikistan*, UN Doc. CCPR/CO/84/TJK (2005) §12; See WGAD, *China*, UN Doc. E/CN.4/2005/6/Add.4 (2004) §§32(c), 78(a); Inter-American Court: *Acosta-Calderón v Ecuador*, (2005) §§79-81, *Chaparro Álvarez and Lapo Íñiguez v Ecuador*, (2007) §§84-86.

<sup>189</sup> European Court: *Bricat v Italy* (13867/88), (1992) §§20-22, *Assenov and others v Bulgaria* (24760/94), (1998) §§146-150, *Nikolova v Bulgaria* (31195/96) Grand Chamber (1999) §§49-53, *De Jong, Baljet and van den Brink v Netherlands* (8805/79,

8806/79, 9242/81), (1984) §49, *Hood v United Kingdom* (27267/95), (1999) §§57-58, *Huber v Switzerland* (12794/87), (1990) §§42-43, *H.B. v Switzerland* (26899/95), (2001) §§62-64.

<sup>190</sup> *McKay v United Kingdom* (543/03), European Court Grand Chamber (2006) §§41-51.

<sup>191</sup> *Aquilina v Malta* (25642/94), European Court Grand Chamber (1999) §§48-51; HRC *General Comment 8*, §2.

<sup>192</sup> HRC Concluding Observations: *El Salvador*, UN Doc. CCPR/C/SLV/CO/6 (2010) §14; Special Rapporteur on torture, UN Doc. E/CN.4/2003/68 (2002) §26(g) and UN Doc. A/65/273 (2010) §75; See CAT Concluding Observations: *Venezuela*, UN Doc. CAT/C/CR/29/2 (2002) §6(f); *Kandzhov v Bulgaria* (68294/01), European Court (2008) §§66-67.

<sup>193</sup> HRC Concluding Observations: *Uzbekistan*, UN Doc. CCPR/CO/83/UZB (2005) §14, *Ukraine*, UN Doc. CCPR/C/UKR/CO/6 (2006) §8, *Moldova*, UN Doc. CCPR/C/MDA/CO/2 (2009) §19.

<sup>194</sup> CAT Report under Article 20: *Mexico*, UN Doc. CAT/C/75 (2003) §220(b).

<sup>195</sup> See *Koster v Netherlands* (12843/87), European Court (1991) §§24, 25.

The requirement of promptness, however, allows some flexibility in light of the circumstances of the case.

Flexibility may be required, for example, when people are arrested or detained at sea.<sup>196</sup>

While some flexibility has been accorded in view of factors such as the complexity of the investigations, for example in terrorism-related cases, a number of bodies have criticized delays in such cases.<sup>197</sup> The European Court's 1988 ruling in *Brogan et al v United Kingdom*, which found that a delay of 4 days and 6 hours before bringing terrorism suspects before a judge was excessive, remains a lead case.<sup>198</sup> The Special Rapporteur on human rights and counter-terrorism has stated that everyone held in detention must have access to a judicial hearing about the lawfulness of their detention within 48 hours.<sup>199</sup>

The Human Rights Committee has indicated that the right to be brought promptly before a judge should not be restricted during times of emergency.<sup>200</sup> The jurisprudence of the European and Inter-American Courts indicates that, while some delay in bringing a person before a court may be permissible during states of emergency, the delay must not be prolonged. The European Court requires adequate safeguards against abuse to be available during this period, such as access to a lawyer, doctor, and family and the right to habeas corpus.<sup>201</sup> (See **Chapter 31** on states of emergency.)

## 5.2 RIGHTS DURING THE HEARING AND SCOPE OF REVIEW

The burden of proving that the initial arrest or detention was lawful and that continued detention, if ordered, is both necessary and proportionate, lies with the state – either the prosecutor or, in some civil law systems, the investigating judge.<sup>202</sup> It must establish that release would create a substantial risk that cannot be allayed by other means.<sup>a 203</sup>

Individuals have the following procedural rights during the hearing:<sup>b</sup>

- to be brought physically before a judicial officer<sup>204</sup>
- to assistance of counsel, including appointed counsel, free of charge if necessary<sup>c</sup> (see **Chapter 3**)
  - access to relevant documents<sup>205</sup>
  - free services of an interpreter if the individual does not speak or understand the language used by the court<sup>d</sup>
  - to be heard on all relevant issues<sup>206</sup>
  - to a fully and specifically reasoned decision<sup>207</sup>
  - to appeal

<sup>a</sup> Rules 7-8 of the CoE Rules on remand in custody

<sup>b</sup> Rules 28, 25(2)-(4), 26, 29, 21, 18, 27 and 32 of the CoE Rules on remand in custody

<sup>c</sup> Principle 3 and Guideline 4 §44(c) of the Principles on Legal Aid, Rule 27 of the Robben Island Guidelines, Rule 25 of the CoE Rules on remand in custody

<sup>d</sup> Guideline 3 §43(f) of the Principles on Legal Aid, Section N(4)(c) of the Principles on Fair Trial in Africa

<sup>196</sup> European Court: *Medvedev and Others v France* (3394/03), Grand Chamber (2010) §§127-134, but see *Vassiss v France*, (62736/09), (2013) §§55-62.

<sup>197</sup> See for example, HRC Concluding Observations: *France*, UN Doc. CCPR/C/FRA/CO/4 (2008) §14; Inter-American Commission, *Report on terrorism and human rights* (2002) §§121-122.

<sup>198</sup> European Court: *Brogan et al v United Kingdom* (11209/84, 11234/84, 11266/84, 11386/85), (1988) §§55-62, but see *Ipek and Others v Turkey* (17019/02, 300070/02), (2009) §§32-38.

<sup>199</sup> Special Rapporteur on human rights and counter-terrorism, UN Doc. A/63/223(2008) §45(a).

<sup>200</sup> HRC report, UN Doc. A/49/40, vol. I, annex XI, p119, §2 (also cited in footnote 9 of HRC General Comment 29); See HRC Concluding Observations: *Israel*, UN Doc. CCPR/C/ISR/CO/3 (2010) §7(c); See also HRC Concluding Observations: *Thailand*, UN Doc. CCPR/CO/84/THA (2005) §§13 and 15.

<sup>201</sup> European Court: *Brannigan and McBride v United Kingdom* (14553/89, 14554/89), (1993) §§61-66, *Aksoy v Turkey* (21987/93), (1996) §§83-84; *Castillo-Petrucci et al v Peru*, Inter-American Court (1999) §§104-112.

<sup>202</sup> *Ilijkov v Bulgaria* (33977/96), European Court (2001) §§84-85; Special Rapporteur on human rights and counter-terrorism, *Australia*, UN Doc. A/HRC/4/26/Add.3 (2006) §34; See WGAD,

*South Africa*, UN Doc. E/CN.4/2006/7/Add.3 (2005) §65.

<sup>203</sup> *Patsuria v Georgia* (30779/04), European Court (2007) §§73-77.

<sup>204</sup> European Court: *Moulin v France* (3710/406), (2010) §118, *Ocalan v Turkey* (46221/99), Grand Chamber (2005) §103, *Medvedev v France* (3394/03), Grand Chamber (2010) §118; Inter-American Court: *Bayarri v Argentina* (2008) §65, *Acosta-Calderón v Ecuador* (2005) §78; WGAD, *China*, UN Doc. E/CN.4/2005/6/Add.4 (2004) §32(b). Rule 28 of the CoE Rules on remand in custody indicates that a video link may sometimes be acceptable, but the CPT has raised concern about this in the UK for people detained under terrorism legislation, calling for detainees to be brought physically before a judge. *CPT/Inf(2008) 27* §§8-10, *CPT/Inf(2009) 30* §9.

<sup>205</sup> *Lebedev v Russia* (493/04), European Court (2007) §77.

<sup>206</sup> European Court: *Assenov and Others v Bulgaria* (24760/94), (1998) §146, *McKay v United Kingdom* (543/03), Grand Chamber (2006) §35; WGAD, *China*, UN Doc. E/CN.4/2005/6/Add.4 (2004) §32(b); Inter-American Court: *Bayarri v Argentina*, (2008) §§65-68, *Chaparro Álvarez and Lapo Iñiguez v Ecuador*, (2007) §85.

<sup>207</sup> WGAD Deliberation No.9, UN Doc. A/HRC/22/44 (2012) §67; European Court: *McKay v United Kingdom* (543/03), Grand Chamber (2006) §43, *Patsuria v Georgia* (30779/04), (2007) §62, *Nikolaishvili v Georgia* (30748/04), (2009) §76; See *Chaparro Álvarez and Lapo Iñiguez v Ecuador*, Inter-American Court (2007) §§102-107, 116-119.



- to consular or other appropriate assistance to foreign nationals (see **Chapter 2.5**)
- to inform family of the date and place of the hearing (unless this would result in serious risk to the administration of justice or national security).

If (continued) detention is ordered, a person has the rights to challenge the legality of detention, to regular periodic review of the continuing necessity of detention, and to a trial within a reasonable time (see **Chapters 6** and **7**).

### 5.3 PRESUMPTION OF RELEASE PENDING TRIAL

In accordance with the right to liberty and the presumption of innocence (see **Chapter 15**), there is a presumption that people charged with a criminal offence will not be detained while awaiting trial.<sup>208</sup>

Some international standards expressly state that people charged with criminal offences should not, as a general rule, be held in custody pending trial.<sup>a</sup>

However, the standards that include a presumption of release, and others, explicitly recognize that:<sup>b</sup>

- a person's release may be subject to guarantees to appear for trial, such as bail or requirements to report to the authorities,
- there are circumstances when an accused may, exceptionally, be detained pending trial, when necessary and proportionate.

The burden rests on the state to establish that it is necessary and proportionate to deprive an individual of their liberty, including pending trial (see **5.2** above). It must establish that release would create a substantial risk of flight, harm to others or interference with the evidence or investigation that cannot be allayed by other means.<sup>c 209</sup> (See also **Chapter 6**, Right to challenge the lawfulness of detention, and **Chapter 7** on the right to trial within a reasonable time or to release from detention.)

### 5.4 PERMISSIBLE REASONS FOR DETENTION PENDING TRIAL

To justify detaining an individual pending trial, there must be:<sup>d</sup>

- reasonable suspicion that the individual has committed an offence that is punishable by imprisonment<sup>210</sup>, and
- a genuine public interest which, notwithstanding the presumption of innocence, outweighs the right to personal liberty,<sup>211</sup> and
- substantial reasons for believing that, if released, the individual would<sup>212</sup>:
  - abscond,<sup>213</sup>
  - commit a serious offence,
  - interfere with the investigation or the course of justice,<sup>214</sup> or
  - pose a serious threat to public order,<sup>215</sup> and
  - there is no possibility that alternative measures would address these concerns.<sup>216</sup>

<sup>a</sup> Article 9(3) of the ICCPR, Article 37(b) of the Convention on the Rights of the Child, Article 16(6) of the Migrant Workers Convention, Article 14(5) of the Arab Charter, Principle 39 of the Body of Principles, Rule 6 of the Tokyo Rules, Section M(1)(e) of the Principles on Fair Trial in Africa, Principle III(2) of the Principles on Persons Deprived of Liberty in the Americas, Rule 3 of the CoE Rules on remand in custody

<sup>b</sup> Article 7(5) of the American Convention, Article 5 of the European Convention, Principle III(2) of the Principles on Persons Deprived of Liberty in the Americas, Rules 6 and 7 of the CoE Rules on remand in custody; See Article 9(3) of the ICCPR, Article 16(6) of the Migrant Workers Convention

<sup>c</sup> Rule 8(2) of the CoE Rules on remand in custody

<sup>d</sup> Rules 6 and 7 of the CoE Rules on remand in custody

**208** *Peirano Basso v Uruguay* (12.533), Inter-American Commission (2009) §69.

**209** *Marinich v Belarus*, HRC, UN Doc. CCPR/C/99/D/1502/2006 (2010) §10.4, *Peirano Basso v Uruguay* (12.533) Inter-American Commission, Report 86/09 (2009) §§68-81.

**210** *Barreto Leiva v Venezuela*, Inter-American Court (2009) §122; *Peirano Basso v Uruguay* (12.553) Inter-American Commission (2009) §110.

**211** *Van der Tang v Spain* (19382/92), European Court (1995) §55; *Pinheiro and Dos Santos v Paraguay* (11.506), Inter-American Commission (2002) §§65-66; HRC General Comment 32, §30.

**212** See *Bronstein and others v Argentina* (11.205 et al), Inter-American Commission, (1997) §§25-37.

**213** *Peirano Basso v Uruguay* (12.553), Inter-American Commission (2009) §§81, 85; European Court: *Letellier v France* (12369/86), (1991) §43, *Patsuria v Georgia* (30779/04), (2007) §69.

**214** *Patsuria v Georgia* (30779/04), European Court (2007) §71; *Peirano Basso v Uruguay* (12.553), Inter-American Commission (2009) §131.

**215** *Letellier v France* (12369/86), European Court (1991) §51.

**216** *Patsuria v Georgia* (30779/04), European Court (2007) §§75-76.

The permissible reasons for ordering detention in remand are to be strictly and narrowly interpreted.<sup>217</sup>

In reviewing risks in an individual case, consideration may be given to the nature and seriousness of the alleged offence,<sup>218</sup> though this alone will not suffice to justify detention. In addition, consideration must be given to the circumstances of the case<sup>219</sup> and the circumstances of the individual, including their age, health, character and record as well as their personal and social situation, including community ties. The fact that a person is a foreign national is not, in and of itself, sufficient reason to conclude that there is a risk of flight,<sup>220</sup> nor is the fact that the person does not have a fixed residence.<sup>a 221</sup> Particular consideration should be given to an individual's responsibility for the care of infants.<sup>b 222</sup>

Detention of children must be a measure of last resort<sup>c</sup> (see **Chapter 27**).

Detention pending trial is a preventive measure aimed at averting further harm or obstruction of justice, rather than a punishment.<sup>d 223</sup> It must not be used for improper purposes or constitute an abuse of power.<sup>224</sup> It must not last any longer than is necessary. There must be an ongoing examination of the continuing lawfulness and necessity of detention in each individual case.<sup>225</sup>

This principle is violated by laws which remove judicial control, for example by prohibiting bail for particular groups of people, such as repeat offenders,<sup>226</sup> or laws making pre-trial detention obligatory for any specific offence.<sup>e 227</sup>

Decisions to detain should not be based solely on the length of the possible prison term faced by an accused.<sup>228</sup>

To ensure protection against discrimination on the basis of economic status, in cases in which bail is warranted, the individual's financial resources should be taken into consideration in setting an appropriate and proportionate amount of bail.<sup>229</sup> (See **Chapter 11** on the right to equality.)

In cases of violent crime, including domestic violence, the authorities must take into account the risks posed by the suspect. The failure to protect a victim of violence from known danger posed by a particular individual violates the rights of the victim. In such cases, a range of measures proportionate to the risk should be considered.<sup>f 230</sup> (See **Chapter 22.4**, Rights of victims and witnesses.)

#### 5.4.1 ALTERNATIVES TO DETENTION PENDING TRIAL

Given that detention pending trial should be exceptional, international standards contemplate alternative, less restrictive measures pending trial. These should be considered if the court

<sup>a</sup> Article 16(6) of the Migrant Workers Convention, Rule 9(1)-(2) of the CoE Rules on remand in custody

<sup>b</sup> Rule 58 of the Bangkok Rules, Rule 10 of the CoE Rules on remand in custody, Section M(1)(f) of the Principles on Fair Trial in Africa

<sup>c</sup> Article 37(b) of the Convention on the Rights of the Child, Rule 65 of the Bangkok Rules

<sup>d</sup> Principle III(2) of the Principles on Persons Deprived of Liberty in the Americas

<sup>e</sup> Rule 3(2) of the CoE Rules on remand in custody

<sup>f</sup> Article 7(b)-(f) of the Inter-American Convention on Violence against Women, Articles 51-52 of the CoE Convention on violence against women

217 *Medvedyev v France* (3394/03), European Court Grand Chamber (2010) §117, 120.

218 See for example, *Fifth Report on Guatemala*, Inter-American Commission (2001) Chapter VII §4, 28-29, 33-34.

219 *Patsuria v Georgia* (30779/04), European Court (2007) §72; *Peirano Basso v Uruguay* (12.553), Inter-American Commission (2009) §§84, 89-90.

220 *Hill v Spain*, HRC, UN Doc. CCPR/C/59/D/526/1993 (1997) §12.3; CoE Committee of Ministers Recommendation *Rec (2012)12*, Appendix §§13.2(b), 5.

221 *Sulaoja v Estonia* (55939/00), European Court (2005) §64.

222 UN General Assembly resolution *65/229*, §9.

223 *López Álvarez v Honduras*, Inter-American Court (2006) §69; *Peirano Basso v Uruguay* (12.553) Inter-American Commission (2009) §§84, 141-145; *Prosecutor v Bemba* (ICC-01/05-01/08-475), ICC Pre-Trial Chamber II, Decision on the Interim Release of Jean-Pierre Bemba Gombo (14 August 2009) §38.

224 *Gusinsky v Russia* (70276/01), European Court (2004) §§71-78.

225 European Court: *Wemhoff v Germany* (2122/64), (1968) §A.10, *McKay v United Kingdom* (543/03), Grand Chamber (2006) §42, 43.

226 European Court: *Cabellero v United Kingdom* (32819/96/98), Grand Chamber (2000) §§14-15, 18-21, *Moiseyev v Russia* (62936/00), (2009) §154.

227 HRC Concluding Observations: *Mauritius*, UN Doc. CCPR/CO/83/MUS (2005) §12, 15.

228 HRC Concluding Observations: *Argentina*, UN Doc. CCPR/CO/70/ARG (2000) §10, *Moldova*, UN Doc. CCPR/C/MDA/CO/2 (2009) §19, *Italy*, UN Doc. CCPR/C/ITA/CO/5 (2005) §14; *López Álvarez v Honduras*, Inter-American Court (2006) §69.

229 CERD General Recommendation XXXI §26(b); WGAD, UN Doc. E/CN.4/2006/7 (2005) §§65-66. See CAT Concluding Observations: *Kenya*, UN Doc. CAT/C/KEN/CO/1 (2008) §12; SPT: *Mexico*, UN Doc. CAT/OP/MEX/1 (2010) §208.

230 European Court: *Osman v United Kingdom* (23452/94), Grand Chamber (1998) §§115, 116, *Opuz v Turkey* (33401/02146), (2009) §§192-202; See Views of CEDAW Committee: *Yildirim v Austria*, UN Doc. CEDAW/C/39/D/6/2005 (2007) §12.1.5, *A.T. v Hungary* (2/2003), UN Doc. A/60/38 (Part I), Annex III (2005) §§8.4, 9.2-9.4, *Goekce v Austria* (5/2005) UN Doc. CEDAW/C/39/D/5/2005 (2007) §12.1.5; *Lenahan et al v United States* (12.626) Inter-American Commission (2011) §§211-213.

believes that some steps may be necessary to ensure an accused's appearance for trial.<sup>a 231</sup> Such measures include appropriate bail or sureties, prohibition on leaving the country, and supervision including electronic tagging, house arrest and restraining orders.<sup>b</sup> Such measures must be prescribed by law, necessary and proportionate.<sup>232</sup>

Decisions setting the amount of bail or other alternatives to detention should in each case be based on assessment of the specific applicable risk and the accused's individual situation<sup>233</sup> (see **5.4** above).

Non-custodial measures should be preferred for people awaiting trial who are the sole or primary carer of children and for women who are pregnant or breast-feeding.<sup>c 234</sup>

<sup>a</sup> See Article 9(3) of the ICCPR, Article 7(5) of the American Convention, Article 14(5) of the Arab Charter, Article 5(3) of the European Convention, the Tokyo Rules (particularly Rules 2.3 and 6.2), Section M(1)(e) of the Principles on Fair Trial in Africa, Principle III(4) of the Principles on Persons Deprived of Liberty in the Americas, Rule 4 of the CoE Rules on remand in custody

<sup>b</sup> Rules 57, 58 and 62 of the Bangkok Rules

<sup>c</sup> Rules 57-60 and 62 of the Bangkok Rules, Section M1(f) of the Principles on Fair Trial in Africa, Rule 10 of the CoE Rules on remand in custody

<sup>231</sup> See *Kaszczyńiec v Poland* (59526/00), European Court (2007) §57; UN General Assembly resolution [65/229](#), §5.

<sup>232</sup> *Canese v Paraguay*, Inter-American Court (2004) §§113-135.

<sup>233</sup> European Court: *Mangouras v Spain* (12050/04), Grand Chamber (2010) §§78-93, *Hristova v Bulgaria* (60859/00), (2006) §111.

<sup>234</sup> UN General Assembly resolution [65/229](#), §9; UN General Assembly resolution [63/241](#), §47; Special Rapporteur on torture, UN Doc. [A/HRC/7/3](#) (2008) §41.

# CHAPTER 6

## RIGHT TO CHALLENGE THE LAWFULNESS OF DETENTION

Everyone deprived of their liberty has the right to challenge the lawfulness of their detention before a court. People who have been unlawfully detained have the right to reparation, including compensation.

- 6.1 Right to challenge the lawfulness of detention
- 6.2 Procedures to challenge lawfulness of detention
- 6.3 Right to continuing review of detention
- 6.4 Right to reparation for unlawful arrest or detention

### 6.1 RIGHT TO CHALLENGE THE LAWFULNESS OF DETENTION

Everyone deprived of their liberty has the right to take proceedings to challenge the lawfulness of their detention before a court. The court must rule without delay and order release if the detention is unlawful.<sup>a</sup>

While not expressly set out in the African Charter, the jurisprudence of the African Commission indicates that this right is inherent in Article 7(1) of the African Charter.<sup>235</sup>

This right safeguards the rights to liberty and security and provides protection against human rights violations including torture and other ill-treatment, arbitrary detention and enforced disappearance.<sup>236</sup> This right is guaranteed to all people deprived of their liberty, for whatever reason.<sup>237</sup> It also applies to all forms of deprivation of liberty, including house arrest<sup>238</sup> and administrative detention (including detention on grounds of public security).<sup>239</sup>

Generally the detainee or their lawyer would bring a challenge to secure judicial protection. However, some standards expressly provide that such challenges may be brought on behalf of the detainee by other people.<sup>b</sup> <sup>240</sup>

The right to challenge the lawfulness of detention differs from the right to be brought before a judge (see **Chapter 5**) principally because it is initiated by the detainee or on the detainee's behalf, rather than by the authorities.

Where an individual is held in secret or unacknowledged detention, this right serves as a means to establish the whereabouts and well-being of the detainee, and who is responsible for their detention.<sup>c</sup>

In many legal systems, the right to challenge the lawfulness of detention, and to seek remedy, is invoked by *amparo* or habeas corpus.

<sup>a</sup> Article 9(4) of the ICCPR, Article 17(2)(f) of the Convention on Enforced Disappearance, Article 37(d) of the Convention on the Rights of the Child, Article 16(8) of the Migrant Workers Convention, Article 7(6) of the American Convention, Article 14(6) of the Arab Charter, Article 5(4) of the European Convention, Principle 32 of the Body of Principles, Guideline 32 of the Robben Island Guidelines, Section M(4) and (5) of the Principles on Fair Trial in Africa, Article XXV of the American Declaration, Guideline VII(3) of the CoE Guidelines on human rights and counter-terrorism; See Article 8 of the Universal Declaration

<sup>b</sup> Article 17(2)(f) of the Convention against Enforced Disappearance, Article 7(6) of the American Convention, Section M(5)(b) of the Principles on Fair Trial in Africa; See Principle 32 of the Body of Principles

<sup>c</sup> Article 9 of the Declaration on Disappearance, Article X of the Inter-American Convention on Disappearance, Section M(5)(b) of the Principles on Fair Trial in Africa

<sup>235</sup> *Constitutional Rights Project v Nigeria* (153/96), African Commission, 13th Annual Report (1999) §17.

<sup>236</sup> Inter-American Court: Habeas Corpus in Emergency Situations, *Advisory Opinion OC-8/87*, (1987) §35, *Urrutia v Guatemala*, (2003) §111; *Kurt v Turkey* (24276/94), European Court (1998) §123.

<sup>237</sup> CAT General Comment 2, §13; See e.g., European Court: *Ismoilov v Russia* (2947/06), (2008) §§145-152 (detention related to request for extradition), *Varbanov v Bulgaria* (31365/96), (2000) §§58-61 (detention related to proceedings for psychiatric internment); See also *Benjamin and Wilson v United Kingdom*

(28212/95), (2002) §§33-38 (detention in hospital following discretionary life sentence); *A v Australia*, HRC, UN doc. CCPR/C/59/D/560/1993 (1997) §§9.4-9.5 (detention of asylum-seeker), *Baritussio v Uruguay*, HRC, UN Doc. A/37/40 (Supp. 40) (1982) §13 (security-related detention).

<sup>238</sup> *Abbassi Madani v Algeria*, HRC, UN Doc. CCPR/C/89/D/1172/2003 (2007) §8.5.

<sup>239</sup> Human Rights Council resolution 15/18, §4(d)-(e).

<sup>240</sup> *Suárez-Rosero v Ecuador*, Inter-American Court (1997) §§59-60.

The UN General Assembly has repeatedly called on states to ensure that counter-terrorism measures comply with international law, including the right to challenge the legality of detention.<sup>241</sup> The Working Group on Arbitrary Detention has underlined the importance of ensuring that all people deprived of their liberty in connection with terrorism-related activity enjoy the effective right to habeas corpus.<sup>242</sup> Concern has been raised by numerous human rights bodies that individuals held at Guantánamo Bay were deprived of this right for a number of years.<sup>243</sup>

The Committee against Torture criticized the denial of this right in Australia to individuals held for questioning by intelligence agents under a law authorizing renewable seven-day periods of detention, those held in preventive detention and those held under control orders introduced by anti-terrorism legislation.<sup>244</sup>

People held incommunicado or in solitary confinement must be allowed access to a court to challenge both the legality of their detention and the decision to hold them incommunicado or in solitary confinement.<sup>245</sup>

Holding people in incommunicado detention in the context of enforced disappearance without the right to challenge the legality of their detention violates not only the right to liberty but also other rights, including the right to recognition before the law.<sup>246</sup>

The right to challenge the legality of detention must always apply, even in times of emergency. Such challenges safeguard the right to liberty and other rights, including non-derogable rights such as the right to be free from torture and other ill-treatment.<sup>a</sup> <sup>247</sup> (See **Chapter 31** on states of emergency.)

When considering a Nigerian government decree law prohibiting courts from issuing writs of habeas corpus on behalf of individuals detained on state security grounds, the African Commission stated: “While the Commission is sympathetic to all genuine attempts to maintain public peace, it must note that too often extreme measures to curtail rights simply create greater unrest. It is dangerous for the protection of human rights for the executive branch of government to operate without such checks as the judiciary can usefully perform.”<sup>248</sup>

The European Court has stated that it would constitute a flagrant denial of fair trial if a person detained on suspicion of planning or committing a criminal offence did not have access to an independent and impartial tribunal to have the legality of the detention reviewed, and to be released if the suspicions were not well-founded.<sup>249</sup>

The Convention on Enforced Disappearance requires states to impose sanctions on those who delay or obstruct procedures to challenge the legality of detention.<sup>b</sup> Similarly, UN human rights mechanisms have recommended that laws should penalize officials who refuse to disclose relevant information in habeas corpus proceedings.<sup>250</sup>

<sup>a</sup> Article 27(2) of the American Convention, Article X of the Inter-American Convention on Disappearance, Article 4(2) of the Arab Charter, Section M(5)(e) of the Principles on Fair Trial in Africa

<sup>b</sup> Article 22 of the Convention on Enforced Disappearance

<sup>241</sup> UN General Assembly resolutions 65/221 §6(b)-(c), and 64/168 §6(b)-(c); See also Human Rights Council resolution 13/26, §9.

<sup>242</sup> WGAD, UN Doc. A/HRC/10/21 (2009) §§53, 54(e)-(f).

<sup>243</sup> See UN Mechanisms Joint Report on detainees at Guantánamo Bay, UN Doc. E/CN.4/2006/120 (2006) §§17-29.

<sup>244</sup> CAT Concluding Observations: Australia, UN Doc. CAT/C/AUS/CO/3 (2008) §10.

<sup>245</sup> Inter-American Court: *Suárez-Rosero v Ecuador*, (1997) §§59-60, *Cesti-Hurtado v Peru*, (1999) §123; See CAT Concluding Observations: Iceland, UN Doc. CAT/C/CR/30/3 (2003) §5.

<sup>246</sup> See e.g., *Grioua v Algeria*, HRC, UN Doc. CCPR/C/90/D/1327/2004 (2007) §§7.5, 7.8-7.9; WGEID General Comment 11 on the right to recognition before the law.

<sup>247</sup> HRC General Comment 29, §16; Inter-American Court: Advisory

Opinion OC-8/87 (1987) §42, Advisory Opinion OC-9/87 (1987) §41(1); CHR resolution 1992/35, §2; UN Mechanisms Joint Report on secret detention, UN Doc. A/HRC/13/42 (2010), §§46-47; WGAD, UN Doc. A/HRC/7/4 (2008) §§67, 82(a); SPT: Honduras, UN Doc. CAT/OP/HND/1 (2010), §282(a)-(b).

<sup>248</sup> *Constitutional Rights Project and Civil Liberties Organisation v Nigeria* (143/95 and 150/96), African Commission, 13th Annual Report (1999) §33.

<sup>249</sup> European Court: *Al-Moayad v Germany* (35865/03), (inadmissibility) Decision (2007) §101, *Othman v United Kingdom* (8139/09), (2012) §259.

<sup>250</sup> UN Mechanisms Joint Report on secret detention UN Doc. A/HRC/13/42 (2010) §292(b).

## 6.2 PROCEDURES TO CHALLENGE LAWFULNESS OF DETENTION

Governments are required to create procedures which enable individuals to challenge the lawfulness of detention and obtain release if the detention is unlawful. Such procedures must apply throughout the period of detention. They must be simple and expeditious,<sup>251</sup> and free of charge if the detainee cannot afford to pay.<sup>a</sup>

<sup>a</sup> Principle 32(2) of the Body of Principles

While generally either the detainee or their lawyer would bring such a challenge, some standards expressly recognize the right of any person with a legitimate interest, including relatives, their representatives or lawyers, to do so (see **6.1** above).

The body reviewing the lawfulness of detention must be a court that is independent of the executive and impartial.<sup>252</sup> The court must have the power to order the release of the detainee if the detention is unlawful.<sup>b 253</sup>

<sup>b</sup> Article 9(4) of the ICCPR, Article 17(2)(f) of the Convention on Enforced Disappearance, Article 16(8) of the Migrant Workers Convention, Article 7(6) of the American Convention, Article 14(6) of the Arab Charter, Article 5(4) of the European Convention

The European Court concluded that an advisory panel which had no decision-making power, but made non-binding recommendations to a UK government minister, did not qualify as a “court” for this purpose.<sup>254</sup>

The Human Rights Committee and UN mechanisms raised concern that the initial bodies that reviewed the detention of individuals held at Guantánamo Bay failed to meet the requirements of independence essential to the notion of a “court”, due to their lack of independence from the executive and army. Furthermore, the release of a detainee was not guaranteed, even if those bodies determined that the individual should no longer be held.<sup>255</sup>

After it was decided that US courts were competent to consider habeas corpus petitions on behalf of Guantánamo Bay detainees, the Inter-American Commission expressed concern that these petitions often did not appear to constitute an effective remedy, as the US courts purportedly lacked the authority to order the release of detainees whose detention was found to be unwarranted, until the executive arranged for their transfer to a country other than the USA.<sup>256</sup>

The review of the lawfulness of a detention must ensure that:

- the arrest and detention were carried out according to the procedures established by national law,

### Body of Principles, Principle 32

“1. A detained person or his counsel shall be entitled at any time to take proceedings according to domestic law before a judicial or other authority to challenge the lawfulness of his detention in order to obtain his release without delay, if it is unlawful.

2. The proceedings referred to in paragraph 1 of the present principle shall be simple and expeditious and at no cost for detained persons without adequate means. The detaining authority shall produce without unreasonable delay the detained person before the reviewing authority.”

<sup>251</sup> HRC Concluding Observations: *Panama*, UN Doc. CCPR/C/PAN/CO/3 (2008) §13.

<sup>252</sup> HRC: *Vuolanne v Finland*, UN Doc. CCPR/C/35/D/265/1987 (1989) §§9.6-10, *Umarova v Uzbekistan*, UN Doc. CCPR/C/100/D/1449/2006 (2010) §8.6; *Kulov v Kyrgyzstan*, UN Doc. CCPR/C/99/D/1369/2005 (2010) §8.5; *Constitutional Rights Project v Nigeria* (153/96), African Commission, 13th Annual Report (1999) §§11-18; Inter-American Court: *Chaparro Álvarez and Lapo Íñiguez v Ecuador*, (2007) §128, Habeas Corpus in Emergency Situations *Advisory Opinion OC-8/87* (1987) §42; European Court: *Ramishvili and Kokhreizde v Georgia*, (1704/06), (2009) §§128-136;

See *Varbanov v Bulgaria* (31365/96), (2000) §§58-61.

<sup>253</sup> European Court: *A and Others v United Kingdom* (3455/05), Grand Chamber (2009) §202, *Chahal v United Kingdom* (22414/93), (1996) §130; *A v Australia*, HRC, UN Doc. CCPR/C/59/D/560/1993 (1997) §9.5.

<sup>254</sup> *Chahal v United Kingdom* (22414/93), European Court Grand Chamber (1996) §130.

<sup>255</sup> UN Mechanisms Joint Report on Guantanamo Bay, UN Doc E/CN.4/2006/120 (2006) §§27-29; HRC Concluding Observations: *USA*, UN Doc. CCPR/C/USA/CO/3/REV.1 (2006) §18.

<sup>256</sup> Inter-American Commission resolution 2/11.

- the grounds for detention were authorized by national law,
- the detention is not arbitrary or otherwise unlawful according to international standards.<sup>257</sup>

The authorities must bring the detainee to court without unreasonable delay.<sup>258</sup>

The court must consider evidence that has a concrete bearing on the lawfulness of the detention under national and international law.<sup>259</sup>

For individuals detained in the context of a criminal case, the procedure should be fair, adversarial and apply the principle of equality of arms (see **Chapter 13.2**).<sup>260</sup> The detainee has the right to be present at the hearing and to be represented by their lawyer of choice or by appointed counsel, free of charge if they cannot pay.<sup>a</sup> <sup>261</sup> An oral hearing is likely to be necessary. The detainee must have an opportunity to challenge the basis of the allegations faced, and so it must be possible to hear witnesses whose testimony may have a material bearing on the (continuing) lawfulness of the detention. The detainee or their lawyer should have access to documents which form the basis of the prosecution case, particularly those including information on the issues relating to the arrest and detention.<sup>262</sup> The defence and prosecution should be able to comment on the evidence adduced and observations filed by the other party. Where an independent impartial court determines that measures impeding full disclosure are necessary and proportionate to meet a legitimate concern about national security or the safety of others, restrictions imposed on the detainee must be counterbalanced in a manner that still enables an effective challenge to the allegations against the detainee.<sup>263</sup> (See also **Chapter 8.4** on access to information held by the prosecution and **Chapter 14.2** on public hearings.)

Courts examining the lawfulness of detention must decide “speedily” or “without delay”. The speediness of the review is determined in light of the circumstances of the individual case.<sup>264</sup> The requirement that a decision must be made speedily applies to the initial decision and to any appeals against that decision.<sup>265</sup>

The court must order the release of the individual if the detention is not lawful.

If continued detention is ordered, the court must provide a reasoned decision specifying the reasons that the detention is necessary and reasonable in the specific case.<sup>b</sup> <sup>266</sup> Such orders should be subject to appeal and regular review.

### 6.3 RIGHT TO CONTINUING REVIEW OF DETENTION

Anyone detained in connection with a criminal offence has the right to have an independent and impartial court or other judicial authority review the lawfulness of the detention at reasonable intervals.<sup>c</sup>

Such reviews fall within Article 5(4) of the European Convention.<sup>267</sup>

<sup>257</sup> *A and Others v United Kingdom* (3455/05), European Court Grand Chamber (2009) §202; HRC: *A v Australia*, UN Doc. CCPR/C/59/D/560/1993 (1997) §9.5, *Baban et al v Australia*, UN Doc. CCPR/C/78/D/1014/2001 (2003) §7.2.

<sup>258</sup> See *Chaparro Álvarez and Lapo Iñiguez v Ecuador*, Inter-American Court (2007) §129.

<sup>259</sup> European Court: *A and Others v United Kingdom* (3455/05), Grand Chamber (2009) §§202-224 (particularly 202-204), *Nikolova v Bulgaria* (31195/1996), Grand Chamber (1999) §§58-64, *Wloch v Poland* (27785/95), (2000) §§125-127, *Garcia Alva v Germany* (23541/94), (2001) §§39, 42-43; See *Baban et al v Australia*, HRC, UN Doc. CCPR/C/78/D/1014/2001 (2003) §7.2.

<sup>260</sup> European Court: *A and Others v United Kingdom* (3455/05), Grand Chamber (2009) §§202-224, *Ramishvili and Kokhreizde v Georgia* (1704/06), (2009) §§128-136, *Kampanis v Greece* (17977/91), (1995) §47; *Rafael Ferrer-Mazorra et al v United States* (9903) Inter-American Commission, Report 51/01 (2001) §213.

<sup>261</sup> European Court: *Kampanis v Greece* (17977/91), (1995) §§47-59;

See *Winterwerp v the Netherlands* (6301/73), (1979) §60.

<sup>262</sup> European Court: *Wloch v Poland* (27785/95), (2000) §§125-131; *A and Others v United Kingdom* (3455/05) Grand Chamber (2009) §§202-204.

<sup>263</sup> *A and Others v United Kingdom* (3455/05) European Court Grand Chamber (2009) §§202-224 (particularly 205, 218-224); See also Principles 1, 2 and 14 of the *Johannesburg Principles*.

<sup>264</sup> *Suárez-Rosero v Ecuador*, Inter-American Court (1997) §§63-64; *Wloch v Poland* (27785/95), European Court (2000) §§133-136; See *Sanchez-Reisse v Switzerland* (9862/82), European Court (1986) §§55-61; *Ameziane v United States (P-900-08)*, Inter-American Commission Admissibility Decision (2012) §39.

<sup>265</sup> *Navarra v France* (13190/87), European Court (1993) §28.

<sup>266</sup> European Court: *Patsuria v Georgia* (30779/04), (2007) §62, *Aleksanyan v Russia* (46468/06), (2008) §179.

<sup>267</sup> European Court: *Assenov and Others v Bulgaria* (24760/94), (1998) §162, *Chitayev and Chitayev v Russia* (59334/00), (2007) §177.

<sup>a</sup> Principle 3 §§20 and 23 of the Principles on Legal Aid; See Guidelines 4 §44(c-d) and 5 of the Principles on Legal Aid

<sup>b</sup> Principle IV of the Principles on Persons Deprived of Liberty in the Americas

<sup>c</sup> Principle 39 of the Body of Principles, Rule 17 of the CoE Rules on remand in custody, Guideline VIII of the CoE Guidelines on human rights and counter-terrorism, Article 60(3) of the ICC Statute

<sup>a</sup> See Rule 6.2 of the Tokyo Rules

<sup>b</sup> See Rule 6.2 of the Tokyo Rules, Article 60(4) of the ICC Statute

<sup>c</sup> Guideline 4 §44(c) of the Principles on Legal Aid

<sup>d</sup> Article 9(5) of the ICCPR, Article 24(4) of the Convention on Enforced Disappearance, Article 16(9) of the Migrant Workers Convention, Article 14(7) of the Arab Charter, Article 5(5) of the European Convention, Section M(1)(h) of the Principles on Fair Trial in Africa; See Article 8 of the Universal Declaration, Article 7 of the African Charter, Article 25 of the American Convention, Principle 35 of the Body of Principles, Article 85(1) of the ICC Statute

<sup>e</sup> Articles 18-23 of the Basic Principles on Reparation, Guideline XVI of the CoE Guidelines on eradicating impunity

<sup>f</sup> Principle 19 of the Basic Principles on Reparation

Detention that was lawful at its inception may become unlawful. Pre-trial detention is only lawful so long as it is strictly necessary to prevent the risk(s) permissible under international standards that are identified in the detention order.<sup>a</sup> (If some other justification that falls within international standards is alleged to have arisen, a new hearing should be held and the necessity and proportionality reassessed.) (See **Chapter 5.4.**)

By its nature and in the light of the right to trial within a reasonable time, pre-trial detention must be limited in duration.<sup>b</sup> The longer the detention, the greater the need for careful scrutiny of its continued necessity and proportionality.

In such review proceedings, the authorities have the burden of proving that detention is still necessary and proportionate and that they are conducting the investigation with special diligence.<sup>268</sup> If any of these conditions are not met, the individual must be released. If continued detention is ordered, reasons must be given.<sup>269</sup> (See **Chapter 7**, Right of detainees to trial within a reasonable time or to release.)

During reviews, fundamental guarantees of fair procedure apply. The detainee has the right to a hearing, to counsel,<sup>c</sup> to present evidence and to equality of arms, including access to information necessary to challenge allegations put forward by the authorities.<sup>270</sup>

The Working Group on Arbitrary Detention has underscored that deprivation of liberty, even if initially lawful, becomes arbitrary if it is not periodically reviewed. The right to periodic review applies to all detained people, including those held on suspicion of a criminal offence, whether or not they have been charged.<sup>271</sup>

(See **Chapter 25.7** on the right to review of indefinite terms of imprisonment.)

## 6.4 RIGHT TO REPARATION FOR UNLAWFUL ARREST OR DETENTION

Every person who has been the victim of unlawful arrest or detention has an enforceable right to reparation, including compensation. (The French and Spanish texts of the ICCPR use the broader term reparation; the term compensation used in the English text is an element of reparation.)<sup>d</sup> Forms of reparation include but are not limited to: restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition.<sup>e</sup> <sup>272</sup> In cases of unlawful detention, reparation includes release.<sup>f</sup>

### Body of Principles, Principle 39

“Except in special cases provided for by law, a person detained on a criminal charge shall be entitled, unless a judicial or other authority decides otherwise in the interest of the administration of justice, to release pending trial subject to the conditions that may be imposed in accordance with the law. Such authority shall keep the necessity of detention under review.”

<sup>268</sup> European Court: *Prencipe v Monaco* (43376/06), (2009) §§73-88, *Labita v Italy* (26772/95), (2000) §§152-153; *Jorge, José and Dante Peirano Basso v Uruguay* (12.553, Report 86/09), Inter-American Commission (2009) §§104-105.

<sup>269</sup> *Chaparro Alvarez and Lapo Ñiguez v Ecuador*, Inter-American Court (2007) §§117-118; See *Bronstein and others v Argentina* (11.205 et al), Inter-American Commission (1997) §19.

<sup>270</sup> *Rafael Ferrer-Mazora et al v United States* (9903), Inter-American Commission (2001) §213; European Court: *Assenov v*

*Bulgaria* (24760/94), (1998) §§163-165, *Mamedova v Russia* (7064/05), (2006) §§89-93; See *Allen v United Kingdom* (18837/06), (2010) §§38-48.

<sup>271</sup> *Ali Saleh Kahlah Al-Marri v USA* (Opinion 43/2006), WGAD, UN Doc. A/HRC/7/4/Add.1 (2008) pp29-37, §§36-37; See *A v Australia*, HRC, UN Doc. CCPR/C/59/D/560/1993 (1997) §9.4.

<sup>272</sup> European Court: *Chitayev and Chitayev v Russia* (59334/00) (2007) §192, *Hood v United Kingdom* (27267/95), (1999) §69; See *Rodriguez v Honduras*, Inter-American Court (1988) §§166, 174.



The right to reparation applies to people whose detention or arrest has violated national laws or procedures, or international standards, or both.<sup>273</sup> The issue in such cases is whether or not the detention itself was lawful, irrespective of whether the individual was subsequently convicted or acquitted.<sup>274</sup>

Legal aid should be available to individuals seeking reparation on these grounds.<sup>a</sup>

(See also **Chapter 10.11** on the right to reparation for torture and other ill-treatment and **Chapter 30**, Right to compensation for miscarriages of justice.)

<sup>a</sup> **Guideline 11 §55(b) of the Principles on Legal Aid**

#### **ICCPR, Article 9(5)**

“Anyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation.”

<sup>273</sup> European Court: *Chitayev and Chitayev v Russia* (59334/00), (2007) §§192-196, *Stephen Jordan v United Kingdom* (30280/96), (2000) §33, *Hill v United Kingdom* (19365/02), (2004) §27.

<sup>274</sup> *W.B.E. v The Netherlands*, HRC, UN Doc. CCPR/C/46/D/432/1990 (1992) §6.5; See *Sekanina v Austria* (13126/87), European Court (1993) §25.

# CHAPTER 7

## RIGHT OF DETAINEES TO TRIAL WITHIN A REASONABLE TIME OR TO RELEASE

People held in pre-trial detention have the right to have proceedings against them conducted with particular speed and promptness. If a person in detention is not brought to trial within a reasonable time, they have the right to be released from detention pending trial.

### 7.1 Right to trial within a reasonable time or release pending trial

#### 7.2 What is a reasonable time?

##### 7.2.1 Are the authorities acting with the necessary diligence?

## 7.1 RIGHT OF DETAINEES TO TRIAL WITHIN A REASONABLE TIME OR RELEASE PENDING TRIAL

There are two sets of standards that require criminal proceedings be completed within a reasonable time. The first set, addressed in this chapter, applies only to people detained before trial. The second set of standards, addressed in **Chapter 19**, applies to everyone charged with a criminal offence, whether or not detained. Both are tied to the presumption of innocence and the interests of justice.

Anyone detained on a criminal charge has the right to trial within a reasonable time or to release pending trial.<sup>a 275</sup>

This right is based on the presumption of innocence and on the right to liberty, which requires that detention should be an exception and should last no longer than is necessary in a particular case. (See **Chapters 5.3** and **6.3**.) It means that anyone held in pre-trial detention is entitled to have their case given priority and to have the proceedings conducted with particular expedition.<sup>276</sup>

Pre-trial detention must not be used for punitive purposes.<sup>277</sup> The failure to comply with the requirement of a reasonable detention period is tantamount to punishment without conviction, counter to universally recognized general principles of law.<sup>278</sup>

Prolonged delays in bringing detained individuals to trial, resulting in longer pre-trial detention, exacerbate overcrowding in detention facilities and may lead to conditions that violate international standards.<sup>279</sup> (See **Chapter 10.3**.)

Release from pre-trial detention on the grounds that trial proceedings have not started or finished within a reasonable time does not mean that charges must be dropped. Such release is pending trial, which still must take place without undue delay.<sup>280</sup> Such release may be

<sup>a</sup> Article 9(3) of the ICCPR, Article 16(6) of the Migrant Workers Convention, Article 7(5) of the American Convention, Article 14(5) of the Arab Charter, Article 5(3) of the European Convention, Principle 38 of the Body of Principles, Section M(3)(a) of the Principles on Fair Trial in Africa, Article XXV of the American Declaration; See Article 60(4) of the ICC Statute

<sup>275</sup> *Tomasi v France* (12850/87), European Court (1992) §84; *HRC General Comment 32*, §61; *Cagas et al v the Philippines*, HRC, UN Doc. CCPR/C/73/D/788/1997 (2001) §7.4.

<sup>276</sup> *Barreto Leiva v Venezuela*, Inter-American Court (2009) §§120-122; *Wemhoff v Germany* (2122/64) European Court (1968) The Law §§4-5.

<sup>277</sup> *López Álvarez v Honduras*, Inter-American Court (2006) §69; *Peirano Basso v Uruguay* (12.553), Inter-American Commission (2009) §§84, 141-147; *Prosecutor v Bemba* (ICC-01/05-01/08-475),

ICC Single Judge, Pre-Trial Chamber II, Decision on the Interim Release of Jean-Pierre Bemba Gombo (14 August 2009) §38.

<sup>278</sup> *Case of the "Juvenile Reeducation Institute" v Paraguay*, Inter-American Court (2004) §229.

<sup>279</sup> See e.g., *CAT Concluding Observations: Bolivia*, UN Doc. A/56/44 (2001) §95(e).

<sup>280</sup> See *Wemhoff v Germany* (2122/64), European Court (1968) The Law §§4-5.

conditional on appropriate guarantees to ensure the person's appearance for trial, if necessary and proportionate in the individual case (such as bail, reporting requirements or electronic tagging).<sup>a</sup>

## 7.2 WHAT IS A REASONABLE TIME?

Under international law the reasonableness of the time between arrest and trial for those detained pre-trial is assessed on a case-by-case basis.<sup>281</sup> (The jurisprudence of the European Court is often cited on this issue.<sup>282</sup>)

While the accused must raise the issue, the burden of proof lies with the authorities to justify delay.<sup>283</sup>

The time frame for assessing the reasonableness of pre-trial detention begins when a suspect is first deprived of liberty<sup>284</sup> and, at least for purposes of compliance with Article 9(3) of the ICCPR and Article 5(3) of the European Convention, ends with judgment at first instance.<sup>285</sup> (In contrast, the time frame for assessing whether criminal proceedings have been held without undue delay – under standards applicable to everyone charged with a criminal offence, whether or not detained – runs until final judgment, including the outcome of any appeal. See **Chapter 19.**)

Each of the following factors should be considered in examining the reasonableness of the length of pre-trial detention:<sup>b</sup>

- the complexity of the case,
- whether the authorities have displayed “special diligence” in the conduct of the proceedings, considering the complexity and special characteristics of the investigation (see **7.2.1** below),
- whether delays are due in large part to the conduct of the accused or the prosecution,
- and measures taken by the authorities to expedite proceedings.<sup>286</sup>

Some states have laws setting maximum periods of pre-trial detention. Whether the length of a person's pre-trial detention is less than allowed in national law may be relevant, but it is not decisive in determining its reasonableness under international human rights law.<sup>287</sup> The Human Rights Committee has raised concern about laws which set the maximum time of pre-trial detention in relation to the possible penalty for the alleged offence. These laws focus on the potential penalty rather than the need to protect legitimate interests, to limit the length of pre-trial detention and to bring the detainee before the courts promptly. Such laws, and laws requiring mandatory detention pending trial, are inconsistent with the presumption of innocence, the presumption of release pending trial and the right to trial within a reasonable time or release.<sup>288</sup> (See **Chapters 5.3** and **15.**)

### ICCPR, Article 9(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...”

<sup>281</sup> European Court: *Kalashnikov v Russia* (47095/99), (2002) §114, *Kudła v Poland* (30210/96) Grand Chamber (2000) §110, *Labita v Italy* (26772/95), Grand Chamber (2000) §152.

<sup>282</sup> See *Article 19 v Eritrea* (275/2003), African Commission, 22nd Annual Report (2007) §§97-99; *Lacayo v Nicaragua*, Inter-American Court (1997), §77; *Prosecutor v Lubanga* (ICC-01/04-01/06-824), ICC Appeal Chamber (13 February 2007) §124.

<sup>283</sup> *Barroso v Panama*, HRC, UN Doc. CCPR/C/54/D/473/1991 (1995) §8.5.

<sup>284</sup> *Evans v Trinidad and Tobago*, HRC, UN Doc.

CCPR/C/77/D/908/2000 (2003) §6.2.

<sup>285</sup> *Solmaz v Turkey* (27561/02), European Court (2007) §§23-26.

<sup>286</sup> European Court: *Kalashnikov v Russia* (47095/99), (2002) §§114-120, *O'Dowd v United Kingdom* (7390/07), (2010) §§68-70.

<sup>287</sup> *Moiseyev v Russia* (62936/00), European Court (2008) §150.

<sup>288</sup> HRC Concluding Observations: *Argentina*, UN Doc. CCPR/CO/70/ARG (2000) §10, *Moldova*, UN Doc. CCPR/C/MDA/CO/2 (2009) §19, *Italy*, UN Doc. CCPR/C/ITA/CO/5 (2005) §14.

<sup>a</sup> See Article 9(3) of the ICCPR, Article 7(5) of the American Convention, Article 14(5) of the Arab Charter, Article 5(3) of the European Convention, Rules 57, 58 and 62 of the Bangkok Rules, the Tokyo Rules, particularly Rules 2.3 and 6.2, Section M(1)(e) of the Principles on Fair Trial in Africa, Rules 4 and 2(1) of the CoE Rules on remand in custody

<sup>b</sup> Principle V of the Principles on Persons Deprived of Liberty in the Americas

Factors relevant to determining the complexity of a case include the nature of the offence(s), the number of alleged offenders, and the legal issues involved.<sup>289</sup> The complexity of the case alone is not decisive in determining whether the length of detention before trial is reasonable.<sup>290</sup>

The fact that an accused has exercised their rights, including the right to remain silent, must not be taken into account when assessing whether the accused has unduly delayed proceedings.<sup>291</sup>

The length of time deemed reasonable to hold a person in pre-trial detention may be shorter than the delay considered reasonable before starting the trial of a person not in detention, as the aim of these standards is to limit the length of detention before trial.<sup>292</sup>

In the case of a man charged with capital murder, who was held for more than 22 months before trial, the Human Rights Committee reiterated that, in cases involving serious charges where the accused is denied bail by the court, the accused must be tried in as expeditious a manner as possible. In finding that his right to trial within a reasonable time was violated, the Committee took into consideration that he had been detained since the day of the crime, that the factual evidence was straightforward and apparently required little police investigation, and that the reasons given by the authorities for the delay – general problems and instability following a coup attempt – did not justify the delay.<sup>293</sup>

The Human Rights Committee raised concern about the length of pre-trial detention of people charged with organized crime and terrorism-related offences in France, lasting up to four years and eight months. Although detainees had access to defence counsel and the factual basis and necessity of the detention was periodically reviewed by judges, the Committee still considered that this practice was difficult to reconcile with the right to trial within a reasonable time.<sup>294</sup>

The African Commission found that a delay of two years without a hearing or projected trial date constituted a violation of Article 7(1)(d) of the African Charter.<sup>295</sup> It also clarified that “states parties to the Charter [which does not permit derogation] cannot rely on the political situation existing within their territory or a large number of cases pending before the courts to justify excessive delay” in the context of the incommunicado detention without trial for over five years of 18 journalists in Eritrea.<sup>296</sup>

The Inter-American Court has stated that, given the presumption of innocence, a period of pre-trial detention that is equal to or exceeds the penalty faced by an individual would be disproportionate. It held that the pre-trial detention of a person for 16 days longer than the sentence subsequently imposed (14 months) exceeded reasonable limits.<sup>297</sup>

**289** *Sextus v Trinidad and Tobago*, HRC, UN Doc. CCPR/C/72/D/818/1998 (2001) §7.2; *Van der Tang v Spain* (19382/92), European Court (1995) §§72-76; See *Lorenzi, Bernardini and Gritti v Italy* (13301/87), European Court (1992) §§14-17.

**290** European Court: *Assenov and Others v Bulgaria* (24760/94) (1998) §§153-158; See *Milasi v Italy* (10527/83), (1987) §§15-20; See also *Buchholz v Germany* (7759/77), (1981) §55; *Jaramillo et al v Colombia*, Inter-American Court (2008) §156.

**291** *Mamedova v Russia* (7064/05), European Court (2006) §83.

**292** *Haase v Federal Republic of Germany* (7412/76), European Commission Report (1977) §120; *Barreto Leiva v Venezuela*, Inter-

American Court (2009) §119.

**293** *Sextus v Trinidad and Tobago*, HRC, UN Doc. CCPR/C/72/D/818/1998 (2001) §7.2.

**294** HRC Concluding Observations: *France*, UN Doc. CCPR/C/FRA/CO/4 (2008) §15.

**295** *Annette Pagnouille (on behalf of Abdoulaye Mazou) v Cameroon* (39/90), African Commission, 10th Annual Report (1996-1997) pp52-56 at p55.

**296** *Article 19 v Eritrea* (275/2003), African Commission, 22nd Annual Report (2007) §§97-100.

**297** *Barreto Leiva v Venezuela*, Inter-American Court (2009) §§117-123.

### 7.2.1 ARE THE AUTHORITIES ACTING WITH THE NECESSARY DILIGENCE?

The authorities must act with “special diligence” in order to ensure that people held in pre-trial detention are tried within a reasonable time.<sup>298</sup>

The European Court has stressed that it is incumbent on the authorities “to collect evidence and conduct the investigation in a way that ensures the individual’s trial within a reasonable time”.<sup>299</sup> However, the need for expedition must be balanced against and not hinder the efforts of the authorities to carry out their tasks with proper care. It found no violation of the European Convention where a foreign national was detained pre-trial in a drug-trafficking case for more than three years, due to the continuing risk of his absconding, and because the time in detention was not attributable to any lack of special diligence by the authorities.<sup>300</sup>

The European Court concluded that the authorities had violated the right to trial within a reasonable time of a youth charged with at least 16 burglaries and robberies who was detained for two years before trial. Although the government contended that the delay was due to the complexities of the case, the Court found that, over a period of a year, virtually no action was taken – no new evidence was collected and the suspect was questioned only once.<sup>301</sup>

The Human Rights Committee considered that a delay of some 16 months before the start of the trial of an individual accused of murder violated the ICCPR, noting that the authorities had gathered all evidence for the case within days following the arrest.<sup>302</sup>

<sup>298</sup> European Court: *Stögmüller v Austria* (1602/62), (1969) §5, *O’Dowd v United Kingdom* (7390/07), (2010) §§68-70.

<sup>299</sup> *Mamedova v Russia* (7064/05), European Court (2006) §83.

<sup>300</sup> *Van der Tang v Spain* (19382/92), European Court (1995) §§72-76.

<sup>301</sup> *Assenov and Others v Bulgaria* (24760/94), European Court (1998) §§153-158.

<sup>302</sup> *Teesdale v Trinidad and Tobago*, HRC, UN Doc. CCPR/C/74/D/677/1992 (2002) §9.3.

# CHAPTER 8

## RIGHT TO ADEQUATE TIME AND FACILITIES TO PREPARE A DEFENCE

Fundamental to a fair trial is the right of all people accused of a criminal offence to adequate time and facilities to prepare a defence.

### 8.1 Adequate time and facilities to prepare a defence

#### 8.2 What is adequate time?

#### 8.3 Right to information about charges

##### 8.3.1 When must information about charges be given?

##### 8.3.2 Language

#### 8.4 Disclosure

## 8.1 ADEQUATE TIME AND FACILITIES TO PREPARE A DEFENCE

Anyone accused of a criminal offence must have adequate time and facilities to prepare the defence.<sup>a 303</sup> (See **Chapter 20.1**, Right to defend oneself.)

This right is an important aspect of the principle of “equality of arms”: the defence and the prosecution must be treated in a manner that ensures that both parties have an equal opportunity to prepare and present their case.<sup>304</sup> (See **Chapter 13.2**, “Equality of arms”.)

This right applies at all stages of the proceedings, including before trial, during trial and during appeals. It applies irrespective of the seriousness of the charges.<sup>305</sup>

The European Court has clarified that the right to adequate time and facilities to prepare a defence implies that the accused must have the opportunity to organize their defence appropriately and be allowed “to put all relevant defence arguments before the trial court and thus to influence the outcome of the proceedings”.<sup>306</sup>

The Inter-American Court found violations of defence rights in a case in which the trial court did not allow the accused to give a new statement after the court modified the charges in the indictment from aggravated rape to murder (punishable by the death penalty) and changed the factual basis of the accusation.<sup>307</sup>

<sup>a</sup> Article 14(3)(b) of the ICCPR, Article 18(3)(b) of the Migrant Workers Convention, Article 8(2)(c) of the American Convention, Article 16(2) of the Arab Charter, Article 6(3)(b) of the European Convention, Principle 7 and Guidelines 4 §44(g), 5 §45(b) and 12 §62 of the Principles on Legal Aid, Section N(3) of the Principles on Fair Trial in Africa, Article 67(1)(b) of the ICC Statute, Article 20(4)(b) of the Rwanda Statute, Article 21(4)(b) of the Yugoslavia Statute; See Article 11(1) of the Universal Declaration, Article 8(c) of the OAS Convention to prevent and punish terrorism

### ICCPR, Article 14(3)(b)

“In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality:...

(b) To have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing,”

<sup>303</sup> Although the preparation of the defence begins before trial, international standards such as the ICCPR place this right among the rights pertaining to trial (in Article 14 of the ICCPR), rather than with other pre-trial rights (in Article 9 of the ICCPR).

<sup>304</sup> HRC General Comment 32, §32.

<sup>305</sup> *Galstyan v Armenia* (26986/03), European Court (2007) §§85-88.

<sup>306</sup> *Moiseyev v Russia* (62936/00), European Court (2008) §220.

<sup>307</sup> *Ramirez v Guatemala*, Inter-American Court (2005) §§70-80.

For this right to be effective, the accused must be allowed to communicate in confidence with their lawyer, which is particularly relevant to people in detention. (See **Chapter 3.6.1** and **Chapter 20.4** on confidential communications with counsel.) Lawyers must be allowed to advise and represent clients without restrictions, influence, pressure or undue interference (see **Chapter 20.6**).

Furthermore, the conditions of detention must not impinge on the right to prepare and present the defence. (On the right to an interpreter, see **8.3.2** below and **Chapters 9.5** and **23**.)

On the issue of “facilities”, the European Court noted that conditions for individuals detained pre-trial should be such as to enable them to read and write with a reasonable degree of concentration. In addition, the Court concluded that the following impinged on defence rights: an exhausting overnight transfer to court in a prison van, hearings lasting more than 17 hours, and a defence team’s limited access to the case file and their own notes.<sup>308</sup>

The right to adequate facilities to prepare a defence includes the right of the accused to obtain the opinion of relevant independent experts in the course of preparing and presenting a defence.<sup>a 309</sup> (See **Chapter 22**, Right to call and examine witnesses.)

## 8.2 WHAT IS ADEQUATE TIME?

The time adequate to prepare a defence depends on the nature of the proceedings, for example preliminary proceedings, trial or appeal, and on the circumstances of each case. Relevant factors include the complexity of a case, an accused’s access to information and evidence (and the extent of such material) and to their lawyer, and time limits prescribed by national law, although these alone are not decisive.<sup>310</sup>

The right to trial within a reasonable time must be balanced against the right to adequate time to prepare a defence.

If an accused believes that the time allowed to prepare the defence (including speaking with counsel and reviewing documents) has been inadequate, they should request that the court adjourn the proceedings.<sup>311</sup> Courts have a duty to grant reasonable requests for adjournment,<sup>312</sup> and adjournments must provide adequate time for the accused and counsel to prepare the defence.<sup>313</sup>

The European Court found that an accused who represented himself on charges of “minor hooliganism” (characterized as an administrative offence), whose trial began within a few hours of his arrest and questioning, did not have adequate time and facilities to prepare his defence.<sup>314</sup>

<sup>a</sup> Guideline 12 §62 of the Principles on Legal Aid; See Article 8(2)(f) of the American Convention

<sup>308</sup> European Court: *Moiseyev v Russia* (62936/00), (2008) §§221-224; See *Mayzit v Russia* (63378/00), (2005) §81; See also *Barberà, Messegué and Jabardo v Spain* (10590/83), (1988) §89, *Makhfi v France* (59335/00), (2004) §§20-42.

<sup>309</sup> See *G.B. v France* (44069/98), European Court (2001) §§56-70.

<sup>310</sup> See *HRC General Comment 32*, §32; *Ngirabatware v The Prosecutor* (ICTR-99-54-A), ICTR Appeals Chamber, Decision of the Appeal Chamber of the Rwanda Tribunal on Augustin Ngirabatware’s Appeal of Decisions Denying Motions to Vary Trial Date (12 May 2009) §§20-33 (particularly 28).

<sup>311</sup> *HRC General Comment 32*, §32, *Douglas, Gentles and Kerr v Jamaica*, HRC, UN Doc. CCPR/C/49/D/352/1989 (1993) §11.1,

*Sawyers and McLean v Jamaica*, HRC, UN Doc. CCPR/C/41/D/226/1987 (1991) §13.6; *Nahimana et al v the Prosecutor* (ICTR-99-52-A) ICTR Appeals Chamber Judgement (28 November 2007) §220.

<sup>312</sup> *HRC General Comment 32*, §32.

<sup>313</sup> HRC: *Chan v Guyana*, UN Doc. CCPR/C/85/D/913/2000 (2006) §6.3, *Smith v Jamaica*, UN Doc. CCPR/C/47/D/282/1988 (1993) §10.4, *Phillip v Trinidad and Tobago*, UN Doc. CCPR/C/64/D/594/1992 (1998) §7.2; See *Sakhnovskiy v Russia* (21272/03), European Court Grand Chamber (2010) §103.

<sup>314</sup> *Galstyan v Armenia* (26986/03), European Court (2007) §§85-88.

<sup>a</sup> Article 14(3)(a) of the ICCPR, Article 40(2)(b)(ii) of the Convention on the Rights of the Child, Article 18(3)(a) of the Migrant Workers Convention, Article 16(1) of the Arab Charter, Article 6(3)(a) of the European Convention, Section N(1)(a)-(c) and (3)(b) of the Principles on Fair Trial in Africa, Article 67(1)(a) of the ICC Statute, Articles 19(2) and 20(4)(a) of the Rwanda Statute, Articles 20(2) and 21(4)(a) of the Yugoslavia Statute

<sup>b</sup> Article 14(3)(a) of the ICCPR, Article 40(2)(b)(ii) of the Convention on the Rights of the Child, Article 18(3)(a) of the Migrant Workers Convention, Article 16(1) of the Arab Charter, Article 6(3)(a) of the European Convention, Section N(1)(a) of the Principles on Fair Trial in Africa

## 8.3 RIGHT TO INFORMATION ABOUT CHARGES

The right to adequate time and facilities to prepare a defence requires all people charged with a criminal offence to be promptly informed in detail of the nature and cause of any charges against them.<sup>a 315</sup>

Many international standards include two separate provisions on the right to information about charges. They differ in their purpose, who they apply to and the level of detail required.

Provisions such as Article 9(2) of the ICCPR (and others cited in **Chapter 2.3**) require states to promptly inform anyone detained of the charges against them in sufficient detail to allow them to challenge their detention and to begin preparing their defence.

In contrast, provisions such as Article 14(3)(a) of the ICCPR (and the other standards cited above) apply to all people once they are formally charged, whether or not detained.

When an individual is formally charged, they must be given detailed information about the law under which they are charged (“the nature”) and the alleged material facts which form the basis of the accusation (“the cause”). The information must be sufficient and detailed enough to allow preparation of the defence.<sup>316</sup>

The Yugoslavia Tribunal has clarified that where the prosecution alleges that an accused personally committed criminal acts, the material facts, such as the identity of the victim, the time and place of the events and the means by which the acts were committed, have to be set out in detail. It also clarified that in large-scale crimes, and broad crimes, including persecution, “[i]t is not acceptable for the Prosecution to omit the material aspects of its main allegations in the indictment with the aim of moulding the case against the accused in the course of the trial depending on how the evidence unfolds”. It noted, however, that “in criminal trials where the evidence turns out differently than expected”, the indictment may be required “to be amended, an adjournment to be granted, or certain evidence to be excluded as not being within the scope of the indictment”.<sup>317</sup>

The information about charges should be provided in writing; if provided orally it should be confirmed in writing.<sup>318</sup>

### 8.3.1 WHEN MUST INFORMATION ABOUT CHARGES BE GIVEN?

Detailed information about the nature and cause of charges must be given “promptly”.<sup>b</sup>

Clarifying governments’ obligations under Article 14(3)(a) of the ICCPR, the Human Rights Committee has stated that the information should be given as soon as the person

#### ICCPR, Article 14(3)(a)

“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,”

<sup>315</sup> *Pélissier and Sassi v France* (25444/94), European Court Grand Chamber (1999) §54.

<sup>316</sup> HRC General Comment 32, §31, *McLawrence v Jamaica*, UN Doc. CCPR/C/60/D/702/1996 (1997) §5.9; European Court: *Pélissier and Sassi v France* (25444/94), Grand Chamber (1999) §§51-52,

*Mattoccia v Italy* (23969/94), (2000) §§59-60.

<sup>317</sup> *Prosecutor v Kupreškić et al.*, (IT-95-16-A), ICTY Appeals Chamber (23 October 2001) §§88-124 (quoting from §92).

<sup>318</sup> HRC General Comment 32, §31.



is formally charged with a criminal offence under domestic law or the individual is publicly named as a suspect.<sup>319</sup> In the case of an individual arrested initially for fraud, who was informed more than a month later that he was suspected of murdering three people and charged with murder more than six weeks after that, the Human Rights Committee ruled that his rights under Article 14(3)(a) had been violated.<sup>320</sup>

The Inter-American Court has made clear that Article 8(2)(b) of the American Convention requires the competent judicial authorities to inform an accused of the details of the charges against them and the reasons for the charges before the accused offers a first statement to an investigating judge.<sup>321</sup>

Failure to promptly notify the accused that charges have been amended may also violate this right. (An accused must also have the right to adequate time and facilities to prepare a defence on amended charges.)

When ruling on a request to amend an indictment, the Rwanda Tribunal indicated that the test was whether the amendment would unjustly penalize the accused in the conduct of his defence, noting that the more belated the amendment, the more likely it was to infringe the rights of the accused.<sup>322</sup>

Where the document committing the accused for trial charged them with criminal bankruptcy, the investigation by the investigating judge was limited to criminal bankruptcy, the arguments before the criminal court were confined to the offence of criminal bankruptcy and the accused were unaware that they could be convicted on a separate charge of “aiding and abetting criminal bankruptcy”, the European Court found a violation of the right to be notified of charges and the right to adequate time and facilities to prepare a defence. Elements of the two charges differ and the accused only learned of the new charge when the court returned its guilty verdict.<sup>323</sup>

### 8.3.2 LANGUAGE

Information about the charges must be given in a language the accused person understands.<sup>a</sup>

If the accused does not speak or understand the language used, the charging document must be translated into a language that the accused understands.<sup>324</sup> (See **Chapter 23**, Right to an interpreter and to translation.)

The Inter-American Commission has stressed the vulnerability of a person facing criminal proceedings in a foreign country. It stated that to ensure that the person understands the charges and the full range of procedural rights available, translation and explanation of all legal concepts in the individual’s language is essential and should be financed by the state if necessary.<sup>325</sup>

This right also requires provision of services or facilities necessary to make the information accessible to accused individuals with disabilities and to children.<sup>b</sup> (See **Chapter 27.6.5** on children.)

<sup>a</sup> Article 14(3)(a) of the ICCPR, Article 18(3)(a) of the Migrant Workers Convention, Article 16(1) of the Arab Charter, Article 6(3)(a) of the European Convention, Section N(1)(a) of the Principles on Fair Trial in Africa, Principle V of the Principles on Persons Deprived of Liberty in the Americas, Article 67(1)(a) of the ICC Statute, Article 20(4)(a) of the Rwanda Statute, Article 21(4)(a) of the Yugoslavia Statute; See Article 8(2)(a)-(b) of the American Convention, Guideline 3 §43(f) of the Principles on Legal Aid

<sup>b</sup> Article 13 of the Convention on Persons with Disabilities; See Principle 10 of the Principles on Legal Aid

<sup>319</sup> HRC General Comment 32, §31.

<sup>320</sup> *Kurbanov v Tajikistan*, HRC, UN Doc. CCPR/C/79/D/1096/2002 (2003) §7.3.

<sup>321</sup> *López-Álvarez v Honduras*, Inter-American Court (2006) §149.

<sup>322</sup> *Musema v the Prosecutor* (ICTR-96-13-A), ICTR Appeals Chamber (16 November 2001) §343.

<sup>323</sup> *Pélissier and Sassi v France* (25444/94), European Court Grand Chamber (1999) §§42-63.

<sup>324</sup> See *Hermi v Italy* (18114/02), European Court Grand Chamber (2006) §68.

<sup>325</sup> *Report on Terrorism and Human Rights*, Inter-American Commission (2002) §400.

## 8.4 DISCLOSURE

The right to adequate facilities to prepare a defence requires that, in addition to information about the charges, the accused and their counsel should be granted timely access to relevant information. This information includes witness lists and information, documents and other evidence on which the prosecution intends to rely (inculpatory material). It also includes information that might lead to the exoneration of the accused (exculpatory material), affect the credibility of evidence presented by the prosecution, support a line of argument of the defence or otherwise help the accused prepare their case or mitigate a penalty.<sup>a 326</sup>

Disclosure provides the defence with an opportunity to learn about and prepare comments on the observations filed or evidence to be adduced by the prosecution.<sup>327</sup>

When necessary, the information should generally be translated into a language the accused understands,<sup>b</sup> although provision of the documents to a defence lawyer who understands the language and oral translation (by the lawyer or an interpreter) may suffice. (See **Chapter 23.3.**)

The Inter-American Court has clarified that the right to adequate time and means to prepare a defence “binds the state to allow the accused access to the record of the case and to the evidence gathered against him”.<sup>328</sup> The information should be provided in a time frame which allows the accused adequate time to prepare their defence.<sup>329</sup>

The prosecution must provide information about the circumstances in which a confession or other evidence was obtained, to enable the defence to assess or challenge its admissibility or weight.<sup>330</sup> (See **Chapter 17**, Exclusion of evidence obtained in violation of international standards.)

The duty on the prosecution to disclose information that might assist the defence is broad and continues throughout the trial proceedings (before and after witnesses testify). The prosecution must monitor the testimony of witnesses and disclose information relevant to the credibility of witnesses.<sup>331</sup>

In cases with large amounts of information, the prosecution must identify and disclose the incriminating and exculpatory evidence relevant to the case. The duty is not satisfied by providing the defence with large volumes of documents, including those on a searchable computerized database, whose relevance or usefulness to the case may be difficult for the defence to identify; this may prejudice the rights to a defence and delay the proceedings.<sup>332</sup>

The right to disclosure of relevant information is not absolute; however, restrictions on disclosure and any failure to disclose must not lead to an unfair trial. To avoid unfairness as a result of lack of disclosure, charges may ultimately have to be dropped or criminal proceedings terminated.

In some exceptional circumstances, it may be lawful for an independent and impartial court (following a fair procedure) to permit the prosecution to withhold disclosure of some evidence from the defence. However, any such restrictions on disclosure must be strictly necessary and

<sup>a</sup> Principle 21 of the Basic Principles on the Role of Lawyers, Principle 12 §36 of the Principles on Legal Aid, Section N(3)(d) and (e)(iii)-(vii) of the Principles on Fair Trial in Africa, Article 67(2) of the ICC Statute, Rules 66-68 of the Rwanda Rules, Rules 66, 67(b)(ii) and 68 of the Yugoslavia Rules

<sup>b</sup> Rule 66 of the Yugoslavia Rules

<sup>326</sup> HRC General Comment 32, §33.

<sup>327</sup> See *Foucher v France* (22209/93), European Court (1997) §§36-38.

<sup>328</sup> *Leiva v Venezuela*, Inter-American Court (2009) §54.

<sup>329</sup> *Castillo Petruzzi et al v Peru*, Inter-American Court (1999) §141.

<sup>330</sup> HRC General Comment 32, §33.

<sup>331</sup> *Prosecutor v Blaškić*, (IT-95-14-A), ICTY Appeals Chamber (29 July 2004) §§263-267; See *Prosecutor v Lubanga Dyilo* (ICC-01/04-01/06),

ICC, Decision on the scope of the prosecution’s disclosure obligations as regards defence witnesses (12 November 2010) §§12-16.

<sup>332</sup> *Prosecutor v Bemba*, (ICC-01/05-01/08-55), ICC Pre-Trial Chamber, Decision on the Evidence Disclosure System and Setting a Timetable for Disclosure between the Parties (31 July 2008) §§20-21, 67; *Prosecutor v Karemera et al*, (ICTR-98-44-AR73.7), ICTR Appeals Chamber, Decision of the Appeals Chamber on Interlocutory Appeal Regarding the Role of the Prosecutor’s Electronic Disclosure Suite in Discharging Disclosure Obligations (30 June 2006) §§9-15.

proportionate to the aim of protecting the rights of another individual (including those who may be at risk of reprisal) or to safeguard an important public interest (such as national security or the effectiveness of lawful police investigations). Court orders permitting non-disclosure must be the exception, not the rule, and must not have an adverse impact on the overall fairness of the proceedings. Difficulties caused to the defence by the non-disclosure must be sufficiently counterbalanced by the court to ensure fairness. The authorities and courts must also keep under review, throughout the proceedings, the appropriateness of the non-disclosure in the light of the significance of the information, the adequacy of the safeguards and the impact on the fairness of the proceedings as a whole.<sup>a 333</sup>

The necessity of non-disclosure should be decided by a court rather than the prosecution. An adversarial hearing respecting the principle of equality of arms should generally be held by the trial court.<sup>334</sup>

According to the Johannesburg Principles, any restriction on the disclosure of information on grounds of national security should be prescribed by law and allowed only if its demonstrable effect is to protect a country's existence or territorial integrity, or its capacity to respond to the use or threat of force.<sup>335</sup>

When reviewing anti-terrorism legislation in Canada which permitted non-disclosure of information which could cause injury to international relations, national defence or national security, the Human Rights Committee reminded the authorities that in no case could exceptional circumstances be invoked as a justification for deviating from fundamental principles of fair trial.<sup>336</sup> The Committee called on the authorities in Spain to consider abolishing a rule permitting a judge in a criminal investigation to restrict disclosure of information to the defence, reminding the authorities that respect for the principle of equality of arms includes the right of the defence to access to the documents needed to prepare the case.<sup>337</sup>

The Human Rights Committee has clarified that the right to adequate facilities to prepare a defence must be understood as a guarantee that individuals cannot be convicted on the basis of evidence to which the accused or their counsel do not have full access.<sup>338</sup>

<sup>a</sup> See Rules 81-84 of the ICC Rules of Procedure and Evidence

### Basic Principles on the Role of Lawyers, Principle 21

“It is the duty of the competent authorities to ensure lawyers access to appropriate information, files and documents in their possession or control in sufficient time to enable lawyers to provide effective legal assistance to their clients. Such access should be provided at the earliest appropriate time.”

**333** *Rowe and Davis v United Kingdom* (28901/95), European Court Grand Chamber (2000) §§60-67; See *Prosecutor v Katanga and Ngudjolo* (ICC-01/04-01/07-475), ICC Appeals Chamber, Judgment on the appeal of the Prosecutor against the decision of Pre-Trial Chamber I entitled “First Decision on the Prosecution Request for Authorisation to Redact Witness Statements” (13 May 2008) §§60-73.

**334** European Court: *Rowe and Davis v United Kingdom* (28901/95), Grand Chamber (2000) §§53-67, *McKeown v United Kingdom* (6684/05), (2011) §§45-55; *Myrna Mack Chang v Guatemala*, Inter-American Court (2003)§179; but see European Court: *Jasper v United Kingdom* (27052/95), Grand Chamber (2000) §§42-58, *Botmeh and Alami v United Kingdom* (15187/03), (2007) §§41-45.

**335** Principles 1, 2 and 15 of the *Johannesburg Principles*.

**336** HRC Concluding Observations: *Canada*, UN Doc. CCPR/C/CAN/CO/5 (2006) §13; See *Onoufriou v Cyprus*, HRC, UN Doc. CCPR/C/100/D/1636/2007 (2010) §6.11; HRC Concluding Observations: *United Kingdom*, UN Doc. CCPR/C/GBR/CO/6 (2008) §17; UN Mechanisms Joint Report on detainees at Guantánamo

*Bay*, UN Doc. E/CN.4/2006/120 (2006) §36; Special Rapporteur on the independence of judges and lawyers, UN Doc. A/64/181 (2009) §§41-43; See *Myrna Mack Chang v Guatemala*, Inter-American Court (2003) §§179-182; See also *Prosecutor v Katanga and Ngudjolo* (ICC-01/04-01/06-2681-Red2), ICC Trial Chamber, Decision on the Prosecution's Request for the Non-Disclosure of Information, a Request to Lift a Rule 81(4) Redaction and the Application of Protective Measures pursuant to Regulation 42 (14 March 2011) §27.

**337** HRC Concluding Observations: *Spain*, UN Doc. CCPR/C/ESP/CO/5 (2008) §18.

**338** *Onoufriou v Cyprus*, HRC, UN Doc. CCPR/C/100/D/1636/2007 (2010) §6.11, HRC Concluding Observations: *Canada*, UN Doc. CCPR/C/CAN/CO/5 (2006) §13; See *Prosecutor v Katanga and Ngudjolo* (ICC-01/04-01/06-2681-Red2) ICC Pre-Trial Chamber, Decision on the Prosecution's Request for the Non-Disclosure of Information, a Request to lift a Rule 81(4) Redaction and the Application of Protective Measures pursuant to Regulation 42 (14 March 2011) §27; Principle 20(i) of the *Johannesburg Principles*.

# CHAPTER 9

## RIGHTS AND SAFEGUARDS DURING QUESTIONING

People suspected of or charged with criminal offences have the right to the assistance of counsel during questioning. They have the right to remain silent and the right not to be coerced into incriminating themselves.

- 9.1 Rights and safeguards during questioning
- 9.2 Right to counsel during questioning
- 9.3 Prohibition of coercion
- 9.4 Right to remain silent
- 9.5 Right to an interpreter
- 9.6 Records of questioning
- 9.7 Interrogation rules and practices

### 9.1 RIGHTS AND SAFEGUARDS DURING QUESTIONING

People undergoing questioning by the authorities must not be subjected to torture or other ill-treatment. Those questioned on suspicion of involvement in a criminal offence also have the rights to be presumed innocent, not to be compelled to incriminate themselves, to remain silent and to the presence and assistance of a lawyer. A number of other safeguards aim to protect against abuse during questioning. (For information about questioning victims and witnesses see **Chapter 22**.)

The rights and safeguards apply during questioning by all state agents, including intelligence officers, and when such questioning takes place outside the territory of the state.<sup>339</sup>

Statements and other forms of evidence obtained as a result of torture or other ill-treatment of any person must be excluded from evidence, except at the trial of the alleged perpetrator of the torture. Evidence obtained from the accused as a result of other forms of coercion must also be excluded from the proceedings. (See **Chapters 16** and **17**.)

The risk of abuse during questioning is often heightened by the actual or perceived personal characteristics or status of the individual being questioned (due to discriminatory attitudes) or because of the circumstances of the case (including the nature of the crime). Groups at particular risk include people with disabilities, people with mental illness, people who are unable to speak or read the language used by the authorities, members of racial, ethnic, religious and other minorities, non-nationals and people facing discrimination on grounds of sexual orientation or gender identity.<sup>340</sup>

<sup>339</sup> Special Rapporteur on human rights and counter-terrorism, UN Doc. [A/HRC/14/46](#) (2010), Practice 29 and §43; See CAT Concluding Observations: [USA](#), UN Doc. CAT/C/USA/CO/2 (2006) §16.

<sup>340</sup> See UN Principles and Guidelines on access to legal aid in criminal justice systems, UN Doc. [A/RES/67/187](#) (2012), Annex §32.

Individuals questioned in connection with terrorism-related offences,<sup>341</sup> politically motivated crimes or because of their political opinions have been at particular risk of coercion or other abuse during questioning.

Additional safeguards apply when questioning children and women. For example, women detainees should be questioned by women police or judicial officials.<sup>a</sup> (See **Chapter 27** on children's rights during questioning.)

The risk of abuse during questioning is also increased when people are detained. International standards prohibit the authorities from taking undue advantage of the situation of a detained person during interrogation to compel them to confess or to give evidence against themselves or others.<sup>b</sup>

## 9.2 RIGHT TO COUNSEL DURING QUESTIONING

People suspected or accused of criminal offences who are being questioned have the right to the presence and assistance of a lawyer.<sup>342</sup> They have the right to speak with counsel in confidence. (See **Chapter 3** on the right to the assistance of a lawyer in pre-trial stages.) They should be notified of these rights before being questioned.<sup>c</sup> Individuals who are unable to communicate in the language used by their lawyer are entitled to an interpreter (paid for by the state).<sup>343</sup> (See **9.5** below.)

The Inter-American Court<sup>344</sup> and the European Court<sup>345</sup> have both clarified that suspects have the right to a lawyer when being questioned by the police.

The Human Rights Committee and the Committee against Torture have repeatedly called on states to ensure the right of all detainees, including those suspected of terrorism-related offences, to access to counsel before questioning and to the presence of counsel during questioning.<sup>346</sup>

The Principles on Legal Aid provide that unless there are compelling circumstances, states should prohibit police from interviewing suspects in the absence of their lawyer unless they have voluntarily and knowingly waived the right to counsel. Such prohibition should be absolute if the person is under the age of 18.<sup>d</sup>

The Special Rapporteur on torture has stated that no statement or confession made by a person deprived of their liberty, except one made in the presence of a lawyer or judge, should have probative value in court, except as evidence against a person accused of obtaining the statement by unlawful means.<sup>347</sup>

### Body of Principles, Principle 21

"1. It shall be prohibited to take undue advantage of the situation of a detained or imprisoned person for the purpose of compelling him to confess, to incriminate himself otherwise or to testify against any other person."

<sup>a</sup> Section M(7)(b) of the Principles on Fair Trial in Africa; See Rule 65 of the Bangkok Rules

<sup>b</sup> Principle 21 of the Body of Principles, Section M(7)(d) of the Principles on Fair Trial in Africa; See Article 7 of the Inter-American Convention against Torture

<sup>c</sup> Principle 8 §29 of the Principles on Legal Aid

<sup>d</sup> Guidelines 3 §43(b) and 10 §53(b) of the Principles on Legal Aid

<sup>341</sup> See UN General Assembly resolution 65/221, §6(n); *Report on Terrorism and Human Rights*, Inter-American Commission, §§1, 210-216.

<sup>342</sup> Special Rapporteur on the independence of judges and lawyers, *United Kingdom*, UN Doc. E/CN.4/1998/39/add.4 (1998) §47.

<sup>343</sup> HRC General Comment 32, §32.

<sup>344</sup> Inter-American Court: *Barreto Leiva v Venezuela*, (2009) §§62-64, *Cabrera-García and Montiel-Flores v Mexico*, (2010) §§154-155; See *Report on Terrorism and Human Rights*, Inter-American Commission, §237.

<sup>345</sup> European Court: *Salduz v Turkey* (36391/02), Grand Chamber

(2008), §§54-55; See also, *Nechiporuk and Yonkalo v Ukraine* (42310/04), (2011) §§262-3, *John Murray v United Kingdom* (18731/91), Grand Chamber (1996) §66, *Dayanan v Turkey* (7377/03), (2009) §§32-33, *Turkan v Turkey* (33086/04), (2008) §42.

<sup>346</sup> HRC Concluding Observations: *Ireland*, UN Doc. CCPR/C/IRL/CO/3 (2008) §14, *Republic of Korea*, UN Doc. CCPR/C/KOR/CO/3 (2006) §14, *Netherlands*, UN Doc. CCPR/C/NL/CO/4 (2009) §11; See CAT Concluding Observations: *Turkey*, UN Doc. CAT/C/TUR/CO/3 (2010) §11.

<sup>347</sup> Special Rapporteur on torture, UN Doc. E/CN.4/2003/68 (2002) §26(e).

<sup>a</sup> Article 14(3)(g) of the ICCPR, Article 40(2)(b)(iv) of the Convention on the Rights of the Child, Article 18(3)(g) of the Migrant Workers Convention, Article 8(2)(g) of the American Convention, Article 16(6) of the Arab Charter, Principle 21(1) of the Body of Principles, Section N(6)(d) of the Principles on Fair Trial in Africa, Principle V of the Principles on Persons Deprived of Liberty in the Americas, Articles 55(1)(a)-(b) and 67(1)(g) of the ICC Statute, Article 20(4)(g) of the Rwanda Statute, Article 21(4)(g) of the Yugoslavia Statute

<sup>b</sup> Section N(6)(d)(i) of the Principles on Fair Trial in Africa

### 9.3 PROHIBITION OF COERCION

No one charged with a criminal offence may be compelled to confess guilt or testify against themselves.<sup>348</sup>

The right not to be compelled to incriminate oneself or confess guilt is broad. It prohibits any form of coercion, whether direct or indirect, physical or psychological. Such coercion includes, but is not limited to, torture and other cruel, inhuman or degrading treatment. The Human Rights Committee has stated that the prohibition of coerced confessions requires “the absence of any direct or indirect physical or psychological pressure from the investigating authorities on the accused, with a view to obtaining a confession of guilt”.<sup>348</sup>

Prohibited interrogation techniques include sexual humiliation, “waterboarding”, “short shackling”, stress positions, and exploiting an individual’s phobias to induce fear.<sup>349</sup> Blindfolding and hooding should also be prohibited, as should prolonged playing of loud music, prolonged sleep deprivation, threats, including threats of torture and death threats, violent shaking, using cold air to chill the detainee, electrocution, suffocating with plastic bags, beating, removing finger and toe nails, cigarette burns, and forced feeding of excrement and urine.<sup>350</sup>

Other forms of coercion include interrogation techniques designed to offend personal, cultural or religious sensitivities.<sup>351</sup>

Coercive pressure has also been exerted through detention conditions designed to “counter resistance”. Prolonged incommunicado detention and secret detention violate the prohibition against torture or other ill-treatment and are therefore forms of prohibited coercion.<sup>352</sup> Furthermore, the Principles on Fair Trial in Africa state that “any confession or admission obtained during incommunicado detention shall be considered to have been obtained by coercion” and therefore be inadmissible.<sup>b</sup> Holding a person in solitary confinement before trial may be considered a form of coercion, and when used intentionally to obtain information or a confession amounts to torture or other ill-treatment.<sup>353</sup>

Examining a Peruvian anti-terrorism law allowing incommunicado detention for 15 days, the Inter-American Commission concluded that the law “created conditions that allowed individuals under investigation for terrorist crimes to be systematically tortured”.<sup>354</sup>

Other techniques that may violate the rights of detainees include withholding clothing or hygienic products, permanently keeping lights on in the cell, and sensory deprivation.<sup>355</sup>

The European Court has made clear that the right not to be compelled to incriminate oneself does not prohibit the authorities from taking and using breath, blood and urine samples and bodily tissue for DNA testing against the will of the suspect. To comply with the European Convention, however, the taking of such samples must be prescribed by law, the need for such samples must be convincingly justified and the samples must be taken in a manner that

<sup>348</sup> HRC General Comment 32, §§41, 60.

<sup>349</sup> CAT Concluding Observations: USA, UN Doc. CAT/C/USA/CO/2 (2006) §24.

<sup>350</sup> See UN Special Rapporteur on torture, UN Doc. A/56/156 (2001) §39(f); CPT Standards, 12th General Report, CPT/Inf (2002) 15 §38; CAT Concluding Observations: Israel, UN Docs. CAT/C/SR.297/Add.1 (1997)§§5, 8(a) and CAT/C/ISR/CO/4 (2009) §14, USA, UN Doc. CAT/C/USA/CO/2 (2006) §24; HRC Concluding Observations: USA, UN Doc. CCPR/C/USA/CO/3/Rev.1 (2006) §13; UN Special Rapporteur on human rights and counter-terrorism: USA, UN Doc. A/HRC/6/17/Add.3 (2007), §§33–35, 61–62; UN Mechanisms Joint Report on detainees at Guantánamo Bay, UN Doc. E/CN.4/2006/120 (2006), §§446–52; *Kaing Guek Eav alias Duch*, Extraordinary Chambers in the Courts of Cambodia, Judgment, (26 July 2010), §360; *Gäfgen v Germany* (22978/05) European Court Grand Chamber, (2010), §§90–91.

<sup>351</sup> UN Mechanisms Joint Report on detainees at Guantánamo Bay, UN Doc. E/CN.4/2006/120 (2006) §60.

<sup>352</sup> UN Mechanisms Joint Study on secret detention, UN Doc. A/HRC/13/42 (2010), §§27–28, 292(f); UN Mechanisms Joint Report on detainees at Guantánamo Bay, UN Doc. E/CN.4/2006/120 (2006) §53; Special Rapporteur on torture, UN Doc. A/61/259 (2006) §56; Special Rapporteur on human rights and counter-terrorism, UN Doc. A/63/223 (2008) §§33, 45(d); *Asencios Lindo et al v Peru* (11.182), Inter-American Commission Report 49/00 (2000) §103; See HRC General Comment 20, §11.

<sup>353</sup> Special Rapporteur on torture, UN Doc. A/66/268 (2011), §73, 85.

<sup>354</sup> *Asencios Lindo et al v Peru* (11.182), Inter-American Commission, Report 49/00 (2000) §103.

<sup>355</sup> See UN Mechanisms Joint Report on detainees at Guantánamo Bay, UN Doc. E/CN.4/2006/120 (2006) §53.

respects the suspect's rights. The same applies to voice samples (excluding incriminating statements), even if secretly obtained.<sup>356</sup>

The prohibition on the participation of medical personnel in torture or other ill-treatment extends to such practices as examining detainees to determine their "fitness for interrogation" and treating detainees to enable them to withstand further abuse.<sup>a 357</sup>

Criminal justice systems that rely heavily on confession evidence create incentives for investigating officials – who are often under pressure to obtain results – to use physical or psychological coercion.<sup>358</sup> In such systems, performance evaluation based on percentage of cases solved further encourages the use of coercion. The Committee against Torture has called for changes to eliminate incentives to obtain confessions.<sup>359</sup> The Human Rights Committee and the European Committee for the Prevention of Torture have recommended reducing reliance on confession evidence by developing other investigative techniques, including scientific methods.<sup>360</sup> The Special Rapporteur on torture has stated that confessions alone should never be sufficient evidence for a conviction; other corroborating evidence should be required.<sup>361</sup>

(See **Chapter 10**, Rights to humane detention conditions and freedom from torture, **Chapter 16**, Right not to be compelled to incriminate oneself, and **Chapter 17**, Exclusion of evidence obtained in violation of international standards.)

## 9.4 RIGHT TO REMAIN SILENT

The right of an accused to remain silent during the investigation phase (and at trial) is inherent in the presumption of innocence and an important safeguard of the right not to be compelled to incriminate oneself. During questioning by the police it serves to protect the freedom of a suspect to choose whether to speak or to remain silent. The right to remain silent is vulnerable during questioning by law enforcement officials.

The right to remain silent is incorporated into many national legal systems and is expressly set out as a right in the Principles on Fair Trial in Africa, the ICC Statute and the Yugoslavia and Rwanda Rules.<sup>b</sup> Although not expressly guaranteed in the ICCPR and European Convention, it is considered to be implicit in both treaties.

The Human Rights Committee has stated that "anyone arrested on a criminal charge should be informed of the right to remain silent during police questioning, in accordance with Article 14, paragraph 3(g) of the Covenant [ICCPR]".<sup>362</sup> It has called for the right to remain silent to be enshrined in law and applied in practice.<sup>363</sup>

The European Court has stated that: "there can be no doubt that the right to remain silent under police questioning and the privilege against self-incrimination are generally recognized international standards which lie at the heart of the notion of a fair procedure under article 6 [of the European Convention]". However the Court considers that the right to remain silent is not absolute, and in contrast to the Principles on Fair Trial in Africa and the ICC Statute, in certain circumstances, adverse inferences may be drawn at trial from an accused's silence during questioning.<sup>364</sup>

<sup>a</sup> Principles 2 and 4 of the Principles of Medical Ethics

<sup>b</sup> Section N(6)(d)(ii) of the Principles on Fair Trial in Africa, Article 55(2)(b) of the ICC Statute, Rule 42(A)(iii) of the Rwanda Rules, Rule 42(A)(iii) of the Yugoslavia Rules

<sup>356</sup> European Court: *Schmidt v Germany* (32352/02), Decision (2006), *Jalloh v Germany* (54810/00), Grand Chamber (2006) §§67-83, *P.G. and J.H. v United Kingdom* (44787/98), (2001) §80.

<sup>357</sup> Special Rapporteur on torture, UN Doc. A/56/156 (2001) §39(l).

<sup>358</sup> CPT 12th General Report, CPT/Inf (2002) 15 §35.

<sup>359</sup> CAT Concluding Observations: *Kazakhstan*, UN Doc. CAT/C/KAZ/CO/2 (2008) §7(c), *Russian Federation*, UN Doc. CAT/C/CR/28/4 (2002) §6(b).

<sup>360</sup> HRC Concluding Observations: *Japan*, UN Doc. CCPR/C/JPN/CO/5 (2008) §19; CPT Standards, 12th General Report

CPT/Inf (2002) 15 §35.

<sup>361</sup> Special Rapporteur on torture, UN Doc. A/HRC/13/39/Add.5 (2010) §§100-101; See Human Rights Council resolution 13/19, (2010) §7.

<sup>362</sup> HRC Concluding Observations: *France*, UN Doc. CCPR/C/FRA/CO/4 (2008) §14.

<sup>363</sup> HRC Concluding Observations: *Algeria*, UN Doc. CCPR/C/DZA/CO/3 (2007) §18.

<sup>364</sup> European Court: *John Murray v United Kingdom* (18731/91), (1996) §§45, 47-58, but see *O'Halloran and Francis v United Kingdom* (15809/02), (2007) §§43-63.

<sup>a</sup> Expressly applicable to pre-trial phases: **Article 16(8) of the Migrant Workers Convention, Article 16(4) of the Arab Charter, Principle 14 of the Body of Principles, Guideline 3 §43(f) of the Principles on Legal Aid, Section N(4) of the Principles on Fair Trial in Africa, Principle V of the Principles on Persons Deprived of Liberty in the Americas, Article 55(1)(c) of the ICC Statute, Article 17(e) of the Rwanda Statute, Article 18(3) of the Yugoslavia Statute, Rule 42(A)(ii) of the Rwanda Rules, Rule 42(A)(ii) of the Yugoslavia Rules.**

Applicable during criminal proceedings and considered to apply pre-trial: **Article 14(3)(f) of the ICCPR, Article 40(2)(vi) of the Convention on the Rights of the Child, Article 18(f) of the Migrant Workers Convention, Article 8(2)(a) of the American Convention, Article 6(3)(e) of the European Convention, Article 26(2) of the European Convention on Migrant Workers**

<sup>b</sup> **Guideline 3 §43(f) of the Principles on Legal Aid, Article 8(2)(a) of the American Convention, Section N(4)(d) of the Principles on Fair Trial in Africa, Article 67 of the ICC Statute, Rule 187 of the ICC Rules of Procedure and Evidence, Article 17(e) of the Rwanda Statute, Article 18(3) of the Yugoslavia Statute**

<sup>c</sup> See **Article 13 of the Convention on Persons with Disabilities**

<sup>d</sup> **Principle 23 of the Body of Principles, Guideline 28 of the Robben Island Guidelines, Rule 111(1) of the ICC Rules of Procedure and Evidence; See also Guideline IV(4) of the CoE Guidelines on eradicating impunity**

<sup>e</sup> **Guideline 28 of the Robben Island Guidelines, Rule 112 of the ICC Rules of Procedure and Evidence, Rule 43 of the Rwanda Rules, Rule 43 of the Yugoslavia Rules**

The European Court found that the right to remain silent was undermined when police used subterfuge to elicit confessions or other incriminatory statements. Although the suspect had remained silent during police questioning, a police informant was placed in his cell who had been coached by the police to obtain information from him. The introduction at trial of the evidence elicited in this way violated the accused's rights to a fair trial.<sup>365</sup>

(See **Chapter 16.2-16.2.1**, on the right to remain silent during trial.)

## 9.5 RIGHT TO AN INTERPRETER

Anyone who does not understand or speak the language used by the authorities is entitled to have the assistance of an interpreter following arrest, including during questioning, free of charge.<sup>a 366</sup> The interpreter should be independent of the authorities.

Furthermore, translations should be provided of key written documents which the individual needs to understand to ensure fairness,<sup>367</sup> including written records that the accused is asked to sign. This is important not only for people who do not speak the language but also for people who do not read the language (even if they speak it).<sup>b</sup> The right to interpretation and translation must extend to facilities for people with disabilities, including visual or hearing disabilities.<sup>c</sup>

The Human Rights Committee found a violation of the right to a fair trial where a conviction was based on a confession allegedly made by the accused without an independent interpreter; one of two police officers present during questioning acted as interpreter and typed the statement.<sup>368</sup>

The European Court concluded that the rights of a Kurdish-speaking woman, who had limited knowledge of Turkish and could not read or write, were violated in a case in which she was questioned pre-trial in Turkish, without an interpreter or assistance of counsel.<sup>369</sup>

(See also **Chapters 8.3.2** and **23**.)

## 9.6 RECORDS OF QUESTIONING

Records of any questioning during an investigation should be made.

The records should contain: place(s) and date(s) of questioning; the place of detention, if any; the start and end times of each interrogation session; the intervals between sessions (including rest periods); the identities of the officials conducting the interrogation and all others present; and any requests made by the individual being questioned. These records should be accessible to the detainee and their counsel.<sup>d 370</sup> (See also **Chapters 2.4** and **10.2.1**.)

Electronic recording of questioning is recommended by the Robben Island Guidelines and a range of human rights bodies and mechanisms and is required by rules of international criminal tribunals.<sup>e 371</sup> Such recordings aim to protect individuals against ill-treatment and to protect police against unfounded claims of ill-treatment. The European Committee for the Prevention of Torture has underscored the importance of ensuring uninterrupted recording (via

<sup>365</sup> *Allan v United Kingdom* (48539/99), European Court (2002) §§50-53.

<sup>366</sup> *Kamasinski v Austria* (9783/82), European Court (1989) §74.

<sup>367</sup> *Luedicke, Belkacem and Koç v Germany* (6210/73, 6877/75, 7132/75), European Court (1978) §48.

<sup>368</sup> *Singarasa v Sri Lanka*, HRC, UN Doc. *CCPR/C/81/D/1033/2001* (2004) §7.2.

<sup>369</sup> *Saman v Turkey* (35292/05), European Court (2011) §§31-37. <sup>370</sup> CPT 2nd General Report, *CPT/Inf (92) 3*, §39.

<sup>371</sup> HRC Concluding Observations: *Japan*, UN Doc. *CCPR/C/JPN/CO/5* (2008) §19, *Hungary*, UN Doc. *CCPR/C/HUN/CO/5* (2010) §13; CAT Concluding Observations: *France*, UN Doc. *CAT/C/FRA/CO/4-6* (2010) §23, *Israel*, UN Doc. *CAT/C/ISR/CO/4* (2009) §16; CPT 12th General Report, *CPT/Inf (2002) 15* §36.



automatic time and date stamping) of all present in the room during questioning.<sup>372</sup> Such recordings must be made available to the individual's lawyer.<sup>373</sup> The Special Rapporteur on torture has stated that evidence from interrogations which are not recorded should be excluded from court proceedings.<sup>374</sup>

This safeguard should apply to questioning by all state agents, including intelligence officers who question individuals in connection with criminal offences, even if questioning takes place outside the territory of the state.<sup>375</sup>

## 9.7 INTERROGATION RULES AND PRACTICES

Rules for the conduct of interrogations should be standardized, formalized and made public.<sup>376</sup> States must regularly and systematically review these rules and interrogation methods and practices.<sup>a</sup>

The rules should address, among other things: informing the individual of the identity (name or number) of all present during questioning; the permissible duration of interrogations as well as an interrogation session (both of which should be strictly limited); required rest periods between sessions and breaks during a session; places in which questioning may take place; and questioning people under the influence of drugs or alcohol.<sup>377</sup>

Every individual carrying out questioning should be identifiable.<sup>b</sup>

The UN General Assembly and international human right bodies have emphasized the duty of states to provide training on human rights standards to people involved in questioning suspects.<sup>378</sup> The Convention against Torture requires such training.<sup>c</sup>

The law should not only penalize those who use unlawful force, threats or other prohibited methods to extort a confession, but also provide for sanctions against those who violate other interrogation rules, including time limits.<sup>379</sup>

(See **Chapter 10** on the prohibition of torture and other ill-treatment.)

<sup>a</sup> Article 11 of the Convention against Torture

<sup>b</sup> Guideline IV(4) of the CoE Guidelines on eradicating impunity

<sup>c</sup> Article 10 of the Convention against Torture

<sup>372</sup> CPT: (Turkey), [CPT/Inf \(2011\) 13](#) §33, (Ireland), [CPT/Inf \(2011\) 3](#) §18.

<sup>373</sup> CAT Concluding Observations: [Algeria](#), UN Doc. CAT/C/DZA/CO/3 (2008) §5.

<sup>374</sup> Special Rapporteur on torture, UN Doc. [A/56/156](#) (2001) §39(f).

<sup>375</sup> Special Rapporteur on human rights and counter-terrorism, UN Doc. [A/HRC/14/46](#) (2010), Practice 29 and §43; See CAT Concluding Observations: [USA](#), UN Doc. CAT/C/USA/CO/2 (2006) §16.

<sup>376</sup> CPT Standards, CPT 2nd General Report, [CPT/Inf \(92\)3](#) §39,

CAT Concluding Observations: [Kazakhstan](#), UN Doc.

CAT/C/KAZ/CO/2 (2008) §11, [Latvia](#), UN Doc. CAT/C/CR/31/3 (2003) §7(h), [Greece](#), UN Doc. CAT/C/CR/33/2 (2004) §6(e), [USA](#), UN Doc. CAT/C/USA/CO/2 (2006) §§19, 24.

<sup>377</sup> CPT Standards, CPT 2nd General Report, [CPT/Inf \(92\) 3](#) §39; HRC Concluding Observations: [Japan](#), UN Doc. CCPR/C/JPN/CO/ 5 (2008) §19.

<sup>378</sup> UN General Assembly resolution [65/205](#), §8; CHR resolution [2005/39](#), §14; CPT 12th General Report, [CPT/Inf \(2002\) 15](#), §34.

<sup>379</sup> CAT Concluding Observations: The Former Yugoslav Republic of Macedonia, UN Doc. [A/54/44](#) (1999) §110(b), [Japan](#), UN Doc. CAT/C/JPN/CO/1 (2007) §16.

# CHAPTER 10

## RIGHTS TO HUMANE DETENTION CONDITIONS AND FREEDOM FROM TORTURE AND OTHER ILL-TREATMENT

Every person deprived of liberty has the right to be held in conditions that are consistent with human dignity. No one may be subjected to torture or other ill-treatment, under any circumstances. Detention conditions that unreasonably impede accused individuals from preparing their defence violate their right to a fair trial.

- 10.1 Right to humane conditions of detention and imprisonment
- 10.2 Place of detention
  - 10.2.1 Records of detention
- 10.3 Right to humane conditions of detention
- 10.4 Right to health
- 10.5 Right to freedom from discrimination
- 10.6 Women in custody
- 10.7 Additional guarantees for pre-trial detainees
- 10.8 Disciplinary measures
- 10.9 Solitary confinement
- 10.10 Right to freedom from torture and other ill-treatment
  - 10.10.1 Sexual abuse
  - 10.10.2 Use of force
  - 10.10.3 Instruments and methods of restraint
  - 10.10.4 Body searches
- 10.11 Duty to investigate, rights to remedy and reparation

### 10.1 RIGHT TO HUMANE CONDITIONS OF DETENTION AND IMPRISONMENT

States must ensure that all people deprived of their liberty are treated with respect for the inherent dignity of the human person, and are not subjected to torture or other cruel, inhuman or degrading treatment or punishment.

Except for proportionate limitations necessitated by their deprivation of liberty, the human rights of detainees and prisoners must be respected and ensured.<sup>a</sup> Any restrictions on detainees' and prisoners' rights – such as the rights to private and family life, to freedom of expression or to manifest religious or other beliefs – must be prescribed by law, and must be both necessary and proportionate to achieve an aim that is legitimate under international standards.<sup>b 380</sup>

States' obligations to ensure the rights of people deprived of their liberty apply to all detainees and prisoners, without discrimination. They apply regardless of nationality or immigration status,<sup>381</sup> and regardless of whether the person is detained within the state's own territory or

<sup>a</sup> Principle 5 of the Basic Principles for the Treatment of Prisoners, Principle VIII of the Principles on Persons Deprived of Liberty in the Americas, Rule 2 of the European Prison Rules

<sup>b</sup> Principles VIII, XV-XI of the Principles on Persons Deprived of Liberty in the Americas, Rule 3 of the European Prison Rules

380 See HRC General Comment 34, §18, 21-36, HRC General Comment 22, §8.

381 HRC General Comment 15.

elsewhere under the state's effective control.<sup>382</sup> (See **Chapter 32.1.2** on extraterritorial application of human rights obligations.)

States' obligations to ensure the rights of people deprived of their liberty also apply in privately run detention facilities and prisons.<sup>a</sup> States remain responsible, even when private security personnel act beyond the authority delegated by the state or contravene its instructions.<sup>383</sup>

Police and personnel in detention facilities and prisons must receive training on international human rights standards, including those on the use of force and physical restraint. States must ensure that the prohibition of torture and other ill-treatment is included in training and instructions for everyone involved in the custody, interrogation or treatment of detainees.<sup>384</sup> Law enforcement officers and others, including health professionals, lawyers and judges, should be trained to recognize signs of and to prevent all forms of torture and other ill-treatment.<sup>385</sup> They should also be specially trained to identify and address the special needs of certain categories of people, such as foreign nationals, women, children or people with disabilities or mental disorders.<sup>b</sup>

All places where people are deprived of their liberty (including privately run facilities) must be monitored by bodies that are independent of the detaining authority.<sup>c</sup> <sup>386</sup> Visits and inspections should be regular and unrestricted, and monitors should be able to interview all inmates privately and confidentially, and examine records held.<sup>d</sup> <sup>387</sup>

There must be accessible and independent mechanisms to which individuals can submit any complaint about their treatment while deprived of their liberty, and domestic law must recognize their right to do so.<sup>e</sup> <sup>388</sup> (See also **10.11** below, Duty to investigate, rights to remedy and reparation, and **Chapter 6**.)

The conditions of detention must not unreasonably interfere with the right and ability of those accused to prepare and present their defence.

## 10.2 PLACE OF DETENTION

People deprived of their liberty must be held only in a place of detention that is officially recognized.<sup>f</sup> <sup>389</sup>

States must ensure that no one is held secretly in detention<sup>g</sup>, whether in officially recognized detention facilities or elsewhere, including ships, hotels or private residences.<sup>390</sup> This duty applies both within the state's territory and elsewhere under the state's effective control. The family or another third party must be notified of the fact and place of detention, as well as any transfers. Detainees have the right of access to a court and both detainees and prisoners have the right of access to the outside world, in particular to their families and lawyers, and to adequate health care. (See **Chapters 2, 3, 4, 5** and **6**.)

<sup>382</sup> HRC General Comment 31, §10; CAT General Comment 2, §16; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territories*, ICJ Advisory Opinion, (2004), §111; See, CAT Concluding Observations: USA, UN Doc. CAT/C/USA/CO/2 (2006) §15; *Al-Skeini v United Kingdom* (55721/07), European Court Grand Chamber (2011) §149; Inter-American Commission *Report on Terrorism and Human Rights*, (2002) §44.

<sup>383</sup> CAT General Comment 2, §17; Articles 5 and 7 of *State Responsibility for Internationally Wrongful Acts*, International Law Commission (2001) commended to governments by UN General Assembly resolution 65/19; *Cabal and Pasini Bertran v Australia*, HRC, UN Doc. CCPR/C/78/D/1020/2001 (2003) §7.2, HRC Concluding Observations: New Zealand, UN Doc. CCPR/C/NZL/CO/5 (2010) §11.

<sup>384</sup> HRC General Comment 20, §10; CPT 2nd General Report, CPT/Inf (92) 3, §59.

<sup>385</sup> CAT General Comment 2, §25. CAT Concluding Observations: Burundi, UN Doc. CAT/C/BDI/CO/1 (2006) §16, Estonia, UN Doc. CAT/C/CR/29/5 (2002) §6(b).

<sup>386</sup> CAT General Comment 2, §13; Human Rights Council resolution 21/4 (2012) §18(a).

<sup>387</sup> SPT: Honduras, UN Doc. CAT/OP/HND/3 (2013) §§25-26.

<sup>388</sup> HRC General Comment 20, §14; CAT General Comment 2, §13; Human Rights Council resolution 21/4 §18(a); HRC Concluding Observations: Kenya, UN Doc. CCPR/CO/83/KEN (2005) §18; *Mikheyev v Russia* (77617/01), European Court (2006) §140.

<sup>389</sup> HRC General Comment 20, §11; Special Rapporteur on torture, UN Doc. E/CN.4/2003/68 (2002) §26(e); See *Bityeva and X v Russian Federation* (57953/00, 37392/03), European Court (2007) §118.

<sup>390</sup> *Ei-Masri v the former Yugoslav Republic of Macedonia* (39630/09), European Court Grand Chamber (2012) §§200-204, 230-241; UN Mechanisms Joint Study on secret detention, UN Doc. A/HRC/13/42 (2010) §§17-35; CAT Concluding Observations: USA, UN Doc. CAT/C/USA/CO/2 (2006) §17, Syria, UN Doc. CAT/C/SYR/CO/1 (2010) §15, Israel, UN Doc. CAT/C/ISR/CO/4 (2009) §26; UN General Assembly resolution 65/205, §21.

<sup>a</sup> See Rule 88 of the [European Prison Rules](#)

<sup>b</sup> Articles 10 and 11 of the Convention against Torture, Article 7 of the Inter-American Convention against Torture, Rules 33-35 of the Bangkok Rules, Guidelines 45-46 of the Robben Island Guidelines, Principle XX of the Principles on Persons Deprived of Liberty in the Americas, Rules 66 and 81 of the European Prison Rules

<sup>c</sup> Among others, Article 17(2)(e) of the Convention on Enforced Disappearance, Optional Protocol to the Convention against Torture, Article 2 of the European Convention for the Prevention of Torture, Principle 29 of the Body of Principles, Guidelines 41-42 of the Robben Island Guidelines, Section M(8)(a) of the Principles on Fair Trial in Africa, Principle XXIV of the Principles on Persons Deprived of Liberty in the Americas, Rules 9 and 92-93 of the European Prison Rules

<sup>d</sup> Articles 12, 14-15, 19-21 of the Optional Protocol to the Convention against Torture, Article 8 of the European Convention for the Prevention of Torture, Section M(8) of the Principles on Fair Trial in Africa, Principle XXIV of the Principles on Persons Deprived of Liberty in the Americas

<sup>e</sup> Principle 33 of the Body of Principles, Guidelines 17 and 40 of the Robben Island Guidelines, Section M(7)(g)-(h) of the Principles on Fair Trial in Africa, Principle V of the Principles on Persons Deprived of Liberty in the Americas, Rule 70 of the [European Prison Rules](#), Rule 44 of the CoE Rules on remand in custody

<sup>f</sup> Article 17(2)(c) of the Convention on Enforced Disappearance, Article XI of the Inter-American Convention on Disappearance, Article 10(1) of the Declaration on Disappearance, Section M(6)(a) of the Principles on Fair Trial in Africa, Principle III(1) of the Principles on Persons Deprived of Liberty in the Americas

<sup>g</sup> Article 17(1) of the Convention on Enforced Disappearance, Guideline 23 of the Robben Island Guidelines

As a safeguard against ill-treatment, an arrested person's initial hearing before a judge or judicial officer should mark the end of the individual's detention in police custody. If not released, they should be transferred to a (remand) detention centre not under the control of the investigating authorities. (See **Chapter 5.1.**)

The place of detention should be as close as possible to the detainee's home, to facilitate visits from their lawyer and family.<sup>a 391</sup> (See **Chapter 3** and **Chapter 4.4.**) The authorities should ensure that there are safe and appropriate places of detention for women throughout the country.<sup>392</sup>

The UN Special Rapporteur on human rights and counter-terrorism raised concern about the dispersal of people held in relation to terrorism-related crimes to distant parts of Spain. This dispersal created problems for the preparation of the detainees' defence and a significant economic burden for visiting family members.<sup>393</sup>

### 10.2.1 RECORDS OF DETENTION

The authorities must maintain up-to-date official records of all detainees held under their effective control, at each place of detention and centrally.<sup>394</sup> This information must be made available to those with a legitimate interest, such as the detainee, their lawyer and their relatives, judicial or other competent authorities and national or international human rights bodies or mechanisms.<sup>b</sup> The right to privacy of detained children, however, must be respected (see **Chapter 27.6.9.**).

The records must include:

- the identity of the detainee,
- where and when they were deprived of liberty,
- the authority that ordered the deprivation of liberty and on what grounds,
- where the detainee is being held and the date and time they were admitted,
- the authority responsible for the detention facility,
- when the family was notified of the arrest,
- the detainee's state of health,
- the date and time when the individual was brought before a court,
- the date and time of release or transfer to another detention facility, the new place of detention and the authority responsible for the transfer.<sup>395</sup>

The European Court has held that a failure to keep adequate records of every detainee, including the location, time and grounds of detention, violates the individual's right to liberty and security of person.<sup>396</sup>

Records should start from the time the person is effectively deprived of liberty.<sup>397</sup> (See **Chapter 2.4** on language and **Chapter 9.6.** Records of questioning.)

## 10.3 RIGHT TO HUMANE CONDITIONS OF DETENTION

All people deprived of their liberty must be treated with humanity and with respect for the inherent dignity of the human person.<sup>c</sup> The right to humane treatment is expressly

<sup>a</sup> Principle 20 of the Body of Principles, Rule 4 of the Bangkok Rules, Principle IX(4) of the Principles on Persons Deprived of Liberty in the Americas, Rule 17 of the European Prison Rules

<sup>b</sup> Articles 17(3) and 18 of the Convention on Enforced Disappearance, Article XI of the Inter-American Convention on Disappearance, Principle 12 of the Body of Principles, Guideline 30 of the Robben Island Guidelines, Rule 7 of the Standard Minimum Rules, Section M(6)(b-d) of the Principles on Fair Trial in Africa, Principle IX(2) of the Principles on Persons Deprived of Liberty in the Americas, Rule 15 of the European Prison Rules

<sup>c</sup> Article 10 of the ICCPR, Article 17(1) of the Migrant Workers Convention, Article 5 of the African Charter, Article 5 of the American Convention, Article 20(1) of the Arab Charter, Principle 1 of the Basic Principles for the Treatment of Prisoners, Principle 1 of the Body of Principles, Section M(7) of the Principles on Fair Trial in Africa, Article XXV of the American Declaration, Principle I of the Principles on Persons Deprived of Liberty in the Americas, Rules 1 and 72.1 of the European Prison Rules

<sup>391</sup> CoE Committee of Ministers Rec (2012) 12, §16.

<sup>392</sup> CPT 10th General Report, CPT/Inf (2000) 13, §21.

<sup>393</sup> Special Rapporteur on human rights and counter-terrorism, Spain, UN Doc. A/HRC/10/3/Add.2 (2008) §20.

<sup>394</sup> HRC Concluding Observations: Algeria, UN Doc. CCPR/C/DZA/CO/3 (2007) §11; CAT Concluding Observations: Egypt, UN Doc. A/54/44 (1999) §213, Cameroon, UN Doc. CAT/C/CR/31/6 (2003) §§5(e), 9(d), USA, UN Doc. CAT/C/USA/CO/2 (2006) §16; SPT Concluding Observations: Sweden, UN Doc. CAT/OP/SWE/1 (2008) §91; Human Rights Council resolution 21/4 §18(a); See HRC General Comment 20, §11; Special Rapporteur on torture, UN Doc. A/HRC/13/39 (2010) §51.

<sup>395</sup> CAT Concluding Observations: Nicaragua, UN Doc.

CAT/C/NIC/CO/1 (2009) §20, USA, UN Doc. CAT/C/USA/CO/2 (2006) §16, Tajikistan, UN Doc. CAT/C/TJK/CO/1 (2006) §7; SPT Concluding Observations: Paraguay, UN Doc. CAT/OP/PRY/1 (2010) §74, Maldives, UN Doc. CAT/OP/MDV/1(2009) §117; WGAD, UN Doc. A/HRC/7/4 (2008) §§73, 84.

<sup>396</sup> European Court: *Çakici v Turkey* (23657/94), Grand Chamber (1999) §§105-107, *Orhan v Turkey* (25656/94), (2002) §§371-375, *Ahmet Özkan and Others v Turkey* (21689/93), (2004) §§371-372.

<sup>397</sup> See Special Rapporteur on torture, UN Doc. A/HRC/13/39/Add.5 (2010) §87; CAT Concluding Observations: Turkey, UN Doc. CAT/C/CR/30/5 (2003) §7(e), Ukraine, UN Doc. CAT/C/UKR/CO/5 (2007) §9; Special Rapporteur on human rights and counter-terrorism, Tunisia, UN Doc. A/HRC/16/51/add.2 (2010) §§23, 62.

non-derogable under the American Convention and Arab Charter.<sup>a</sup> This right is a norm of general international law: it applies at all times, in all circumstances, including in times of emergency.<sup>398</sup>

The obligation to treat detainees with humanity and respect for their dignity is a universally applicable rule, which does not depend on the availability of material resources<sup>b</sup>, and must be applied without discrimination.<sup>399</sup>

The Human Rights Committee has referred to the close connection between the obligation of humane treatment and the prohibition of cruel, inhuman or degrading treatment, set out in Articles 10 and 7 of the ICCPR respectively.<sup>400</sup> Conditions of detention which violate Article 10 may also violate Article 7 of the ICCPR.

Deprivation of liberty renders individuals vulnerable and dependent on the authorities for their essential needs. States are obliged to ensure that detainees have access to necessities and services that satisfy their basic needs, including adequate and appropriate food, washing and sanitary facilities, bedding, clothing, health care, natural light, recreation, physical exercise, facilities to allow religious practice, and communication with others, including those in the outside world.<sup>c</sup><sup>401</sup>

This obligation requires states to ensure that conditions in police custody, which should be short-term (see **Chapter 5.1**), meet basic requirements including adequate space, light and ventilation, food, sanitation facilities, and, for those held overnight, a clean mattress and blankets.<sup>402</sup>

Cramped and unhygienic accommodation and lack of privacy in custody can amount to inhuman or degrading treatment.<sup>403</sup> States should take steps to reduce overcrowding, including by considering alternatives to detention and imprisonment.<sup>d</sup><sup>404</sup> (See **Chapters 5.4.1** and **25.2.**)

In assessing conditions of detention the European Court takes account of the cumulative effects of the conditions.<sup>405</sup> Lack of personal space can be so extreme as to justify, in itself, a finding of degrading treatment.<sup>406</sup> Combined with other factors, such as lack of privacy, ventilation, daylight or outdoor exercise, lack of personal space can amount to degrading treatment.<sup>407</sup>

The European Committee for the Prevention of Torture regards 7m<sup>2</sup> as a minimum reasonable size for a single occupancy cell and 4m<sup>2</sup> per person for a multi-occupancy cell.<sup>408</sup>

## 10.4 RIGHT TO HEALTH

Everyone, including an individual in custody, has the right to the highest attainable standard of physical and mental health.<sup>e</sup><sup>409</sup> The right to health extends not only to timely and appropriate health care, but also to underlying determinants of health, such as adequate food, water and sanitation.<sup>410</sup>

<sup>a</sup> Article 27(2) of the American Convention, Article 4(2) of the Arab Charter, Principle I of the Principles on Persons Deprived of Liberty in the Americas

<sup>b</sup> See Rule 4 of the European Prison Rules

<sup>c</sup> Rules 9-22 and 37-42 of the Standard Minimum Rules, Principles 19 and 28 of the Body of Principles, Rules 5-6, 10-17, 26-28, 48, 54 of the Bangkok Rules, Principles XI-XVIII of the Principles on Persons Deprived of Liberty in the Americas, Rules 18-29 and 39-48 of the European Prison Rules; See Guideline 33 of the Robben Island Guidelines

<sup>d</sup> See Principle XVII of Principles on Persons Deprived of Liberty in the Americas

<sup>e</sup> Article 12 of the ICESCR, Article 16 of the African Charter, Article 39 of the Arab Charter, Article 10 of the Additional Protocol to the American Convention on Economic, Social and Cultural Rights, Principle X of the Principles on Persons Deprived of Liberty in the Americas; See Part I (11) and Article 11 of the Revised European Social Charter

<sup>398</sup> HRC General Comment 29, §13(a); See HRC General Comment 20 §3.

<sup>399</sup> HRC General Comment 21, §4.

<sup>400</sup> HRC General Comment 29, §13(a).

<sup>401</sup> Special Rapporteur on torture, UN Doc. A/64/215 (2009) §55; See also CPT 2nd General Report, CPT/Inf (92) 3, §§46-51.

<sup>402</sup> CPT 2nd General Report, CPT/Inf (92) 3, §42.

<sup>403</sup> *Weerawansa v Sri Lanka*, HRC, UN Doc. CCPR/C/95/D/1406/2005 (2009) §§2.5 and 7.4.

<sup>404</sup> HRC Concluding Observations: *Botswana*, UN Doc.

CCPR/C/BWA/CO/1 (2008) §17, *Tanzania*, UN Doc.

CCPR/C/TZA/CO/4 (2009) §19, *Ukraine*, UN Doc.

CCPR/C/UKR/CO/6 (2006) §11; CAT Concluding Observations: *Hungary*, UN Doc. CAT/C/HUN/CO/4 (2006) §13.

<sup>405</sup> European Court: *Dougoz v Greece* (40907/98), (2001) §46, *Gavazov v Bulgaria* (54659/00), (2008) §§103-116.

<sup>406</sup> See e.g., *Kalashnikov v Russia* (47095/99) European Court (2002) §97.

<sup>407</sup> See e.g., European Court: *Trepashkin v Russia* (36898/03), (2007) §§93-95, *Karalevičius v Lithuania* (53254/99), (2005) §36.

<sup>408</sup> CPT 2nd General Report, CPT/Inf (92) 3, §43, CPT: *Georgia*: CPT/Inf (2010) 27, Annex I.

<sup>409</sup> CESCR General Comment 14, §§34, 4, 11, 43 and 44.

<sup>410</sup> See CPT 3rd General Report, CPT/Inf (93) 12, §53.

<sup>a</sup> Article 6 of the Code of Conduct for Law Enforcement Officials, Principle X of the Principles on Persons Deprived of Liberty in the Americas, Rule 39 of the European Prison Rules, Regulation 103 of the ICC Regulations; See Guideline 31 of the Robben Island Guidelines

<sup>b</sup> Principle 24 of the Body of Principles, Principle X of the Principles on Persons Deprived of Liberty in the Americas

<sup>c</sup> Principle 9 of the Basic Principles for the Treatment of Prisoners, Rule 40 of the European Prison Rules; See Principle X of the Principles on Persons Deprived of Liberty in the Americas

<sup>d</sup> Rule 22 of the Standard Minimum Rules, Principle X of the Principles on Persons Deprived of Liberty in the Americas, Rules 40-41 of the European Prison Rules; See Rules 10-18 of the Bangkok Rules

<sup>e</sup> Rule 10(1) of the Bangkok Rules, Section M(7)(c) of the Principles on Fair Trial in Africa

<sup>f</sup> Rule 22(2) of the Standard Minimum Rules, Rule 46(1) of the European Prison Rules

<sup>g</sup> Rules 12 and 47 of the European Prison Rules; See Rule 16 of the Bangkok Rules

<sup>h</sup> Principle 1 of the Principles of Medical Ethics

<sup>i</sup> Rule 8 of the Bangkok Rules, Principle X of the Principles on Persons Deprived of Liberty in the Americas

Law enforcement officials and prison authorities are responsible for protecting the health of people in their custody.<sup>a</sup> Health care should be provided free of charge.<sup>b</sup> 411

People in custody should receive health care comparable to that available to people in the outside community and must have access to the health services available in the country without discrimination, including on the grounds of their legal situation or status.<sup>c</sup> 412 Health services in places of detention should include medical, psychiatric and dental care and be organized in close co-ordination with health services in the country generally.<sup>d</sup> 413 Health care must also include gender-specific health services which are available in the community.<sup>e</sup>

The state's duty of care to inmates includes prevention, screening and treatment. The authorities are required not only to ensure these things, but also appropriate conditions of detention as well as health-related education and information for detainees, prisoners and staff.<sup>414</sup>

The failure to provide access to adequate health care has been held to violate the rights to respect for dignity<sup>415</sup> and health<sup>416</sup> as well as the prohibition of inhuman or degrading treatment.

In a number of cases the European Court has found that failing to provide timely medical care is a violation of the right to freedom from inhuman or degrading treatment.<sup>417</sup> The Court has held that inadequate care for people deprived of their liberty who are HIV-positive, or who have AIDS or tuberculosis, violated the European Convention.<sup>418</sup>

If the authorities hold a seriously ill person in detention, they must guarantee conditions that meet the individual's needs.<sup>419</sup> Prisoners who require specialist treatment, including mental health care, must be transferred to specialized institutions or outside hospitals when such treatment is not available in prison.<sup>f</sup> 420 Prisoners suffering from serious mental disturbance require special measures appropriate to their condition.<sup>g</sup> 421

Health personnel have an ethical obligation to provide the same quality of health care to detainees and prisoners as that given to those not in custody.<sup>h</sup> The provision of health care must respect the principles of confidentiality and informed consent, which includes the right of an individual to refuse treatment.<sup>i</sup> 422

Practitioners providing health care should be independent of the police and the prosecution.<sup>423</sup>

Even when doctors are appointed and paid by the authorities, they must not be required to act in a manner that is contrary to their professional judgement or medical ethics. Their primary concern must be the health needs of their patient, to whom they have a duty of care and of

411 CAT Concluding Observations: *Cameroon*, UN Doc. CAT/C/CR/31/6 (2004) §§4b, 8d.

412 CPT 3rd General Report, CPT/Inf (93) 12, §31. See CoE Rec (2012) 12, Rule 31 of Appendix concerning foreign prisoners.

413 CPT 3rd General Report, CPT/Inf (93) 12, §§35, 38, 41.

414 CAT Concluding Observations: *Ukraine* UN Doc. CAT/C/UKR/CO/5 (2007) §25; CPT 11th General Report, CPT/Inf (2001) 16, §31, CPT 3rd General Report, CPT/Inf (93) 12, §§52-56.

415 *Engo v Cameroon*, HRC, UN Doc. CCPR/C/96/D/1397/2005 (2009) §7.5.

416 *Media Rights Agenda and Constitutional Rights Project v Nigeria* (105/93, 128/94, 130/94 and 152/96), African Commission, 12th Annual Report (1998) §91, *International Pen, Constitutional Rights Project, Interights on behalf of Ken Saro-Wiwa Jr. and Civil Liberties Organisation v Nigeria* (137/94, 139/94, 154/96 and 161/97) African Commission, 12th Annual Report (1998) §112.

417 See e.g., European Court: *Aleksanyan v Russia* (46468/06), (2008) §158, *Ghavtadze v Georgia* (23204/07), (2009) §76, *Harutyunyan v Armenia* (34334/04), (2010) §§104, 114-116, *Sarban v Moldova* (3456/05), (2005) §§86-87, 90-91, *Kucherik v Ukraine*

(2570/04), (2007) §§147-152, *Kotsaftis v Greece* (39780/06), (2008) §§47-61.

418 European Court: *Yakovenko v Ukraine* (15825/06), (2007) §§90-102, *Pokhlebin v Ukraine* (35581/06), (2010) §§61-68, *Hummalov v Azerbaijan* (9852/03 and 13413/04), (2007) §§107-121, *Aleksanyan v Russia* (46468/06), (2008) §§133-158, *Khudobin v Russia* (59696/00), (2006) §§92-97.

419 European Court: *Farbuths v Lithuania* (4672/02), (2004) §§56-61, *Kudla v Poland* (30210/96), Grand Chamber (2000) §94.

420 *Paladi v Moldova* (39806/05), European Court Grand Chamber (2009) §§70-72; CPT 3rd General Report, CPT/Inf (93)12, §§41-3, 57-9; See *Slawomir Musial v Poland* (28300/06), European Court (2009) §§96-7; *Congo v Ecuador* (11.427) Inter-American Commission, Report 63/99 (1998) §§47-48, 63-68.

421 European Court: *Renolde v France* (5608/05), (2008) §§128-129, *M.S. v United Kingdom* (24527/08), (2012) §§38-46.

422 CPT 3rd General Report, CPT/Inf (93) 12, §§45-51; CoE Recommendation R (98) 7, Appendix §§13-16.

423 CAT: *Mexico*, UN Doc. CAT/C/75 (2003) §220(j); See, CPT: *Ukraine*, CPT/Inf (2012) 30 §27, *Bulgaria*, CPT/Inf (2012) 32 §51.

confidentiality. They must refuse to comply with any procedures that do not have a legitimate medical or therapeutic purpose and must speak out if health services are unethical, abusive or inadequate.<sup>a 424</sup>

It is a contravention of medical ethics for health personnel:

- to participate or be complicit in torture or other ill-treatment,
- to engage in a professional relationship with detainees or prisoners that is not solely to evaluate, protect or improve their health,
- to assist in interrogation in a manner that may adversely affect the health of individuals or which contravenes international standards,
- to participate in certifying people as fit for any treatment or punishment that may adversely affect their health or contravenes international standards, or to participate in treatment which contravenes international standards,
- to participate in restraining an individual unless the procedure is necessary to protect the health or safety of the individual or others, and presents no hazard to the individual's health.<sup>b</sup>

Detainees and prisoners should be offered an independent medical examination as soon as possible after being brought into any place where they are deprived of their liberty.<sup>c</sup> Detainees have the right to request a second medical opinion.<sup>d</sup> People in detention who have not been tried may be treated (at their own expense) by their own doctor or dentist, if there is reasonable ground for the request.<sup>e 425</sup> States must ensure the necessary facilities for detainees to communicate with their doctor.<sup>f</sup> If the request is denied, reasons must be given.

Detainees and prisoners should be able to approach the health care service at any time on a confidential basis; officers should not screen requests.<sup>426</sup> Health care staff should report to the authorities if an individual's mental or physical health is being put seriously at risk by continued detention or imprisonment or by any conditions.<sup>g</sup>

Women have the right to be examined or treated by a female practitioner on request where possible, except in situations requiring urgent medical intervention. A woman staff member must be present if a male doctor or nurse examines a woman detainee or prisoner against her wishes.<sup>h</sup>

Accurate and thorough records must be kept of every medical examination, which should include the names of all persons present during the examination, and the individual must have access to these records.<sup>i 427</sup>

Whenever a detainee or prisoner makes allegations of torture or other ill-treatment, or there is reason to believe that the individual has been tortured or otherwise ill-treated, the individual should be immediately examined by an independent doctor who can report without interference from the authorities. In line with the duty to ensure independent, impartial and thorough investigations into such allegations, such examinations should be conducted by an independent medical service in a manner that is consistent with the Istanbul Protocol.<sup>j 428</sup>

## 10.5 RIGHT TO FREEDOM FROM DISCRIMINATION

Every person deprived of liberty has the right to be treated humanely and with respect for his or her inherent dignity without discrimination on grounds such as race, colour, ethnicity, national

<sup>a</sup> Principles 1-5 of the Principles of Medical Ethics

<sup>b</sup> Principles 2-5 of the Principles of Medical Ethics

<sup>c</sup> Principle 24 of the Body of Principles, Guideline 20(b) of the Robben Island Guidelines, Rule 24 of the Standard Minimum Rules, Principle IX(3) of the Principles on Persons Deprived of Liberty in the Americas, Rule 42 of the European Prison Rules; See Rule 6 of the Bangkok Rules

<sup>d</sup> Principle 25 of the Body of Principles

<sup>e</sup> Rule 91 of the Standard Minimum Rules

<sup>f</sup> Section M(2)(e) of the Principles on Fair Trial in Africa

<sup>g</sup> Rule 25 of the Standard Minimum Rules, Rule 43 of the European Prison Rules

<sup>h</sup> Rule 10(2) of the Bangkok Rules

<sup>i</sup> Principle 26 of the Body of Principles, Principle IX(3) of the Principles on Persons Deprived of Liberty in the Americas

<sup>j</sup> Articles 12 and 13 of the Convention against Torture

<sup>424</sup> Istanbul Protocol, §§66-67.

<sup>425</sup> CAT Concluding Observations: Czech Republic, UN Doc. A/56/44 (2001) §§113(e) and 114(d), Georgia, UN Doc. A/56/44 (2001) §§81(e) and 82(c).

<sup>426</sup> CPT 3rd General Report, CPT/Inf (93) 12, §34.

<sup>427</sup> SPT: Maldives, UN Doc. CAT/OP/MDW/1 (2009) §§111-112; See

Zheludkova v Ukraine, HRC, UN Doc. CCPR/C/76/D/726/1996 (2002) §8.4; Istanbul Protocol, §§83-84.

<sup>428</sup> CAT General Comment 3, §25; See Istanbul Protocol, §§69-73, 83; Principle 6 of the Principles on the Investigation of Torture; HRC Concluding Observations: Hungary, UN Doc. CCPR/C/HUN/CO/5 (2010) §14.

or social origin, religion, political or other opinion, sexual orientation, gender identity, disability or any other status or adverse distinction.

The authorities must ensure that the regime in custody respects the rights to family and private life, and to freedom of religion; the regime must take into account the cultural and religious practices of detainees and prisoners.<sup>429</sup>

The authorities must pay special attention to ensuring the rights, safety and dignity of detainees and prisoners who are at risk because of their actual or perceived identity or status.<sup>430</sup>

This includes taking appropriate measures to respect and protect the rights of lesbian, gay, bisexual, transgender and inter-sex people who risk discrimination and sexual abuse in detention or prison. States must ensure that detainees and prisoners do not suffer human rights abuses or other victimization on the basis of their sexual orientation or gender identity, including sexual abuse, unduly intrusive body searches and the use of denigrating language.<sup>431</sup> A transgender individual's choice and objective criteria about that person's gender identity should be taken into consideration in deciding whether the individual is held in male or female accommodation.<sup>432</sup>

States must ensure that treatment or conditions in detention do not directly or indirectly discriminate against people with disabilities. Pain or suffering caused by discriminatory treatment may constitute torture or other ill-treatment.<sup>433</sup>

Authorities should offer protective custody to individuals, without marginalizing them from the prison population more than is required to protect them and without putting them at further risk of ill-treatment.<sup>434</sup> Individuals who are accommodated separately from others for their own protection should never be held in worse conditions than those in the general population of the facility.<sup>435</sup>

States have a duty to investigate and bring to justice those responsible for violence or abuse against detainees, whether staff or other prisoners.<sup>436</sup>

The Committee against Torture has emphasized that “discriminatory use of mental or physical violence or abuse is an important factor in determining whether an act [committed by or with the consent or acquiescence of a state agent] constitutes torture”.<sup>437</sup>

(See **Chapter 25.8**, Conditions of imprisonment.)

<sup>a</sup> Rules 8(a) and 53 of the Standard Minimum Rules, Guideline 36 of the Robben Island Guidelines, Section M(7)(c) of the Principles on Fair Trial in Africa, Principles XIX-XX of the Principles on Persons Deprived of Liberty in the Americas, Regulation 105 of the ICC Regulations

## 10.6 WOMEN IN CUSTODY

Women in custody must be held in separate accommodation from men, either in separate institutions or segregated within an institution, under the authority of women staff.<sup>a</sup>

<sup>429</sup> CERD General Recommendation XXXI, §§5(f), 26(d).

<sup>430</sup> CAT General Comment 2, §§21-22; CERD General Recommendation XXXI; Report of the Special Rapporteur on torture, UN Doc. A/HRC/13/39 (2010), §§74-75; CERD Concluding Observations: Czech Republic, UN Doc. CERD/C/CZE/CO/7 (2007) §11, Australia, UN Doc. CERD/C/AUS/CO/15-17 (2010) §20.

<sup>431</sup> CAT Concluding Observations: Egypt, UN Doc. CAT/C/CR/29/4 (2002) §6(k); CoE Recommendation CM/Rec(2010)5, Appendix, (§4).

<sup>432</sup> Principle 9 of the Yogyakarta Principles; CoE Recommendation CM/Rec(2010)5, Appendix §4; Special Rapporteur on independence of judges and lawyers, UN Doc. A/66/289 (2011) §81.

<sup>433</sup> Special Rapporteur on torture, UN Doc. A/63/175 (2008) §53-54;

*Hamilton v Jamaica*, HRC, UN Doc. CCPR/C/66/D/616/1995 (1999) §§3.1, 8.2; *Price v UK* (33394/96), European Court (2001) §§21-30.

<sup>434</sup> Special Rapporteur on torture, UN Docs. A/56/156 (2001) §39(j) and E/CN.4/2003/68 (2002) §26(j); See Principle 9 of the Yogyakarta Principles; CoE Recommendation CM/Rec(2010)5, Appendix §4.

<sup>435</sup> CPT, Armenia, CPT/Inf (2004) 25, §74.

<sup>436</sup> CAT Concluding Observations: USA, UN Doc. A/55/44 (2000) §§179-180.

<sup>437</sup> CAT General Comment 2, §20.



Male staff should not hold front-line positions in places where women are deprived of their liberty and should not enter the part of the institution holding women unaccompanied by a female member of staff.<sup>a 438</sup> Personal searches of women must only be carried out by women staff.<sup>b</sup>

International standards underscore the duty of states to address the gender-specific needs of women deprived of their liberty.<sup>c</sup> They require states to provide for women's particular hygiene and health care needs, including pre-natal and post-natal care.<sup>d 439</sup> Whenever possible, arrangements should be made for children to be born in an outside hospital.<sup>e 440</sup>

Women must be able to exercise their right to private and family life. Contact with their families, including extended and open contact with children, must be encouraged and facilitated.<sup>f</sup> (See **Chapter 4.4.**)

Decisions on allowing children to stay with mothers in custody must be based on the best interests of the children, who should not be treated as prisoners, and special provision should be made for them.<sup>g 441</sup> Before women are detained or imprisoned, they should be allowed to make arrangements for dependent children, taking into account the best interests of the children.<sup>h</sup>

Women who have suffered sexual abuse or other forms of violence, before or during their detention or imprisonment, must be informed of their right to seek recourse; prison authorities must help them obtain legal assistance and ensure they have access to specialized psychological support or counselling.<sup>i</sup>

(See **10.10.1** below on sexual abuse.)

## 10.7 ADDITIONAL GUARANTEES FOR PRE-TRIAL DETAINEES

International standards provide additional safeguards for people in pre-trial custody.

All those suspected of or charged with a criminal offence who have not yet been tried must be treated in accordance with the presumption of innocence (see **Chapter 15**). They must be treated in a manner appropriate to their status as unconvicted. Therefore, the treatment of pre-trial detainees should be different from that of convicted prisoners and the conditions and regime (including access to family) should be at least as favourable as for convicted prisoners.<sup>j</sup> While detained, they should be subjected only to such restrictions as are necessary and proportionate for the investigation or the administration of justice in the case and the security of the institution.<sup>k 442</sup>

### ICCPR, Article 10(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;”

### Standard Minimum Rules, Rule 84(2)

“Unconvicted prisoners are presumed to be innocent and shall be treated as such.”

<sup>a</sup> Rule 53(2) of the Standard Minimum Rules; See Principle XX of the Principles on Persons Deprived of Liberty in the Americas

<sup>b</sup> Rule 19 of the Bangkok Rules

<sup>c</sup> Bangkok Rules, Section M(7)(c) of the Principles on Fair Trial in Africa, Rule 34.1 of the European Prison Rules

<sup>d</sup> Rules 5-18 of the Bangkok Rules, Principles X and XII of the Principles on Persons Deprived of Liberty in the Americas, Rule 19.7 of the European Prison Rules

<sup>e</sup> Article 24(b) of the Protocol to the African Charter on the Rights of Women in Africa, Rule 48 of the Bangkok Rules, Rule 23(1) of the Standard Minimum Rules, Rule 34.3 of the European Prison Rules, Regulation 104 of the ICC Regulations

<sup>f</sup> Rules 26-28 and 44 of the Bangkok Rules

<sup>g</sup> Article 3 of the Convention on the Rights of the Child, Rules 49-52 of the Bangkok Rules, Principle X of the Principles on Persons Deprived of Liberty in the Americas, Rule 36 of the European Prison Rules

<sup>h</sup> Rule 2(2) of the Bangkok Rules

<sup>i</sup> Rule 7 of the Bangkok Rules, Rule 34.2 of the European Prison Rules

<sup>j</sup> Article 10(2)(a) of the ICCPR, Article 5(4) of the American Convention, Rule 84(2) of the Standard Minimum Rules, Rules 94-101 of the European Prison Rules

<sup>k</sup> Principle 36(2) of the Body of Principles

<sup>438</sup> HRC Concluding Observations: [Canada](#), UN Doc.

CCPR/C/CAN/CO/5 (2005) §18, [USA](#), UN Doc.

CCPR/C/USA/CO/3/Rev.1 (2006) §33, [Zambia](#), UN Doc.

CCPR/C/ZMB/CO/3 (2007) §20; CAT Concluding Observations: [Togo](#),

UN Doc. CAT/C/TGO/CO/1 (2006) §20, [Philippines](#), UN Doc.

CAT/C/PHL/CO/2 (2009) §18; CEDAW Committee Concluding

Observations: [Argentina](#), UN Doc. CEDAW/C/ARG/CO/6 (2010)

§§27-28; See [CAT General Comment 2](#), §14.

<sup>439</sup> [CPT 10th General Report](#), CPT/Inf (2000) 13, §§30-33; See Special Rapporteur on torture, UN Doc. [A/HRC/7/3](#) (2008) §41.

<sup>440</sup> [CPT 10th General Report](#), CPT/Inf (2000) 13, §27.

<sup>441</sup> [CPT 10th General Report](#), CPT/Inf (2000) 13, §§28-29.

<sup>442</sup> [Laduna v Slovakia](#) (31827/02), European Court (2011) §§59-74.

<sup>a</sup> Article 10(2)(a) of the ICCPR, Article 5(4) of the American Convention, Article 20(2) of the Arab Charter, Rule 85(1) of the Standard Minimum Rules, Guideline 35 of the Robben Island Guidelines, Principle XIX of the Principles on Persons Deprived of Liberty in the Americas, Rule 18(8) of the European Prison Rules

<sup>b</sup> Principles 14 and 17-18 of the Body of Principles, Rules 86, 88-93 of the Standard Minimum Rules, Rules 94-101 of the European Prison Rules; See Section M(1) of the Principles on Fair Trial in Africa

<sup>c</sup> Principle 30 of the Body of Principles, Rule 29 of the Standard Minimum Rules, Principle XXII(1)-(2) of the Principles on Persons Deprived of Liberty in the Americas, Rule 57(2) of the European Prison Rules

<sup>d</sup> Rule 88 of the European Prison Rules

<sup>e</sup> Rules 56-57(1) of the European Prison Rules

People detained pending trial must be held separately from people who have been convicted and sentenced.<sup>a 443</sup> Under the American Convention and Arab Charter, this right is not subject to derogation (temporary restriction) in times of emergency. (See **Chapter 31**.)

A key safeguard for pre-trial detainees is the separation and independence of the authorities responsible for detention from the authorities undertaking the investigation.<sup>444</sup> Once a judicial authority has ruled that an accused should be detained pending trial, he or she should be remanded to a detention facility outside the control of the police.<sup>445</sup> If further questioning is necessary, it is preferable that it takes place in the prison or detention centre, rather than on police premises.<sup>446</sup> (See **Chapter 5**, Right to be brought promptly before a judge.)

The rights of pre-trial detainees include:<sup>b</sup>

- facilities to communicate confidentially with their lawyer to prepare their defence (see **Chapter 3**),
- to be assisted by an interpreter (see **Chapter 9.5**),
- to be visited by their own doctor and dentist, at their own expense, and to continue with necessary treatment,<sup>447</sup>
- additional visits and phone calls,
- to wear their own clothing if it is suitable, and to wear civilian clothing in good condition for court appearances,
- access to books, writing materials and newspapers,
- to have the opportunity, but not to be required, to work,
- accommodation in a single cell, as far as possible, subject to court directions, local custom or choice.

The conditions and regime of detention must not unreasonably interfere with the right and ability of the accused to prepare and present their defence.

As an element of the right to adequate time and facilities to prepare a defence, the European Court has noted that the conditions in pre-trial detention should be such as to enable detainees facing criminal charges to read and write with a reasonable degree of concentration.<sup>448</sup>

(See also **Chapter 8.1**, Adequate time and facilities to prepare a defence, **Chapter 3.6.1**, Right to confidential communication with counsel, and **Chapter 4** on access to the outside world.)

## 10.8 DISCIPLINARY MEASURES

No detainee or prisoner may be subjected to disciplinary punishment within an institution except in accordance with clear rules and procedures established by law or regulation.<sup>449</sup> The law or regulation must also set out the conduct constituting a disciplinary offence; the types and duration of punishment permissible; and the authority competent to impose it.<sup>c</sup>

The state remains responsible for defining and regulating disciplinary measures and procedures even when it contracts out the running of an institution to a private company.<sup>d</sup>

Disciplinary measures should be a last resort. Only conduct likely to constitute a threat to good order, safety or security may be defined as a disciplinary offence.<sup>e</sup>

<sup>443</sup> HRC General Comment 21, §9.

<sup>444</sup> WGAD, UN Doc. E/CN.4/2005/6 (2004) §79.

<sup>445</sup> HRC Concluding Observations: Azerbaijan, UN Doc.

CCPR/C/AZE/CO/3 (2009) §8, El Salvador, UN Doc.

CCPR/C/SLV/CO/6 (2010) §14; Special Rapporteur on torture, UN Docs. E/CN.4/2003/68 (2002) §26(g), A/65/273 (2010) §75; See

CAT Concluding Observations: Japan, UN Doc. CAT/C/JPN/CO/1 (2007) §15(a).

<sup>446</sup> CPT 12th General Report, CPT/Inf (2002) 15, §46.

<sup>447</sup> See Rule 37 of the CoE Rules on remand in custody.

<sup>448</sup> *Mayzit v Russia* (63378/00), European Court (2005) §81.

<sup>449</sup> CPT 2nd General Report, CPT/Inf (92) 3, §55.

The competent authorities must conduct a thorough examination of the alleged disciplinary offence. They must inform the individual(s) concerned of the alleged offence and give them an opportunity to present a defence,<sup>a</sup> with legal assistance if required in the interest of justice,<sup>b</sup> and an interpreter when necessary. An individual has the right to have disciplinary decisions reviewed by an independent higher authority.<sup>c</sup> If the alleged disciplinary offence amounts to a “criminal offence” under national law or international standards, the full range of fair trial rights apply. (See **Definitions of terms.**)

The severity of the punishment must be proportionate to the offence, and the punishment itself consistent with international standards. No disciplinary punishment on a remand detainee may have the effect of extending the period of detention or interfering with the preparation of their defence.<sup>d</sup> Other prohibited punishments include:

- collective disciplinary punishments,
- corporal punishment,
- confinement in a dark cell,
- cruel, inhuman or degrading punishments, including restrictions on food and drinking water,<sup>e</sup>
- prohibition of family visits, especially with children,<sup>f</sup>
- close confinement or segregation of pregnant women or new mothers.<sup>g</sup>

(See **Chapter 25.5**, Corporal punishment.)

## 10.9 SOLITARY CONFINEMENT

Prolonged solitary confinement (segregation from other prisoners) may violate the prohibition of torture and other ill-treatment, particularly when combined with isolation from the outside world (see **Chapter 4.3**, Incommunicado detention).<sup>450</sup>

Solitary confinement must not be imposed on children or on pregnant women or those with young children.<sup>h</sup><sup>451</sup> Nor should it be imposed on people with mental disabilities.<sup>452</sup>

Solitary confinement should be used only as an exceptional measure, for as short a time as possible, under judicial supervision, with adequate review mechanisms including the possibility of judicial review.<sup>i</sup><sup>453</sup> Steps should be taken to minimize its harmful effects on the individual by ensuring they have access to adequate exercise, social and mental stimulation, and that their health is regularly monitored.<sup>454</sup>

In particular during pre-trial detention, solitary confinement should be strictly regulated by law,<sup>455</sup> and imposed only on the basis of a court decision setting time limits.<sup>456</sup> It must not affect access to a lawyer or prohibit all contact with family.<sup>j</sup><sup>457</sup> The Special Rapporteur on torture has called for an end to its use in pre-trial detention; solitary confinement creates psychological pressure that can induce detainees to make incriminating statements. The Special Rapporteur stated that when used intentionally to obtain information or a confession, the use of solitary confinement violates the prohibition against torture and other ill-treatment.<sup>458</sup> (See **Chapters 9** and **16.1.**)

<sup>a</sup> Principle 30(2) of the Body of Principles, Rules 29-30 of the Standard Minimum Rules, Rules 58-59 of the European Prison Rules; See Principle XXI of the Principles on Persons Deprived of Liberty in the Americas

<sup>b</sup> Rule 59(c) of the European Prison Rules

<sup>c</sup> Principle 30 of the Body of Principles, Principle XXII(1) of the Principles on Persons Deprived of Liberty in the Americas, Rule 61 of the European Prison Rules

<sup>d</sup> Rule 41 of the CoE Rules on remand in custody

<sup>e</sup> Rule 31 of the Standard Minimum Rules, Principles XI and XXII of the Principles on Persons Deprived of Liberty in the Americas, Rule 60 of the European Prison Rules

<sup>f</sup> Rule 23 of the Bangkok Rules, Rule 60 of the European Prison Rules

<sup>g</sup> Rule 22 of the Bangkok Rules, Principle XXII(3) of the Principles on Persons Deprived of Liberty in the Americas

<sup>h</sup> Principle XXII(3) of the Principles on Persons Deprived of Liberty in the Americas; See Rule 22 of the Bangkok Rules, Rule 67 of the UN Rules for the Protection of Juveniles Deprived of their Liberty

<sup>i</sup> Principle XXII(3) of the Principles on Persons Deprived of Liberty in the Americas, Rules 51, 53, 60.5 and 70 of the European Prison Rules

<sup>j</sup> Rule 42 of CoE Rules on remand in custody

<sup>450</sup> HRC General Comment 20, §6; Special Rapporteur on torture, UN Doc. *A/66/268* (2011) §81; CAT Concluding Observations: *New Zealand*, UN Doc. CAT/C/CR/32/4 (2004) §§5(d), 6(d), *USA*, UN Doc. CAT/C/USA/CO/2 (2006) §36; *McCallum v South Africa*, HRC, UN Doc. CCPR/C/100/D/1818/2008 (2010) §6.5; *Miguel Castro-Castro Prison v Peru*, Inter-American Court (2006) §323; *Van der Ven v The Netherlands* (50901/99), European Court (2003) §51; See CAT Concluding Observations: *Japan*, UN Doc. CAT/C/JPN/CO/1 (2007) §18.

<sup>451</sup> CRC General Comment 10, §89.

<sup>452</sup> Special Rapporteur on torture, UN Doc. *A/66/268* (2011) §§79-101.

<sup>453</sup> European Court: *Ramirez Sanchez v France* (59450/00), (Grand Chamber) (2006) §138-145, *A. B. v Russia* (1439/06), (2010) §108; CAT Concluding Observations: *Azerbaijan*, UN Doc. CAT/C/AZE/CO/3

(2009) §13, *Denmark*, UN Doc. CAT/C/DNK/CO/5 (2007) §14, *Israel*, UN Doc. CAT/C/ISR/CO/4 (2009) §18; See CAT Concluding Observations: *Norway*, UN Doc. CAT/C/CR/28/3 (2002) §4(d).

<sup>454</sup> CPT 21st General Report, CPT/Inf (2011) 28, §§61-63; Special Rapporteur on torture, UN Doc. *A/66/268* (2011) §§83, 100-101.

<sup>455</sup> CAT Concluding Observations: *Luxembourg*, UN Doc. CAT/C/CR/28/2 (2002) §§5(b), 6(b).

<sup>456</sup> CAT Concluding Observations: *Russian Federation*, UN Doc. CAT/C/CR/28/4 (2002) §8(d); CPT 21st General Report, CPT/Inf (2011) 28, §§56(a), 57(a).

<sup>457</sup> Special Rapporteur on torture, UN Doc. *A/66/268* (2011) §§55, 75, 99.

<sup>458</sup> Special Rapporteur on torture, UN Doc. *A/66/268* (2011) §§73, 85.

<sup>a</sup> Principle XXII(3) of the Principles on Persons Deprived of Liberty in the Americas

<sup>b</sup> Article 5 of the Universal Declaration, Article 7 of the ICCPR, Article 2 of the Convention against Torture, Articles 37(a) and 19 of the Convention on the Rights of the Child, Article 10 of the Migrant Workers Convention, Article 5 of the African Charter, Article 5(2) of the American Convention, Articles 1 and 2 of the Inter-American Convention against Torture, Article 8 of the Arab Charter, Article 3 of the European Convention, Principle 6 of the Body of Principles, Articles 2 and 3 of the Declaration against Torture

<sup>c</sup> Article 4 of the Convention against Torture, Articles 3 and 6 of the Inter-American Convention against Torture

<sup>d</sup> See Article 2(2) of the Convention against Torture, Article 5 of the Inter-American Convention against Torture, Principle 6 of the Body of Principles, Article 5 of the Code of Conduct for Law Enforcement Officials, Article 3 of the Declaration against Torture, Guidelines 9–10 of the Robben Island Guidelines

<sup>e</sup> See Article 2(3) of the Convention against Torture, Articles 3 and 4 of the Inter-American Convention against Torture, Article 5 of the Code of Conduct for Law Enforcement Officials; See also Guideline 11 of the Robben Island Guidelines

<sup>f</sup> Article 8 of the Code of Conduct for Law Enforcement Officials

<sup>g</sup> Article 1 of the Convention against Torture; See Article 2 of the Inter-American Convention against Torture

<sup>h</sup> See Principle XXIII of the Principles on Persons Deprived of Liberty in the Americas

Solitary confinement should not be imposed by a court as part of a sentence.<sup>459</sup>

Solitary confinement in punishment cells should be prohibited.<sup>a 460</sup>

## 10.10 RIGHT TO FREEDOM FROM TORTURE AND OTHER ILL-TREATMENT

Everyone has the right to physical and mental integrity; no one may be subjected to torture or to other cruel, inhuman or degrading treatment or punishment.<sup>b</sup>

The right to freedom from torture and other ill-treatment or punishment is absolute. It is a norm of customary international law that applies to all people in all circumstances, and it may never be restricted, including during times of war or states of emergency. The state's duty to prevent torture and other ill-treatment applies not only on its own territory but also to anyone under its effective control anywhere.<sup>461</sup> (See **Chapter 31.5**, Fair trial rights that may never be restricted.) It applies to acts of torture and to complicity or participation in such acts.<sup>c</sup>

No exceptional circumstances whatsoever, including threats of terrorism or other violent crime, may be invoked to justify torture or other ill-treatment. The prohibition applies irrespective of the offence allegedly committed.<sup>d 462</sup>

All law enforcement officials are prohibited from inflicting, instigating, participating in, acquiescing to, tolerating or turning a blind eye to torture or other ill-treatment or punishment. The fact that a person acted under orders is never a justification for torture or other ill-treatment or punishment; all are bound by international law to disobey such orders.<sup>e</sup> Law enforcement officials must also report any act of torture or other ill-treatment which has occurred or is about to occur.<sup>f</sup>

The prohibition against torture and other ill-treatment or punishment includes acts which cause mental as well as physical suffering.<sup>g</sup>

People deprived of their liberty are particularly vulnerable to torture or other ill-treatment, including before and during questioning. Information elicited by such methods must be excluded from evidence (see **Chapters 9** and **17**).

A state's duty to ensure freedom from torture and other ill-treatment means that it must exercise due diligence to protect people in custody from inter-prisoner violence.<sup>h 463</sup>

(See **Chapter 25** on punishments.)

### 10.10.1 SEXUAL ABUSE

The right to be free from torture and other ill-treatment in detention or prison includes the right not to be subjected to rape or other forms of sexual violence or abuse by any person. Non-consensual sexual contact of any kind amounts to sexual violence.

States must take measures to prevent sexual violence, including by ensuring that men and women are accommodated separately and that women are held under the authority of female staff.

<sup>459</sup> CPT 21st General Report, CPT/Inf (2011) 28, §56(a).

<sup>460</sup> See CAT Concluding Observations: Bolivia, UN Doc. A/56/44 (2001) §95(g).

<sup>461</sup> HRC General Comment 31, §10; CAT General Comment 2, §16; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territories*, ICJ Advisory Opinion (2004) §111; CAT Concluding Observations: USA, UN Doc. CAT/C/USA/CO/2 (2006) §15.

<sup>462</sup> See HRC General Comment 20, §3; CAT: General Comment 2, §5, Israel, UN Doc. A/57/44 (2001) §53(i) and CAT/C/ISR/CO/4

(2009) §14. See also European Court Grand Chamber: *Jalloh v Germany* (54810/00), (2006) §99, *Gäfgen v Germany*, (22978/05), (2010) §87, *V. v the United Kingdom* (24888/94), (1999) §69, *Ramirez Sanchez v France* (59450/00), (2006) §116, *Chahal v United Kingdom* (22414/93), (1996) §76-80, *Saadi v Italy* (37201/06), (2008) §127, 137.

<sup>463</sup> HRC General Comment 31, §8. See *Velasquez Rodriguez v Honduras*, Inter-American Court (1988) §172; European Court: *Mahmut Kaya v Turkey* (22535/93), (2000) §115, *A. v United Kingdom* (25599/94), (1998) §22.

Rape committed by or with the consent or acquiescence of a public official constitutes torture. Rape includes non-consensual oral sex and vaginal or anal penetration through the use of objects or any part of the aggressor's body.<sup>464</sup>

State authorities must exercise due diligence to protect detainees and prisoners from sexual violence by other inmates.<sup>465</sup>

Officials in places of confinement must not take advantage of their position to commit acts of sexual violence including rape and threats of rape, invasive body searches, "virginity tests", or more subtle forms of abuse such as insults and humiliation of a sexual nature.<sup>466</sup>

Sexual conduct between detainees or prisoners and officials or staff is presumed to be coerced, due to the nature of the inherently coercive environment of incarceration.<sup>467</sup>

The Inter-American Court ruled that female inmates who had to use the toilet while observed by a male guard aiming a weapon at them, when they were naked and covered only with a sheet, had been subjected to sexual violence.<sup>468</sup>

### 10.10.2 USE OF FORCE

Force may be used on detainees or prisoners only when strictly necessary for the maintenance of security and order within the institution, in cases of attempted escape, when there is resistance to a lawful order, or when personal safety is threatened. In any event, it may be used only if non-violent means have proved ineffective and as a last resort. The amount of any force used must be the minimum necessary.<sup>a</sup>

Firearms may only be used in defence against an imminent threat of death or serious injury, to prevent a crime involving grave threat to life, to arrest a person presenting such a danger or to prevent their escape, and only when less extreme means are insufficient. Intentional lethal use of firearms is permissible only when strictly unavoidable in order to protect life.<sup>b</sup>

Staff must minimize the use of force. Unnecessary or excessive use of physical force not genuinely necessitated by or proportionate to the conduct of the detainee or prisoner may amount to torture or other ill-treatment.<sup>469</sup>

Staff must be trained in techniques that enable the minimum and safe use of force, in accordance with international standards. In general they must not carry firearms or other lethal weapons except in an operational emergency. Other law enforcement agencies must generally not be involved in dealing with prisoners inside prisons.<sup>c</sup>

Pepper spray and tear gas should not be used in confined spaces. They should never be used on anyone who has already been brought under control.<sup>470</sup>

Electrical discharge weapons (stun guns or "tasers") should only be used by specially trained officers as a last resort in extreme circumstances against a real and immediate threat to life and where it is the only possible alternative to using a method presenting a greater risk of injury or death.<sup>471</sup>

<sup>a</sup> Rule 54 of the Standard Minimum Rules, Principles 4, 5 and 15 of the Basic Principles on the Use of Force and Firearms by Law Enforcement Officials, Article 3 of the Code of Conduct for Law Enforcement Officials, Principle XXIII(2) of the Principles on Persons Deprived of Liberty in the Americas, Rule 64 of the European Prison Rules

<sup>b</sup> Principles 9 and 16 of the Basic Principles on the Use of Force and Firearms by Law Enforcement Officials

<sup>c</sup> Principle XXIII of the Principles on Persons Deprived of Liberty in the Americas, Rules 64-67 and 69 of the European Prison Rules

<sup>464</sup> Special Rapporteur on torture: UN Docs. *E/CN.4/1986/15* (1986) §119, *E/CN.4/1995/34* (1995) §§15-24, *A/HRC/7/3* (2008) §§34-36; *Raquel Martí de Mejía v Perú* (10.970), Inter-American Commission (1996); *Aydın v Turkey* (23178/94), European Court Grand Chamber (1997) §86.

<sup>465</sup> CAT *General Comment 2*, §18; HRC *General Comment 31*, §8.

<sup>466</sup> Special Rapporteur on torture, UN Doc. *A/HRC/7/3* (2008) §§34, 42; See *Miguel Castro-Castro Prison v Peru*, Inter-American Court (2006) §312.

<sup>467</sup> Special Rapporteur on torture, UN Doc. *A/HRC/7/3* (2008) §42; *Prosecutor v Kunarac et al*, IT-96-23 & IT-96-23/1-A, ICTY Appeals

*Judgment* (2002) §§131-133.

<sup>468</sup> *Miguel Castro-Castro Prison v Peru*, Inter-American Court (2006) §§259(h), 306.

<sup>469</sup> European Court: *Artyomov v Russia* (14146/02), (2010) §§164-173, *Kucheruk v Ukraine* (2570/04), (2007) §§128-133, *Umar Karatepe v Turkey* (20502/05), (2010) (French only) §§54-65; See Special Rapporteur on torture, UN Doc. *E/CN.4/2004/56* (2003) §44.

<sup>470</sup> CPT: *Czech Republic*, CPT/Inf (2009) 8, §46, *Portugal*, CPT/Inf (2009) 13, §92.

<sup>471</sup> CPT *20th General Report*, CPT/Inf (2010) 28, §§65-84.

<sup>a</sup> Principle 5(c)-(d) of the Basic Principles on the Use of Force and Firearms by Law Enforcement Officials

<sup>b</sup> Rule 33 of the Standard Minimum Rules, Rule 68 of the European Prison Rules

<sup>c</sup> Rule 24 of the Bangkok Rules

<sup>d</sup> Principle 5 of the Principles of Medical Ethics, Rules 33-34 of the Standard Minimum Rules, Rules 60.6 and 68.3 of the European Prison Rules, Rule 120 of the ICC Regulations

<sup>e</sup> Rule 33 of the Standard Minimum Rules, Rule 68(2)(a) of the European Prison Rules

When force has been used against an individual in custody, the use of force should be documented by the authorities.<sup>472</sup> The individual should have the right to an immediate medical examination and, if necessary, treatment.<sup>473</sup> If injured, relatives or close friends should be notified.<sup>a</sup>

There should be prompt, independent and impartial investigations into all allegations of excessive use of force in places of detention and prisons.<sup>474</sup>

### 10.10.3 INSTRUMENTS AND METHODS OF RESTRAINT

While the use of instruments and techniques of restraint may sometimes be necessary if other methods of control fail, they are open to abuse. Unjustified use or misuse can amount to torture or other ill-treatment<sup>475</sup> and can cause death or serious injury.

International standards prohibit the use of chains or irons,<sup>476</sup> and regulate the use of other restraints, such as handcuffs and strait-jackets.<sup>b</sup>

Instruments of restraint must never be used on women during labour, birth or immediately afterwards.<sup>c 477</sup>

Permitted instruments and methods of restraint may be used only when necessary and proportionate; they must not be applied for longer than strictly necessary and must never be used as a punishment.<sup>d</sup>

The use of some restraint instruments and techniques is inherently cruel, inhuman and degrading. Electric stun body belts should never be used.<sup>478</sup> Blindfolds should be expressly prohibited.<sup>479</sup> Amnesty International calls for dangerous methods of restraint to be prohibited, including carotid or vascular neck chokeholds and hogtying.<sup>480</sup>

The use of restraints such as handcuffs during a lawful arrest does not normally amount to cruel, inhuman or degrading treatment if it is necessary (for example to prevent the individual from absconding or causing injury or damage), and if it does not involve unreasonable force or public exposure.<sup>481</sup> However, if the use of restraints is unjustified or unnecessary, or if they are applied in a manner that causes pain and suffering, this can amount to cruel, inhuman or degrading treatment.<sup>482</sup>

Restraints must be removed when an individual appears before a court.<sup>e</sup>

The European Court has ruled that unnecessarily handcuffing the accused or placing them in a metal cage during court proceedings amounted to degrading treatment.<sup>483</sup>

<sup>472</sup> CPT: Portugal, CPT/Inf (2013) 4 §14.

<sup>473</sup> CPT 2nd General Report, CPT/Inf (92) 3, §53.

<sup>474</sup> HRC Concluding Observations: Honduras, UN Doc. CCPR/C/HND/CO/1 (2006) §10, Paraguay, UN Doc. CCPR/C/PRY/CO/2 (2005) §11; See HRC Concluding Observations: Greece, UN Doc. CCPR/CO/83/GRC (2005) §9, Moldova, UN Doc. CCPR/C/MDA/CO/2 (2009) §§9, 11.

<sup>475</sup> See Special Rapporteur on torture, UN Doc. E/CN.4/2004/56 (2003) §45.

<sup>476</sup> HRC Concluding Observations: Republic of Korea, UN Doc. CCPR/C/KOR/CO/6 (2006) §13; CAT Concluding Observations: Japan, CAT/C/JPN/CO/1 (2007) §15(g); See CAT Concluding Observations: USA, UN Doc. A/55/44 (2000) §179(e).

<sup>477</sup> HRC Concluding Observations: USA, UN Doc. CCPR/C/USA/CO/3/Rev.1 (2006) §33; CPT 10th General Report, CPT/Inf (2000) 13, §27; CAT Concluding Observations: USA, UN Doc. CAT/C/USA/CO/2 (2006) §33; See Special Rapporteur on torture, UN Doc. A/HRC/7/3 (2008) §41.

<sup>478</sup> CPT: 20th General Report, CPT/Inf (2010) 28, §74, Hungary,

CPT/Inf (2010) 16, §120.

<sup>479</sup> CPT 12th General Report, CPT/Inf (2002) 15, §38; Special Rapporteur on torture: UN Doc. A/56/156 (2001) §39(f), UN Doc. E/CN.4/2003/68 (2002) §26(g); CAT Concluding Observations: Liechtenstein, UN Doc. CAT/C/LIE/CO/3 (2010) §23.

<sup>480</sup> Among others, Amnesty International, USA: 'Less than lethal? The use of stun weapons in US law enforcement', Index: AMR 51/010/2008, p54 Rec. 8.

<sup>481</sup> See e.g., European Court: Harutyunyan v Armenia (34334/04), (2010) §§124-129; Öcalan v Turkey (46221/99), Grand Chamber (2005) §§184-185; See also Cabal and Bertran v Australia, HRC, UN Doc. CCPR/C/78/D/1020/2001 (2003) §8.2.

<sup>482</sup> European Court: Yagiz v Turkey (27473/02), (2007) §§46-48, Kashvelov v Bulgaria (891/05), (2011) §§38-40, Kucheruk v Ukraine (2570/04), (2007) §§139-145, Istratii and Others v Moldova (8721/05 et al), (2007) §§55-59, Okhrimenko v Ukraine (53896/07), (2009) §§93-98, Henaf v France (65436/01), (2003) §§47-60.

<sup>483</sup> European Court: Harutyunyan v Armenia (34334/04), (2010) §§124-129, Ramishvili and Kokhreizde v Georgia (1704/06), (2009) §§98-102, Gorodnischev v Russia (52058/99), (2007) §§105-109.

Use of restraints should be recorded and the individual restrained must be kept under constant supervision.<sup>484</sup>

#### 10.10.4 BODY SEARCHES

Body searches of detainees or prisoners must be necessary, reasonable and proportionate, and must be regulated by national law. They should only be carried out in a manner consistent with the dignity of the person being searched by trained staff of the same gender.<sup>a</sup> 485 When a transgender person is to be searched, the individual's request to be searched by a person of a particular gender should be respected.

Intimate physical searches should be exceptional and only carried out by appropriately trained staff, or, if requested by the detainee or prisoner, by a medical practitioner. The practitioner should not normally be the person who provides medical care to the individual.<sup>486</sup> The [Principles on Persons Deprived of Liberty in the Americas](#) state that intrusive vaginal or anal searches must be forbidden by law.<sup>b</sup>

Strip searches and invasive body searches carried out in a humiliating manner can constitute torture or other ill-treatment.<sup>487</sup>

Alternative screening methods such as scans should be developed to replace strip searches and invasive body searches.<sup>c</sup> 488

The European Court found that forcibly administering an emetic agent to a suspect to obtain evidence of a drugs offence – when it was not essential, carried a health risk and alternative, less humiliating, ways could have been used to obtain the evidence – was inhuman and degrading treatment.<sup>489</sup>

### 10.11 DUTY TO INVESTIGATE, RIGHTS TO REMEDY AND REPARATION

Individuals who have been subjected to torture and other ill-treatment must have accessible and effective remedies. In particular, states must ensure that allegations are promptly, impartially, independently and thoroughly investigated, that victims have access to an effective remedy and receive reparation, and that those responsible are brought to justice.<sup>d</sup> 490

States must provide complaints mechanisms to comply with the right to an effective remedy.<sup>491</sup> Even without an express complaint by the victim, there must be an investigation where there are reasonable grounds to believe that an act of torture or other ill-treatment may have taken place.<sup>e</sup> 492 A failure by a state to investigate allegations of torture or other ill-treatment is a violation of the right to an effective remedy and the right not to be subjected to torture or other ill-treatment.<sup>493</sup>

Victims and their lawyers must have access to all relevant information and to any hearings relevant to the allegation. They are entitled to present evidence. Victims and witnesses must be

<sup>a</sup> Rules 19-21 of the Bangkok Rules, Principle XXI of the Principles on Persons Deprived of Liberty in the Americas, Rule 54 of the European Prison Rules

<sup>b</sup> Principle XXI of the Principles on Persons Deprived of Liberty in the Americas

<sup>c</sup> Rule 20 of the Bangkok Rules, Principle XXI of the Principles on Persons Deprived of Liberty in the Americas

<sup>d</sup> Article 8 of the Universal Declaration, Articles 2 and 7 of the ICCPR, Articles 12-14 of the Convention against Torture, Articles 5 and 7 of the African Charter, Articles 5 and 25 of the American Convention, Articles 8-9 of the Inter-American Convention against Torture, Article 23 of the Arab Charter, Articles 3 and 13 of the European Convention, Articles 8-11 of the Declaration against Torture, Guidelines 16-19, 40 and 49-50 of the Robben Island Guidelines, Sections C(a) and M7(g)-(j) of the Principles on Fair Trial in Africa, Article XVIII of the American Declaration, Principle V of the Principles on Persons Deprived of Liberty in the Americas

<sup>e</sup> Article 12 of the Convention against Torture, Principle 2 of the Principles on the Investigation of Torture

<sup>484</sup> CAT Concluding Observations: [New Zealand](#), UN Doc. CAT/C/NZL/CO/5, §9; [CPT 2nd General Report](#), CPT/Inf (92) 3, §53.

<sup>485</sup> HRC General Comment 16, §8; [CPT 10th General Report](#), CPT/Inf (2000) 13, §23; See CAT Concluding Observations: [France](#), UN Doc. CAT/C/FRA/CO/4-6 (2010) §28, [Hong Kong](#), UN Doc. CAT/C/HKG/CO/4 (2008) §10.

<sup>486</sup> [CPT 3rd General Report](#), CPT/Inf (93) 12, §73; World Medical Association, [Statement on Body Searches of Prisoners](#); CAT Concluding Observations: [Hong Kong](#), UN Doc. CAT/C/HKG/CO/4 (2008) §10.

<sup>487</sup> [Boodoo v Trinidad and Tobago](#), HRC, UN Doc. CCPR/C/74/D/721/1996 (2002) §§6.5, 6.7; [López-Álvarez v Honduras](#), Inter-American Court (2006) §§54(12), 107.

<sup>488</sup> CAT Concluding Observations: [Hong Kong](#), UN Doc. CAT/C/HKG/CO/4 (2008) §10, [France](#), UN Doc. CAT/C/FRA/CO/4-6

(2010) §28.

<sup>489</sup> [Jalloh v Germany](#) (54810/00), European Court Grand Chamber (2006) §§67-83.

<sup>490</sup> HRC General Comment 31, §§15-16; [CPT 14th General Report](#), CPT/Inf 2004 (28) §§31-36.

<sup>491</sup> CAT General Comment 3, §23; See CAT Concluding Observations: [Tunisia](#), UN Doc. A/54/44 (1998) §102.

<sup>492</sup> CAT: General Comment 3, §27, Concluding Observations: [Peru](#), UN Doc. A/56/44 (2001) §§169, 172; See e.g., CAT: [Ltaief v Tunisia](#), UN Doc. CAT/C/31/D/189/2001 (2003) §10.6-10.8, [Blanco Abad v Spain](#), UN Doc. CAT/C/20/D/59/1996 (1998) §8.2-8.8.

<sup>493</sup> See e.g., [Avadanov v Azerbaijan](#), HRC, UN Doc. CCPR/C/100/D/1633/2007 (2010) §9.3-9.5; [Aydin v Turkey](#) (23178/94), European Court Grand Chamber (1997) §103.

<sup>a</sup> Article 13 of the Convention against Torture, Guideline VII of the CoE Guidelines on eradicating impunity; See Articles 12 and 18(2) of the Convention on Enforced Disappearance

<sup>b</sup> Principle 3(b) of the Principles on the Investigation of Torture

<sup>c</sup> Principle 9 of the Basic Principles on Reparation, Section II(5) of the CoE Guidelines on eradicating impunity

<sup>d</sup> Basic Principles on Reparation (especially Principles 15-23), Guideline XVI of the CoE Guidelines on eradicating impunity

protected against any retribution or intimidation, including counter-charges,<sup>494</sup> as a result of making the complaint.<sup>a 495</sup>

Anyone potentially implicated in acts of torture or other ill-treatment must be removed from any position of control or power over complainants, witnesses and the investigators.<sup>b</sup> State agents suspected of torture or other ill-treatment should be suspended from active duty during the investigation.<sup>496</sup>

The investigation should include a medical examination (see **10.4** above); where the examination establishes that an individual has injuries that were not present at the time of arrest, there should be a presumption of ill-treatment in detention.<sup>497</sup>

A person who has been subjected to torture or other ill-treatment is entitled to reparation, regardless of whether those responsible have been identified and brought to justice.<sup>c 498</sup>

Reparation should include compensation, rehabilitation, including medical and psychological care and social and legal services, satisfaction, and guarantees of non-repetition.<sup>d 499</sup> Compensation from the state must afford adequate redress to the victim; reparations should be proportionate to the violations suffered.<sup>500</sup>

The state's obligations to ensure victims' right to a remedy cannot be fulfilled just by awarding compensation. The state must also ensure the investigation is capable of leading to the identification and bringing to justice of those responsible, who should receive penalties commensurate with the gravity of the violation.<sup>501</sup>

States must not relieve perpetrators from personal responsibility by means of amnesties, indemnities, immunities or similar measures.<sup>502</sup> (See **Chapter 11.3**, Right to equal access to the courts.)

(See also **Chapter 17**, Exclusion of evidence obtained in violation of international standards.)

<sup>494</sup> CAT General Comment 3, §§30-31; CPT 14th General Report, CPT/Inf 2004 (28) §39.

<sup>495</sup> Principle 3(b) of the Principles on the Investigation of Torture.

<sup>496</sup> *Gäfgen v Germany* (22978/05), European Court Grand Chamber (2010) §125; Special Rapporteur on torture, UN Doc. E/CN.4/2003/68 (2002) §26(k); CAT, e.g. El Salvador, UN Doc. CAT/C/SLV/CO/2 (2009) §12(b); HRC Concluding Observations, e.g. Brazil, UN Doc. CCPR/C/79/Add.66 (1996) §20.

<sup>497</sup> CAT Concluding Observations: Cyprus, UN Doc. CAT/C/CR/29/1 (2002) §4a; European Court: *Aksoy v Turkey* (21987/93), (1996) §61; *Selmouni v France* (25804/94), (1999) §87.

<sup>498</sup> CAT General Comment 3, §§3, 26.

<sup>499</sup> HRC General Comment 31, §§15-17.

<sup>500</sup> See e.g., *Ciorap v Moldova* (No. 2) (7481/06), European Court (2010) §§24-25; *Raxcacó-Reyes v Guatemala*, Inter-American Court (2005) §§114-116.

<sup>501</sup> HRC General Comment 31, §§15, 18; CAT General Comment 3, §§9, 17, *Guridi v Spain*, CAT, UN Doc. CAT/C/34/D/212/2002 (2005) §§6.6-6.8; European Court: *Gäfgen v Germany* (22978/05), Grand Chamber (2010) §119, *Okkali v Turkey* (52067/99), (2006) §§71-78; CPT 14th General Report, CPT/Inf 2004 (28), §§31, 40-41.

<sup>502</sup> HRC General Comment 31, §18; CAT General Comment 2, §5, CAT General Comment 3, §§40-42; Principles 19, 22, 31-35 of the Updated Impunity Principles.



# SECTION B

## RIGHTS AT TRIAL

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# CHAPTER 11

## RIGHT TO EQUALITY BEFORE THE LAW AND COURTS

The guarantee of equality in the administration of criminal justice is multifaceted. It prohibits discriminatory laws and discrimination in the implementation of laws. It includes the rights to equality before and equal protection of the law; equality before and equal treatment by the courts; and equal access to the courts.

### 11.1 Right to equality before the law

#### 11.2 Right to equality before the courts

##### 11.2.1 Right to equal treatment by the courts

#### 11.3 Right to equal access to the courts

## 11.1 RIGHT TO EQUALITY BEFORE THE LAW

All people are entitled to equality before the law and to equal protection of the law.<sup>a</sup>

The right to equal protection of the law prohibits discrimination in law or in practice in the administration of criminal justice. This does not make all differences of treatment discriminatory, only those that are not based on reasonable and objective criteria and that are not for the purpose of or proportionate to achieving a legitimate aim. It means that judges, prosecutors and law enforcement officials have a duty to ensure equal protection of the law and to respect and protect the prohibition of discrimination.<sup>503</sup> (See **Chapter 12** on impartiality of judges and juries.)

States should review existing and draft laws to ensure that they are not discriminatory. They must monitor the implementation of existing laws and regulations to ensure that they do not have a discriminatory impact. They must amend laws and practices as necessary to eliminate all forms of discrimination and to ensure equality.<sup>b</sup><sup>504</sup>

Examples of criminal laws that are discriminatory include laws which: allow for increased penalties based on the legal status of a foreign national within the country; criminalize a person who changes their religion;<sup>505</sup> criminalize sexual activity between consenting adults of the same sex;<sup>506</sup> exonerate men if they marry a woman whom they have raped; or fail to criminalize marital rape.<sup>507</sup>

### ICCPR, Article 26

“All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”

<sup>503</sup> See Special Rapporteur on the independence of judges and lawyers, UN Doc. *A/66/289* (2011) §42.

<sup>504</sup> CERD General Recommendation XXXI Part I A; *Gonçalves v Portugal*, HRC, UN Doc. CCPR/C/98/D/1565/2007 (2010) §7.4; Report of the Special Rapporteur on extrajudicial executions, *USA*, UN Doc. A/HRC/11/2/add.5 (2009) §§19 and 74; *CoE Recommendation CM/Rec* (2010)5, §§1-2, 4, and §46 of the Appendix; *Report of the Fourth World Conference on Women*, UN Doc. A/CONF/177/20 (1995) §232(d); See CEDAW Committee General Recommendation 25, §7; *Human Rights Council resolution 10/7*, §8.

<sup>505</sup> See *HRC General Comment 22*, §5.

<sup>506</sup> HRC: *Toonen v Australia*, UN Doc. CCPR/C/50/D/488/1992 (1994) §§8.2-9; *Kenya*, UN Doc. CCPR/CO/83/KEN (2005) §27; *Dudgeon v United Kingdom* (7525/76), European Court (1981) §§61, 63; See also *L. and V. v Austria* (39392/98 and 39829/98), European Court (2003) §§44-54; *Salah et al v Egypt* (7/2002), WGAD Opinion 6/2002 (Egypt), UN Doc. E/CN.4/2003/8/Add.1 (2002) pp68-73 §§27-28.

<sup>507</sup> CEDAW Committee Concluding Observations: *Bolivia*, UN Doc. CEDAW/C/BOL/CO/4 (2008) §7; *Lebanon*, UN Doc. CEDAW/C/LBN/CO/3 (2008) §27.

<sup>a</sup> Article 7 of the Universal Declaration, Articles 2(1), 3 and 26 of the ICCPR, Articles 2 and 15 of CEDAW, Articles 2 and 5 of the Convention against Racism, Article 5 of the Convention on Persons with Disabilities, Articles 2 and 3 of the African Charter, Articles 1 and 24 of the American Convention, Article 11 of the Arab Charter, Article 14 of the European Convention, Article II of the American Declaration, Principle II of the Principles on Persons Deprived of Liberty in the Americas; See Article 4(f) of the Inter-American Convention on Violence against Women, Articles 8 and 2 of the Protocol to the African Charter on the Rights of Women in Africa, Article 4(2)-(3) of the CoE Convention on violence against women, Protocol 12 to the European Convention, Article 67 of the ICC Statute

<sup>b</sup> Article 3 of the ICCPR, Article 2(1)(c) of the Convention against Racism, Article 4(1)(b) of the Convention on Persons with Disabilities, Articles 2 and 8 of the Protocol to the African Charter on the Rights of Women, Article 7(e) of the Inter-American Convention on Violence against Women, Article 4(2) of the CoE Convention on violence against women

<sup>a</sup> See Article 54 of the CoE Convention on Violence against Women

<sup>b</sup> Article 10 of the Universal Declaration, Article 14(1) of the ICCPR, Articles 2(c) and 15(1) of CEDAW, Articles 2 and 5(a) of the Convention against Racism, Articles 12 and 13 of the Convention on Persons with Disabilities, Article 12 of the Arab Charter, Article 8(2) of the American Convention, Section A(2)(b) of the Principles on Fair Trial in Africa, Article 67(1) of the ICC Statute, Article 20(1) of the Rwanda Statute, Article 21(1) of the Yugoslavia Statute

<sup>c</sup> Article 18(1) of the Migrant Workers Convention, Article 5 of the Declaration on non-Nationals

<sup>d</sup> Article 7 of the Convention against Racism, Article 13(2) of the Convention on Persons with Disabilities, Article 8 of the Protocol to the African Charter on the Rights of Women, Article 8(c) of the Inter-American Convention on Violence against Women, Article 15 of the CoE Convention on violence against women

Examples of procedural laws that are discriminatory include: laws that give a woman's testimony less weight than that of a man, requiring it to be corroborated; and rape laws that allow the sexual history and conduct of the victim to be used in evidence when not relevant or necessary, or that require proof of physical violence to show lack of consent.<sup>a 508</sup>

Examples of discriminatory implementation of laws include: prosecutions targeting one ethnic group;<sup>509</sup> disproportionate application of broadly drawn stop and search laws or anti-terrorism laws targeting particular groups;<sup>510</sup> the repeated arrest and detention of individuals because of their political opinions;<sup>511</sup> criminal laws on adultery enforced principally against women;<sup>512</sup> the failure to investigate and prosecute incidents of violence against women, treating them as private rather than criminal matters;<sup>513</sup> and the failure to investigate possible discriminatory motives for a crime.<sup>514</sup>

The UN General Assembly has repeatedly called on states to ensure that anti-terrorism legislation is not discriminatory.<sup>515</sup>

## 11.2 RIGHT TO EQUALITY BEFORE THE COURTS

All people are entitled to equality before the courts.<sup>b</sup> This right applies equally to foreign nationals and stateless people.<sup>c 516</sup>

This general principle of the rule of law means that everyone is entitled to equal access to the courts, and that the parties to a case are treated without discrimination. This is a “key element of human rights protection and serves as a procedural means to safeguard the rule of law”.<sup>517</sup>

The right to equality before the courts requires states to eliminate discriminatory stereotypes which taint the fairness of criminal proceedings. The composition of the judiciary, prosecuting authorities and police should reflect the diversity of the communities they serve.<sup>518</sup> In addition, judges, prosecutors and law enforcement officials must be trained on the prohibition of discrimination, its various manifestations and the laws which punish it.<sup>d 519</sup>

The right to equality before the courts requires that similar cases be dealt with in similar proceedings.<sup>520</sup> This prohibits the creation of exceptional procedures or special courts for certain categories of offences or groups of people, unless there are objective and reasonable grounds which would justify such a distinction.<sup>521</sup>

### ICCPR, Article 14(1)

“All persons shall be equal before the courts and tribunals...”

<sup>508</sup> CEDAW Committee *General Recommendation 21* §8; Special Rapporteur on the independence of judges and lawyers, UN Doc. *A/66/289* (2011) §48; HRC Concluding Observations: *Japan*, UN Doc. CCPR/C/JPN/CO/5 (2008) §14.

<sup>509</sup> See CERD Concluding Observations: *Croatia*, UN Docs. CERD/C/304/Add.55 (1999) §12, *CERD/C/HRV/CO/8* (2009) §15; CAT Concluding Observations: *Bosnia and Herzegovina*, UN Doc. CAT/C/BIH/CO/1 (2005) §§10-11.

<sup>510</sup> See Special Rapporteur on human rights and counter-terrorism, UN Docs. *A/HRC/4/26* (2007) §37, *E/CN.4/2006/98* (2005) §§26-27, 42-50, 72; Special Rapporteur on the independence of judges and lawyers, UN Doc. *A/64/211* (2009) §23.

<sup>511</sup> *Aminu v Nigeria* (205/97), African Commission (2000) §§21-22, 27.

<sup>512</sup> Special Rapporteur on the independence of judges and lawyers, UN Doc. *A/66/289* (2011) §74; See Amnesty International, *Six-Point checklist on sexual violence against women* (Index: ACT 77/002/2010).

<sup>513</sup> European Court: *Opuz v Turkey* (33401/02), (2009) §§195-202, *Bevacqua and S. v Bulgaria* (71127/01), (2008) §§63, 83-4; CEDAW Committee: *A.T. v Hungary*, UN Doc. CERD/C/32/D/2/2003 (2005) §§8.4, 9.2-9.3, *Tayag Vertido v Philippines*, UN Doc. CERD/C/46/D/18/2008 (2010) §§8.1-8.9; *Lenahan (Gonzales) et al v United States* (12.626), Inter-American Commission (2011) §§209-215; CAT Concluding Observations: *Yemen*, UN Doc. CAT/C/YEM/CO/2/Rev.1 (2010) §29.

<sup>514</sup> *Nachova and Others v Bulgaria* (43577/98), European Court Grand Chamber (2005) §§162-168.

<sup>515</sup> For example, UN General Assembly: resolution *65/221*, §§4,

6(e), 6(m), resolution *66/171* §§4, 6(f), 6(n).

<sup>516</sup> HRC General Comments *15*, §§1, 7 and *32*, §9; See Special Rapporteur on human rights and counter-terrorism, UN Doc. *A/63/223* (2008) §14; *Advisory Opinion OC-16/99* (1999), Inter-American Court, §119; *Advisory Opinion OC-18/03*, Inter-American Court (2003) §173.

<sup>517</sup> HRC *General Comment 32*, §§2, 8; Principle 5 of the *Bangalore Principles*.

<sup>518</sup> CEDAW Committee *General Recommendation 23*, §15; *CERD General Recommendation XXXI*, §§5(d), 1(g); Special Rapporteur on the independence of judges and lawyers, UN Doc. *A/66/289* (2011) §§26, 92; CERD Concluding Observations: *Guatemala*, UN Doc. CERD/C/GTM/CO/12-13 (2010) §8.

<sup>519</sup> Principles 5, 6(3)-6(4) of the *Bangalore Principles*; CEDAW Committee *General Recommendation 19*, §24(b); UN General Assembly resolution *63/155*, §14; Special Rapporteur on the independence of judges and lawyers, UN Doc. *A/66/289* (2011) §§34-40 and 94-96; *Appendix to CoE Recommendation CM/Rec (2010)5*, §3; ECRI General Policy Recommendations: *No. 13 (2011) (Roma)* §§8(d), 9(d), *No. 9 (2004) (anti-Semitism)*; HRC Concluding Observations: *Bosnia and Herzegovina*, UN Doc. CCPR/C/BIH/CO/1 (2006) §12, *Japan*, UN Doc. CCPR/C/JPN/CO/5 (2008) §14; CERD Concluding Observations: *Guatemala*, UN Doc. CERD/C/GTM/CO/12-13 (2010) §8.

<sup>520</sup> *Zimbabwe Lawyers for Human Rights v Republic of Zimbabwe* (284/2003), African Commission, (2009) §156.

<sup>521</sup> HRC *General Comment 32*, §14.

There can never be objective and reasonable grounds for subjecting a person to exceptional criminal procedures or specially constituted courts or tribunals on the grounds of their race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. Discrimination in the enjoyment of rights on the basis of such distinctions is prohibited by international law, including, for example, Articles 2(1) and 26 of the ICCPR. In principle, providing lesser procedural guarantees in “political” criminal cases than would apply in “ordinary” cases would therefore be inconsistent with the right to equality before the courts.

In the context of terrorism-related proceedings, concern has been raised about holding trials in courts using special procedures, such as excluding jury trials in Northern Ireland or trying civilians in Tunisia before military courts that offer a limited scope of appeal. Concern has also been raised about special courts (US military commissions in Guantánamo Bay) used only for trials of non-nationals, in part because they violate the prohibition of discrimination and the principle of equality before the law.<sup>522</sup>

The Committee on the Elimination of Racial Discrimination has expressed concern about the application by Israel of different criminal laws for Palestinians than for Israelis, leading to prolonged detention and harsher punishments for the same offences.<sup>523</sup>

Concern has also been raised about discrimination under some customary law practices and courts.<sup>524</sup>

(See **Chapter 29**, Special, specialized and military courts.)

### 11.2.1 RIGHT TO EQUAL TREATMENT BY THE COURTS

Equal treatment by the courts in criminal cases requires the defence and prosecution to be treated in a manner that ensures equality of arms in the preparation and presentation of their case (see **Chapter 13.2**, “Equality of arms”).

Every accused person is entitled to be treated equally with other similarly placed accused people, without discrimination on any prohibited grounds.<sup>a</sup> <sup>525</sup> Equal treatment in this context does not mean identical treatment; it means that where the objective facts are similar, the response of the judicial system should be similar. Equality would be violated if a court or prosecutorial decision were made on discriminatory grounds.

Violations of the right to equal treatment by the courts include: failure to assign effective defence counsel to those who cannot afford to pay; failure to provide a competent interpreter when required; practices which result in the over-representation of certain ethnic or racial groups or people affected by mental illness in detention facilities and prisons;<sup>526</sup> disproportionately lenient sentences for people convicted of gender-based violence;<sup>527</sup> impunity or lenient sentences for law enforcement officials convicted of human rights violations.<sup>528</sup>

<sup>a</sup> Articles 2(1), 14(1) and 14(3) of the ICCPR, Article 15 of CEDAW, Article 5(a) of the Convention against Racism, Article 18(1) of the Migrant Workers Convention, Article 8 of the Protocol to the African Charter on the Rights of Women, Article 8(2) in conjunction with Article 1(1) of the American Convention, Section A(2)(b) and (d) of the Principles on Fair Trial in Africa; See Articles 6 and 14 of the European Convention, Article II of the American Declaration

<sup>522</sup> HRC Concluding Observations: United Kingdom, UN Docs. [CCPR/CO/73/UK](#) (2001) §18 and [CCPR/C/GBR/CO/6](#) (2008) §18; Special Rapporteur on human rights and counter-terrorism: [Tunisia](#), UN Doc. [A/HRC/16/51/Add.2](#) (2010) §§35-36; Special Rapporteur on the independence of judges and lawyers, UN Doc. [E/CN.4/2005/60](#), §§17-19; See also [A and Others v United Kingdom](#), (3455/05) European Court Grand Chamber (2009) §190.

<sup>523</sup> CERD Concluding Observations: [Israel](#), UN Doc. [CERD/C/ISR/CO/13](#) (2007) §35.

<sup>524</sup> CERD Concluding Observations: [Lebanon](#), UN Doc. [CERD/C/304/Add.49](#) (1998) §14, [Rwanda](#), UN Doc. [CERD/C/304/add.97](#) (2001) §12.

<sup>525</sup> Principle 5 of the [Bangalore Principles](#).

<sup>526</sup> CERD General Recommendation XXXI §26, 30; WGAD, UN

Doc. [E/CN.4/2006/7](#) (2005) §§65-67; [Report on Terrorism and Human Rights](#), Inter-American Commission (2002) Section H §§398-400 (interpreters); HRC Concluding Observations: [New Zealand](#), UN Doc. [CCPR/C/NZL/CO/5](#) (2010) §12; CERD Concluding Observations: [Belgium](#), UN Doc. [CERD/C/BEL/CO/15](#) (2008) §14; CEDAW Committee Concluding Observations: [Canada](#), UN Doc. [CEDAW/C/CAN/CO/7](#) (2008) §§33-34; See [Henry v Trinidad and Tobago](#), HRC, UN Doc. [CCPR/C/64/D/752/1997](#) (1999) §7.6.

<sup>527</sup> HRC Concluding Observations: [Bosnia and Herzegovina](#), UN Doc. [CCPR/C/BIH/CO/1](#) (2006) §§12, 16; [Japan](#), UN Doc. [CCPR/C/JPN/CO/5](#) (2008) §14; CEDAW Committee Concluding Observations: [Honduras](#), UN Doc. [CEDAW/C/HON/CO/6](#) (2007) §18.

<sup>528</sup> CERD Concluding Observations: [Colombia](#), UN Doc. [CERD/C/304/Add.76](#) (1999) §11; CAT Concluding Observations: [Austria](#), UN Doc. [CAT/C/AUT/CO/4-5](#) (2010) §20.

## 11.3 RIGHT TO EQUAL ACCESS TO THE COURTS

Everyone, including those accused of criminal offences and victims of crime, has an equal right to access to the courts, without discrimination.<sup>a</sup> 529 (See **Chapter 22.4** for additional standards and information related to victims.)

The obligation to respect this right requires states to establish and resource courts and to ensure that they are able to conduct fair trials. Such courts must be located in places which are accessible to people throughout the country, including rural areas,<sup>530</sup> and must be physically accessible to people with disabilities. States must also ensure effective legal aid nationwide, professional interpreters and translators for those who do not speak or understand the language used in court,<sup>b</sup> as well as witness protection programmes.<sup>531</sup> They must also ensure the accessibility of proceedings for people with disabilities.<sup>c</sup> (See **Chapters 8.3.2, 9.5** and **23** on interpreters and translation, and **Chapter 22.4** on rights of victims and witnesses.)

The availability of effective legal assistance determines whether a person can protect their rights, participate in proceedings in a meaningful way, or access justice through the courts.<sup>532</sup> States must ensure effective legal aid for the pre-trial, trial and appeal proceedings in criminal cases,<sup>533</sup> and also to pursue remedies for alleged violations of constitutional guarantees, where available, for example in death penalty cases.<sup>d</sup> 534 (For information on the right to legal aid see **Chapters 3.4, 20.3.2, and 22.4** on victims and witnesses.)

Prompt and effective access to courts requires respect for the right to be recognized as a person before the law, a right which is violated, for example, when people are held outside the law, including during enforced disappearance.<sup>535</sup>

Foreign nationals and stateless people who are in the territory of a state or otherwise subject to its jurisdiction must enjoy access to the courts on an equal basis to citizens, whatever their status.<sup>e</sup> 536

Women are entitled to access to courts on an equal basis with men.<sup>f</sup>

The CEDAW Committee has stated: “A woman’s right to bring litigation is limited in some countries by law or by her access to legal advice and her ability to seek redress from the courts. In others, her status as a witness or her evidence is accorded less respect or weight than that of a man.”<sup>537</sup> The UN General Assembly has called upon states to ensure the availability of effective legal assistance to all women who are victims of violence so as to enable them to make informed decisions about legal proceedings.<sup>538</sup>

<sup>a</sup> See, among others, Article 8 of the Universal Declaration, Articles 2, 3, 14(1) and 26 of the ICCPR, Articles 2 and 15 of CEDAW, Articles 5-6 of the Convention against Racism, Articles 13 (and 9) of the Convention on Persons with Disabilities, Article 18 of the Migrant Workers Convention, Articles 2, 7 and 19 of the African Charter, Article 8 of the Protocol to the African Charter on the Rights of Women, Articles 8, 24 and 25 of the American Convention, Articles 12, 13 and 23 of the Arab Charter, Articles 6 and 13-14 of the European Convention

<sup>b</sup> Principle 10 and Guideline 3 §43(f) of the Principles on Legal Aid

<sup>c</sup> Among others, Articles 9 and 13 of the Convention on Persons with Disabilities, Article 7(f) of the Inter-American Convention on Violence against Women, Article 28 of the CoE Convention on Trafficking in Human Beings, Articles 18 and 56 of the CoE Convention on violence against women, Section K(a)-(d) of the Principles on Fair Trial in Africa

<sup>d</sup> Principle 3 and Guidelines 4-6 of the Principles on Legal Aid

<sup>e</sup> Article 18 of the Migrant Workers Convention, Article 26 of the European Convention on Migrant Workers, Article 5 of the Declaration on non-Nationals

<sup>f</sup> Among others, Articles 2, 3, 14 and 26 of the ICCPR, Articles 2 and 15 of CEDAW

529 HRC General Comment 32, §§8-11; *Good v Republic of Botswana* (313/05), African Commission (2010) §163; *Rosendo Cantú et al v Mexico*, Inter-American Court (2010) §184.

530 Arab Human Rights Committee Concluding Observations: Jordan, (2012) §17.

531 HRC General Comment 32, §10 (legal aid); Special Rapporteur on the independence of judges and lawyers, UN Doc. A/66/289 (2011) §§60-73, 100-101 (witness protection programs); Interpreters: CERD Concluding Observations: Iran, UN Doc. CERD/C/IRN/CO/18-19 (2010) §13, Norway, UN Doc. CERD/C/63/CO/8 (2003) §16, Romania, UN Doc. CERD/C/ROU/CO/16-19 (2010) §19; Inter-American Court: *Advisory Opinion OC-16/99*, (1999) §§119-120; *Rosendo Cantú et al v Mexico*, (2010) §§184-185; *Annual Report of the Inter-American Commission*, (2009) Chapter V §179.

532 HRC General Comment 32, §10; See *Golder v United Kingdom* (4451/70), European Court (1975).

533 See, CERD Concluding Observations: USA, UN Doc.

CERD/C/USA/CO/6 (2008) §22; Inter-American Commission *Report on Terrorism and Human Rights*, (2002) Section F, §341.

534 HRC General Comment 32, §10; HRC: *Currie v Jamaica*, UN Doc. CCPR/C/50/D/377/1989 (1994) §§12.2, 13.2-13.4, *Shaw v Jamaica*, UN Doc. CCPR/C/62/D/704/1996 (1998) §7.6, *Henry v Trinidad and Tobago*, UN Doc. CCPR/C/64/D/752/1997 (1998) §7.6.

535 Inter-American Commission *Report on Terrorism and Human Rights*, (2002) Section F, §§341-343; See *Madoui v Algeria*, HRC, UN Doc. CCPR/C/94/D/1495/2006 (2008) §§7.7, 8; WGEID *General Comment 11 on right to recognition before the law in the context of enforced disappearances*.

536 HRC General Comment 32, §9; Special Rapporteur on human rights and counter-terrorism, UN Doc. A/63/223 (2008) §14; *Good v Republic of Botswana* (313/05), African Commission (2010) §163; See *Yula v Belgium* (45413/07), European Court (2009) §§28-40.

537 CEDAW Committee *General Recommendation 21*, §8.

538 UN General Assembly resolution 65/228, §12.

Among the obstacles to access to courts that are prohibited under international law are amnesties, pardons or immunities that prevent prosecution or punishment for war crimes, genocide, crimes against humanity and other crimes under international law. Statutes of limitation (prescription) for such crimes are also inconsistent with international standards.<sup>a 539</sup>

<sup>a</sup> Principles 4-6 and 18-19 of the Basic Principles on Reparation, Section C(d) of the Principles on Fair Trial in Africa, Principles VII and XIV of the CoE Guidelines on eradicating impunity; See Articles 2 and 6-7 of the Convention against Torture, Articles 6 and 8-10 of the Convention on Enforced Disappearance, Articles 1-4 of the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity, Article 4 of the Genocide Convention, Article VII of the Inter-American Convention on Disappearance, European Convention on the Non-Applicability of Statutory Limitation to Crimes against Humanity and War Crimes, Article 29 of the ICC Statute, Article 49 of the First Geneva Convention, Article 50 of the Second Geneva Convention, Article 131 of the Third Geneva Convention, Article 146 of the Fourth Geneva Convention and Article 85 of Protocol I to the Geneva Conventions

<sup>539</sup> See: HRC General Comment 31, §18 and General Comment 20, §15; CAT General Comment 3, §§40-42 and General Comment 2, §5; Principles 19 and 22-29 of the Updated Impunity Principles; *Velásquez-Rodríguez v Honduras*, Inter-American Court (1988) §§172-176; Inter-American Commission: *Consuelo Herrera et al v Argentina* (10.147 et al) (1993) §§42-50, *Santos Mendoza et al v Uruguay* (10.029 et al) (1992) §§50-51; European Court: *Yaman v Turkey* (32446/96), (2004) §55, *Yeter v Turkey* (33750/03), (2009)

§70; *Prosecutor v Morris Kallon and Brima Bazzy Kamara* (SCSL-2004-15-AR72(E) AR16-AR72(E)) Special Court for Sierra Leone Appeals Chamber, Decision on challenge to jurisdiction: Lomé Accord Amnesty, document SCSL-04-15-60, (13 March 2004) §73 (from link Attachment No. 2); See also European Court: *Assenov et al v Bulgaria* (24760/94), (1998) §102, *Kart v Turkey* (8917/05) Grand Chamber (2009) §111.

# CHAPTER 12

## RIGHT TO TRIAL BY A COMPETENT, INDEPENDENT AND IMPARTIAL TRIBUNAL ESTABLISHED BY LAW

A fundamental principle and prerequisite of a fair trial is that the tribunal charged with making decisions in a case must be established by law and be competent, independent and impartial.

### 12.1 Right to trial by a competent, independent and impartial tribunal

#### 12.2 Right to be heard by a tribunal established by law

#### 12.3 Right to be heard by a competent tribunal

#### 12.4 Right to be heard by an independent tribunal

##### 12.4.1 Separation of powers

##### 12.4.2 Appointment and conditions of employment of judges

##### 12.4.3 Assignment of cases

#### 12.5 Right to be heard by an impartial tribunal

##### 12.5.1 Challenges to the impartiality of a tribunal

## 12.1 RIGHT TO TRIAL BY A COMPETENT, INDEPENDENT AND IMPARTIAL TRIBUNAL

Everyone charged with a criminal offence has the right to a trial by a competent, independent and impartial tribunal established by law.<sup>a</sup>

This right requires states to establish and maintain independent, impartial courts. States must ensure adequate human and financial resources for the judicial system to function effectively throughout the country. They must also ensure continuing legal education for judges, prosecutors and other personnel and must address any corruption or discrimination within the administration of justice.<sup>b 540</sup> (See **Chapter 11** on equality before the courts.)

The right to trial by an independent and impartial tribunal established by law is an absolute right that is not subject to exception. It is a general principle of customary international law, binding on all states (including those that have not ratified international treaties) at all times, including during states of emergency and armed conflict.<sup>c 541</sup> (See **Chapter 31**, Fair trial rights during states of emergency, and **Chapter 32**, Fair trial rights in armed conflict.)

### ICCPR, Article 14(1)

“...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...”

<sup>a</sup> Article 10 of the Universal Declaration, Article 14(1) of the ICCPR, Article 40(2)(b)(iii) of the Convention on the Rights of the Child, Article 18(1) of the Migrant Workers Convention, Articles 7(1) and 26 of the African Charter, Articles 8(1) and 27(2) of the American Convention, Articles 12 and 13 of the Arab Charter, Article 6(1) of the European Convention, Basic Principles on the Independence of the Judiciary, Section A(1) of the Principles on Fair Trial in Africa, Article XXVI of the American Declaration

<sup>b</sup> Article 26 of the African Charter, Principles 6 and 7 of the Basic Principles on the Independence of the Judiciary; See Article 13 of the Arab Charter

<sup>c</sup> Article 4 of the Arab Charter; See Article 27(2) of the Inter-American Convention

<sup>540</sup> Principles 4(14)-(15), 5 and 6(3)-(4) of the *Bangalore Principles*; HRC Concluding Observations: *Bosnia and Herzegovina*, UN Doc. CCPR/C/BIH/CO/1 (2006) §13, *Central African Republic*, UN Doc. CCPR/C/CAF/CO/2 (2006) §16, *Democratic Republic of the Congo*, UN Doc. CCPR/C/COD/CO/3 (2006) §21; Special Rapporteur on the independence of judges and lawyers, UN Docs. *A/HRC/14/26* (2010) §§18-24, 99(e), *A/HRC/17/30* (2011) §§56-58.

<sup>541</sup> HRC General Comment 32, §19, General Comment 29, §16; UN

General Assembly resolutions 67/166, preamble §11 and 65/213, preamble §9; *Civil Liberties Organisation, Legal Defence Centre, Legal Defence and Assistance Project v Nigeria* (218/98), African Commission (2001) §27; *González del Río v Peru*, HRC, UN Doc. CCPR/C/46/D/263/1987 (1992) §5.1; *Reverón Trujillo v Venezuela*, Inter-American Court (2009) §68; See, Inter-American Court Advisory Opinions: *OC-8/87* (1987) §§29-30, *OC-9/87* (1987) §20; *ICRC Study on Customary International Law, Volume 1*, Rule 100, pp352-356.



The Human Rights Committee has clarified that only a court of law may try a person for a criminal offence. Any criminal conviction by a body that is not an independent and impartial tribunal established by law is incompatible with the requirements of Article 14 of the ICCPR.<sup>542</sup>

The right to trial before a competent, independent and impartial tribunal established by law requires that “justice must not only be done, it must also be seen to be done”. In deciding whether there is a legitimate reason to fear that a particular court lacks independence or impartiality, what is decisive is whether doubts raised can be objectively justified.<sup>543</sup>

The standards refer to “tribunals”: bodies which exercise judicial functions, established by law to determine matters within their competence in accordance with the rules of law and prescribed proceedings.<sup>544</sup> They include courts.<sup>545</sup> (See **Definitions of terms.**)

Fair trial guarantees, including the right to trial before a competent, independent and impartial court, apply to all courts: ordinary, military and customary law or religious courts recognized by a state in its legal order.<sup>a</sup>

The Human Rights Committee has stated that the judgments of customary law and religious courts should not be binding unless:

- the proceedings relate to minor civil or criminal matters;
- the proceedings meet the basic requirements of fair trial and other relevant human rights guarantees set out in the ICCPR;
- the judgments are validated by state courts in light of the guarantees set out in the ICCPR; and
- the judgments can be challenged by the parties in a procedure which meets the requirements of Article 14 of the ICCPR.<sup>546</sup>

The Principles on Fair Trial in Africa also require such courts to respect international fair trial standards, but permit appeals before a higher traditional court, administrative authority or a judicial tribunal.<sup>b</sup>

(See **Chapter 29**, Special, specialized and military courts.)

International standards do not confer the right to a jury trial, but all trials – with or without a jury – must respect fair trial guarantees.<sup>547</sup>

## 12.2 RIGHT TO BE HEARD BY A TRIBUNAL ESTABLISHED BY LAW

Any tribunal hearing a case must have been established by law.<sup>c</sup> To meet this requirement a tribunal may have been established by the constitution or other legislation passed by the law-making authority, or created by common law.

The aim of this requirement in criminal cases is to ensure that trials are not conducted by special tribunals which do not use duly established procedures and displace the jurisdiction belonging to ordinary courts, or by tribunals set up to decide a particular individual case.<sup>d</sup> <sup>548</sup>

<sup>a</sup> See Section Q of the Principles on Fair Trial in Africa

<sup>b</sup> Section Q of the Principles on Fair Trial in Africa

<sup>c</sup> Article 14(1) of the ICCPR, Article 8(1) of the American Convention, Article 6(1) of the European Convention, Section A(4)(b) of the Principles on Fair Trial in Africa, Article XXVI of the American Declaration

<sup>d</sup> See Principle 5 of the Basic Principles on the Independence of the Judiciary

<sup>542</sup> HRC General Comment 32, §18.

<sup>543</sup> See European Court: *Incal v Turkey* (22678/93), (1998) §71, *Borgers v Belgium* (12005/86), (1991) §§24-29, *Kress v France* (39594/98), Grand Chamber (2001) §§81-87; *Delcourt v Belgium* (26889/65), (1970) §31.

<sup>544</sup> See *Le Compte, Van Leuven and De Meyere v Belgium* (6878/75 and 7238/75), European Court (1981) §55; See also HRC General Comment 32, §18.

<sup>545</sup> See M. Nowak: *U.N. Covenant on Civil and Political Rights: CCPR Commentary, 2nd revised edition*, Engel, 2005, pp319-356.

<sup>546</sup> HRC General Comment 32, §24.

<sup>547</sup> *Wilson v Australia*, HRC, UN Doc. CCPR/C/80/D/1239/2004 (2004) §4.4; See *Taxquet v Belgium* (926/05), European Court Grand Chamber (2010) §§83-84.

<sup>548</sup> *Apitz Barbera et al v Venezuela*, Inter-American Court (2008) §50.

The European Court has clarified that a court established by law requires those deciding the case to meet existing legal requirements. When two lay judges who sat on a case had already exceeded the number of days of service permitted by law, there was no proof of their appointment as lay judges and the authorities failed to present any legal grounds for their participation, the tribunal was not one “established by law”.<sup>549</sup>

## 12.3 RIGHT TO BE HEARD BY A COMPETENT TRIBUNAL

The right to a hearing before a competent tribunal requires that the tribunal has jurisdiction to hear the case.

A tribunal which is competent in law to hear a case has been given that power by law: it has jurisdiction over the subject matter and the person, and the trial is being conducted within any applicable time limit prescribed by law.<sup>550</sup> The issue of whether a court has jurisdiction over a case must be decided by a judicial body, in accordance with the law.<sup>a</sup>

<sup>a</sup> Section A(4)(b)-(d) of the Principles on Fair Trial in Africa

The Inter-American Court held that the transfer of jurisdiction over civilians charged with treason from civilian to military courts violated the right to trial by a competent, independent and impartial tribunal previously established by law. It underscored that states should not create tribunals that do not use duly established procedures to displace the jurisdiction of the ordinary courts.<sup>551</sup> (See **Chapter 29**, Special, specialized and military courts.)

## 12.4 RIGHT TO BE HEARD BY AN INDEPENDENT TRIBUNAL

The independence of the tribunal is essential to a fair trial and a prerequisite of the rule of law.<sup>552</sup> The courts as institutions and each judge must be independent. Decision-makers in a given case must be free to decide matters before them independently and impartially, on the basis of the facts and in accordance with the law, without any interference, pressures or improper influence from any branch of government or elsewhere.<sup>b</sup> <sup>553</sup> It also means that the people appointed as judges must be selected primarily on the basis of their legal expertise and integrity.<sup>c</sup>

<sup>b</sup> Principles 3-4 of the Basic Principles on the Independence of the Judiciary, Section A(4)(c) and (f) of the Principles on Fair Trial in Africa

<sup>c</sup> Principle 10 of the Basic Principles on the Independence of the Judiciary, Section A(4)(i) of the Principles on Fair Trial in Africa

<sup>d</sup> Basic Principles on the Independence of the Judiciary, Section A(4) of the Principles on Fair Trial in Africa

Factors that influence the independence of the judiciary have been articulated by the Human Rights Committee, the Special Rapporteur on the independence of judges and lawyers, the African Commission, the Committee of Ministers of the Council of Europe and the European and Inter-American Courts. They are set out, to some extent, in non-treaty standards including the Basic Principles on the Independence of the Judiciary, the Bangalore Principles, and the Principles on Fair Trial in Africa.<sup>554</sup> They include the separation of powers, which protects the judiciary from undue external influence or interference, and practical safeguards of judges' independence such as security of tenure and adequate salaries.<sup>d</sup> These requirements and safeguards protect the right to a fair trial and the integrity of the justice system itself.<sup>555</sup>

### Basic Principles on the Independence of the Judiciary, Principle 5

“Everyone shall have the right to be tried by ordinary courts or tribunals using established legal procedures. Tribunals that do not use the duly established procedures of the legal process shall not be created to displace the jurisdiction belonging to the ordinary courts or judicial tribunals.”

<sup>549</sup> *Posokhov v Russia* (63486/00), European Court (2003) §§37-42.

<sup>550</sup> *Zimbabwe Lawyers for Human Rights and Associated Newspapers of Zimbabwe v Republic of Zimbabwe* (248/2003), African Commission §172; *Barreto Leiva v Venezuela*, Inter-American Court (2009) §76.

<sup>551</sup> *Castillo Petruzzi et al v Peru*, Inter-American Court (1999) §§119, 128-129; See *WGAD Opinion 39/2005* (Cambodia), UN Doc. A/HRC/4/40/Add.1 (2005) §§21-24.

<sup>552</sup> Principle 1 of the *Bangalore Principles*.

<sup>553</sup> Principle 1 of the *Bangalore Principles*; *Reverón Trujillo v*

*Venezuela*, Inter-American Court (2009) §146.

<sup>554</sup> Other relevant standards (not cited in this Manual) include: the *Commonwealth Principles on the Accountability of and the Relationship Between the Three Branches of Government*, endorsed by the Commonwealth Heads of Government; *Minimum Standards of Judicial Independence*, adopted by the International Bar Association; and the *Beijing Statement of Principles of the Independence of the Judiciary in the LAWASIA Region* adopted by 19 Chief Justices of the Asia-Pacific Region.

<sup>555</sup> See CoE *CM/Rec(2010)12*, preamble §6.

### 12.4.1 SEPARATION OF POWERS

The independence of tribunals is rooted in the separation of powers in a democratic society, in which different organs of the state have exclusive and specific responsibilities. In the words of the African Commission: “The main *raison d’être* of the principle of separation of powers is to ensure that no organ of government becomes too powerful and abuses its power. The separation of powers between the three organs of government – executive, legislature and judiciary – ensures checks and balances against excesses from any of them.”<sup>556</sup>

The judiciary as a whole and each judge must be free from interference either by officials or private individuals.<sup>557</sup> The independence of the judiciary must be guaranteed by the state, enshrined in law and respected by all governmental institutions. States must ensure that there are structural and functional safeguards against political or other interference in the administration of justice.<sup>a 558</sup>

The judiciary as an institution, and judges as individuals, must have the exclusive power to decide cases before them.<sup>559</sup> This means that judicial decisions may not be changed by a non-judicial authority to the detriment of one of the parties, except for issues relating to mitigation or commutation of sentences and pardons.<sup>b 560</sup>

The independence of the judiciary also requires that officials with judicial functions are completely autonomous from those responsible for prosecutions.<sup>c</sup>

Concern has been raised about direct interference with the independence of the judiciary as an institution and with the independence of individual judges.

The African Commission ruled that two decrees issued by the Nigerian Government violated the African Charter; they removed the jurisdiction of the courts over challenges to government decrees and actions. The Commission stated: “An attack of this sort on the jurisdiction of the courts is especially invidious, because while it is a violation of human rights in itself, it permits other violations of rights to go unredressed.”<sup>561</sup>

The Inter-American Court concluded that the mere possibility that a decision of a military court in Mexico could be “revised” by federal authorities meant that the courts did not satisfy the requirement of independent tribunals.<sup>562</sup>

#### Basic Principles on the Independence of the Judiciary, Principle 2

“The judiciary shall decide matters before them impartially, on the basis of facts and in accordance with the law, without any restrictions, improper influences, inducements, pressures, threats or interferences, direct or indirect, from any quarter or for any reason.”

#### Basic Principles on the Independence of the Judiciary, Principles 3 and 4

“3. The judiciary shall have jurisdiction over all issues of a judicial nature and shall have exclusive authority to decide whether an issue submitted for its decision is within its competence as defined by law.  
4. There shall not be any inappropriate or unwarranted interference with the judicial process, nor shall judicial decisions by the courts be subject to revision. This principle is without prejudice to judicial review or to mitigation or commutation by competent authorities of sentences imposed by the judiciary, in accordance with the law.”

<sup>a</sup> Principle 1 of the Basic Principles on the Independence of the Judiciary, Section A(4)(a), (f)-(g) of the Principles on Fair Trial in Africa

<sup>b</sup> Principles 3 and 4 of the Basic Principles on the Independence of the Judiciary, Section A(4)(f) of the Principles on Fair Trial in Africa

<sup>c</sup> Guideline 10 of the Guidelines on the Role of Prosecutors, Section F(f) of the Principles on Fair Trial in Africa

<sup>556</sup> *Lawyers for Human Rights v Swaziland* (251/2002), African Commission (2005) §56.

<sup>557</sup> See *Apitz Barbera et al v Venezuela*, Inter-American Court (2008) §55.

<sup>558</sup> CoE CM/Rec(2010)12, §§7, 13.

<sup>559</sup> HRC General Comment 32, §19; *Apitz Barbera et al v*

*Venezuela*, Inter-American Court (2008) §55.

<sup>560</sup> CoE CM/Rec(2010)12, §§16-17.

<sup>561</sup> *Civil Liberties Organisation v Nigeria* (129/94), African Commission (1995) §14; See *Lawyers for Human Rights v Swaziland* (251/2002), African Commission (2005) §§53-58.

<sup>562</sup> *Radilla-Pacheco v Mexico*, Inter-American Court (2009) §281.

The Committee against Torture raised concern about the power of the Attorney General to influence judicial rulings in Burundi and his decision to overrule a Supreme Court order to release on bail seven people detained for allegedly attempting a coup.<sup>563</sup>

The African Commission concluded that the trial of Ken Saro-Wiwa and his co-accused before a special tribunal whose members were chosen by the executive violated the independence of the courts, regardless of the qualifications of the individuals chosen.<sup>564</sup>

The Special Rapporteur on the independence of judges and lawyers criticized the arrest of a Venezuelan judge who had ordered the conditional release of a detainee. The detainee had spent more than two years in pre-trial detention and his detention had been declared arbitrary by the UN Working Group on Arbitrary Detention.<sup>565</sup>

The failure of judges to take action in cases of alleged human rights violations and low acquittal rates in criminal cases may also be evidence of a lack of independence of judges.<sup>566</sup>

In some countries, the composition of the judiciary fails to satisfy the requirements of the separation of powers.<sup>567</sup> (See also **Chapter 29**, Special, specialized and military courts.)

A number of UN Special Rapporteurs expressed concern that the US Military Commissions operating at Guantánamo Bay were not sufficiently independent of the executive. Among other things, the US Department of Defense and ultimately the President had authority over the body responsible for appointing the judges, who could be removed by the appointing body.<sup>568</sup>

In determining whether or not a tribunal is independent, the European Court has examined whether the decision-makers were subject to orders by branches of the executive.

The European Court considered the State Security Court in Turkey, which included one military judge on each panel, not to be independent in the context of criminal proceedings against a civilian. The military judges had the same professional training as civilian judges and enjoyed many of the same constitutional guarantees of independence. However, they remained serving members of the military, subject to orders of the executive and to military discipline and assessments, and they were appointed by the army and administrative authorities for limited but renewable four-year terms.<sup>569</sup>

Concern has also been raised about the independence of prosecutors. Such concerns have included: police acting as prosecutors;<sup>570</sup> prosecutors supervising pre-trial detention, investigations and trial proceedings; and laws empowering prosecutors to prevent implementation of court decisions or remove a judge from a case.<sup>571</sup>

<sup>563</sup> CAT Concluding Observations: *Burundi*, UN Doc. CAT/C/BDI/CO/1 (2006) §12.

<sup>564</sup> African Commission: *International Pen, Constitutional Rights Project, Interrights on behalf of Ken Saro-Wiwa Jr. and Civil Liberties Organisation v Nigeria* (137/94, 139/94, 154/96 and 161/97), (1998) §§86 and 94-95; See *Media Rights Agenda v Nigeria* (224/98), (2000) §66; See also *Law Office of Ghazi Suleiman v Sudan* (222/98 and 229/99), African Commission (2003) §§63-66.

<sup>565</sup> Special Rapporteur on the independence of judges and lawyers, UN Doc. *A/HRC/14/26* (2010) fn 35 and §68; See also CAT Concluding Observations: *Ethiopia*, UN Doc. CAT/C/ETH/CO/1 (2010) §22.

<sup>566</sup> See HRC Concluding Observations: *Brazil*, UN Doc. CCPR/C/BRA/CO/2 (2005) §7, *Russian Federation*, UN Doc. CCPR/C/RUS/CO/6 (2009) §21; CAT Concluding Observations: *Guatemala*, UN Doc. *A/56/44* (2000) §72(b); Special Rapporteur on human rights and counter-terrorism: *Tunisia*, UN Doc. A/HRC/16/51/Add.2 (2010) §34.

<sup>567</sup> *Palamara-Iribarne v Chile*, Inter-American Court (2005) §155.

<sup>568</sup> UN Mechanisms Joint Report on detainees at Guantánamo Bay, UN Doc. *E/CN.4/2006/120* (2006) §§30-33; See Special Rapporteur on the independence of judges and lawyers, UN Doc. *E/CN.4/2005/60* (2005) §§17-19; See also HRC Concluding Observations: *Jordan*, UN Doc. CCPR/C/JOR/CO/4 (2010) §12.

<sup>569</sup> *Incal v Turkey* (22678/93), European Court (1998) §§65-73; See *Öcalan v Turkey* (46221/99), European Court Grand Chamber (2005) §§112-118.

<sup>570</sup> CAT Concluding Observations: *Zambia*, UN Doc. CAT/C/ZMB/CO/2 (2008) §9.

<sup>571</sup> CAT Concluding Observations: *Kazakhstan*, UN Doc. *A/56/44* (2001) §128(c), *Ukraine*, UN Doc. CAT/C/UKR/CO/5 (2007) §10, *Tajikistan*, UN Doc. CAT/C/TJK/CO/1 (2006) §10, *Benin*, UN Doc. CAT/C/BEN/CO/2 (2008) §13; WGAD: *China*, UN Doc. *E/CN.4/2005/6/Add.4* (2004) §33-34; See also Special Rapporteur on the independence of judges and lawyers, UN Doc. *A/HRC/20/19* (2012) §§40, 100.

## 12.4.2. APPOINTMENT AND CONDITIONS OF EMPLOYMENT OF JUDGES

In order to safeguard the independence of the judiciary and ensure that judges are competent, international standards require people to be selected as judges on the basis of their legal training, experience and integrity.<sup>a 572</sup> Likewise, decisions on the promotion of judges should be based on objective factors, particularly ability, experience and integrity.<sup>b</sup> To combat discrimination, steps should be taken to ensure the appointment of qualified women and members of minority communities.<sup>c 573</sup>

The body responsible for appointment, promotion and discipline of judges should be independent of the executive in both its composition and its work.<sup>574</sup> It should have a plural and balanced composition, with judges constituting the majority. Selection and appointment procedures should be transparent.<sup>d</sup>

The African Commission considered that the body in Cameroon responsible for the appointment, promotion, transfer and discipline of judges, which was chaired by the President and vice-chaired by the Minister of Justice, was not consistent with the doctrine of separation of powers. The fact that members of the legislature and judiciary as well as an “independent personality” also sat on this body was not sufficient to guarantee the independence of the courts under Article 26 of the African Charter.<sup>575</sup>

Where judges are elected rather than appointed on the basis of merit, concerns have been raised about the independence and impartiality of the judiciary and about its politicization. For example, the Human Rights Committee and the Special Rapporteur on extrajudicial executions expressed concern about the impact that the election of judges in some US states may have on fair trial rights, including in death penalty cases. The Human Rights Committee recommended a system of appointment of judges on merit by an independent body. It also expressed concern that “in many rural areas [in the USA] justice is administered by unqualified and untrained persons”.<sup>576</sup>

International standards on conditions of employment for judges require states to provide sufficient resources to ensure adequate salaries and pensions for judges to safeguard their independence and protect them from conflicts of interest and corruption. Judges’ terms of office, conditions of service, remuneration, pensions and retirement age are to be secured by law.<sup>e 577</sup>

### Basic Principles on the Independence of the Judiciary, Principle 10

“Persons selected for judicial office shall be individuals of integrity and ability with appropriate training or qualifications in law. Any method of judicial selection shall safeguard against judicial appointments for improper motives. In the selection of judges, there shall be no discrimination against a person on the grounds of race, colour, sex, religion, political or other opinion, national or social origin, property, birth or status, except that a requirement, that a candidate for judicial office must be a national of the country concerned, shall not be considered discriminatory.”

<sup>a</sup> Principle 10 of the Basic Principles on the Independence of the Judiciary, Section A(4)(i)-(k) of the Principles on Fair Trial in Africa, Article 12 of the Rwanda Statute, Article 13 of the Yugoslavia Statute

<sup>b</sup> Principle 13 of the Basic Principles on the Independence of the Judiciary, Section A(4)(o) of the Principles on Fair Trial in Africa

<sup>c</sup> Article 8 of the Protocol to the African Charter on the Rights of Women

<sup>d</sup> Section A(4)(h) of the Principles on Fair Trial in Africa

<sup>e</sup> Principles 7 and 11-13 of the Basic Principles on the Independence of the Judiciary, Sections A(4)(l)-(m) and B(a)-(c) of the Principles on Fair Trial in Africa; See Article 12 of the Arab Charter

<sup>572</sup> CoE, *CM/Rec(2010)12*, §§44-45; Inter-American Court: *Reverón Trujillo v Venezuela* (2009), §§71-74, *Apitz Barbera et al v Venezuela*, (2008) §43.

<sup>573</sup> Special Rapporteur on independence of judges and lawyers: UN Doc. *A/66/289* (2011) §§22-33, 92; HRC Concluding Observations: *United Kingdom* UN Doc. *CCPR/CO/73/UK* (2001) §15, *France*, UN Doc. *CCPR/C/FRA/CO/4* (2008) §26; CAT Concluding Observations: *Bahrain*, UN Doc. *CAT/C/CR/34/BHR* (2005) §7(h), *Sudan*, UN Doc. *CCPR/C/79/Add.85* (1997) §21; CERD General Recommendation *XXXI*, §§1(g), 5(d); See CERD Concluding Observations: *Guatemala*, UN Doc. *CERD/C/GTM/CO/12-13* (2010) §8, *Colombia*, UN Doc. *CERD/C/304/add.76* (1999) §13.

<sup>574</sup> Special Rapporteur on the independence of judges and lawyers, UN Doc. *A/HRC/11/41* (2009) §§23-34, 97; HRC Concluding Observations: *Azerbaijan* UN Doc. *CCPR/C/AZE/CO/3* (2009) §12, *Honduras*, UN Doc. *CCPR/C/HND/CO/1* (2006) §16; See also HRC Concluding Observations: *Kosovo (Serbia)*, UN Doc. *CCPR/C/UNK/CO/1* (2006) §20; CoE *CM/Rec(2010)12*, §§46-48; *Galstyan v Armenia* (26986/03) European Court (2008) §§61-62.

<sup>575</sup> *Kevin Mgwanga Gunme et al v Cameroon* (266/03), African Commission (2009) §§209-212; See African Commission Concluding Observations: *Democratic Republic of Congo*, (2003) §§20, 26.

<sup>576</sup> HRC Concluding Observations: *USA*, *A/50/40* (CCPR/C/79/Add.50), (1995) §§288, 301; Special Rapporteur on extrajudicial executions: *USA*, UN Doc. *A/HRC/11/2/Add.5* (2009) §§10-12, 74; See CAT Concluding Observations: *Serbia*, UN Doc. *CAT/C/SRB/CO/1* (2008) §8; Special Rapporteur on the independence of judges and lawyers, UN Doc. *A/HRC/11/41* (2009) §25.

<sup>577</sup> *HRC General Comment 32* §19; Special Rapporteur on the independence of judges and lawyers, UN Docs. *A/HRC/11/41* (2009) §§73, 76, *A/HRC/14/26* (2010) §§40-68; CoE *CM/Rec(2010)12*, §§49-55; HRC Concluding Observations: *Georgia*, UN Doc. *CCPR/C/GEO/CO/3* (2007) §14, *Kenya*, UN Doc. *CCPR/CO/83/KEN* (2005) §20; CAT Concluding Observations: *Yemen*, UN Doc. *CAT/C/YEM/CO/2/Rev.1* (2010) §17; Inter-American Court: *Apitz Barbera et al v Venezuela* (2008) §43; *Chocrón Chocrón v Venezuela* (2011) §98.

The Human Rights Committee expressed concern that many judges in Sudan had not been selected primarily on the basis of their legal qualifications, that very few non-Muslims or women occupied judicial positions and that judges could be subjected to pressure by a supervisory authority dominated by the government.<sup>578</sup>

Judges should have security of tenure, to insulate them from concern that their post will be affected by political reaction to their decisions. Whether appointed or elected, judges should have guaranteed tenure until they reach the age of mandatory retirement or if they have a term of office, until its expiry.<sup>579</sup> They may only be suspended or removed from office if they are incapable of carrying out their duties, or for conduct incompatible with their office.<sup>a</sup>

<sup>a</sup> Principles 11, 12 and 18 of the Basic Principles on the Independence of the Judiciary, Section A(4)(l) - (p) of the Principles on Fair Trial in Africa

The Human Rights Committee and the Committee against Torture have raised concern about appointments of judges for specific terms, renewable following review by the executive. In Moldova, for example, judges were initially appointed for five years, and in Uzbekistan, the executive reviewed judges' appointments every five years.<sup>580</sup>

Judges may be subjected to disciplinary procedures and sanctions, including suspension and removal, for misconduct. Complaints made against judges in their judicial capacity should be processed expeditiously and fairly in the course of fair hearings by independent, impartial bodies and subject to independent judicial review; results of disciplinary measures should be made public.<sup>581</sup> Judges should enjoy personal immunity from civil suits for damages for improper acts or omissions in the exercise of their judicial functions, although the state may be liable to pay compensation.<sup>b</sup> <sup>582</sup>

<sup>b</sup> Principles 16, 17, 19 and 20 of the Basic Principles on the Independence of the Judiciary, Sections A(4)(n) and (p)-(r) of the Principles on Fair Trial in Africa

The Human Rights Committee expressed concern that judges of the Constitutional and Supreme Courts in Belarus could be dismissed by the President of the Republic without any safeguards. It noted an allegation that the President had dismissed two judges for failing to collect a fine imposed by the executive.<sup>583</sup>

<sup>c</sup> Principle 14 of the Basic Principles on the Independence of the Judiciary

### 12.4.3 ASSIGNMENT OF CASES

The judicial administration should assign cases to judges within the court to which they belong in accordance with objective criteria.<sup>c</sup> <sup>584</sup>

Where more than one court has possible jurisdiction over a case, decisions about which court should hear the case should be made by the judiciary based on objective factors.

## 12.5 RIGHT TO BE HEARD BY AN IMPARTIAL TRIBUNAL

The tribunal must be impartial. The obligation of impartiality, which is essential to the proper exercise of judicial functions, demands that each of the decision-makers in a criminal case, whether they be professional or lay judges or members of a jury, be unbiased and be seen to be unbiased.<sup>585</sup>

<sup>578</sup> HRC Concluding Observations: *Sudan*, UN Doc. CCPR/C/79/Add.85 (1997) §21.

<sup>579</sup> CoE *CM/Rec(2010)12*, §§49-52; Inter-American Court: *Apitz Barbera et al v Venezuela* (2008) §§84, 43; *Chocrón Chocrón v Venezuela* (2011) §99.

<sup>580</sup> HRC Concluding Observations: *Moldova*, UN Doc. CCPR/C/MDA/CO/2 (2009) §24; *Uzbekistan*, UN Doc. CCPR/C/UZB/CO/3 (2010) §16; CAT Concluding Observations: *Kyrgyzstan*, UN Doc. *A/55/44* (2000) §74(d); *Azerbaijan*, UN Doc. *A/55/44* (2000) §§68(d), 69(d).

<sup>581</sup> HRC General Comment 32, §20; Special Rapporteur on the independence of judges and lawyers, UN Doc. *A/HRC/11/41* (2009) §§57-63, 98; CoE *CM/Rec(2010)12*, §61; Inter-American Court: *Apitz Barbera et al v Venezuela*, (2008) §44, *Chocrón Chocrón v Venezuela*, (2011) §§104-105, 120.

<sup>582</sup> CAT Concluding Observations: *Armenia*, UN Doc. *A/56/44* (2001) §37(c).

<sup>583</sup> HRC Concluding Observations: *Belarus*, UN Doc. CCPR/C/79/Add.86 (1997) §13.

<sup>584</sup> CoE *CM/Rec(2010)12*, §24; Special Rapporteur on the independence of judges and lawyers: UN Doc. *A/HRC/11/41* (2009) §46, *A/HRC/11/41/Add.2* (Russia) (2009) §61; CERD Concluding Observations: *Kazakhstan*, UN Doc. CERD/C/65/CO/3 (2004) §18.

<sup>585</sup> HRC: *Karttunen v Finland*, UN Doc. CCPR/C/46/D/387/1989 (1992) §7.2-7.3, *Collins v Jamaica*, UN Doc. CCPR/C/43/D/240/1987 (1991) §8.4; CoE *CM/Rec(2010)12*, §60; European Court: *Piersack v Belgium* (8692/79), (1982) §30; *Kyprianou v Cyprus*, (73797/01) Grand Chamber (2005) §§118-121.

Actual impartiality and the appearance of impartiality are both fundamental for maintaining respect for the administration of justice.<sup>586</sup>

The right to an impartial tribunal requires that judges and jurors have no interest or stake in the particular case, do not have pre-formed opinions about it, and do not act in ways that promote the interests of one of the parties.<sup>587</sup>

A judge or juror should not consider a case if she or he is unable to decide the matter impartially or if this may appear to be the case. For example, if the judge has personal knowledge of a disputed fact in the case, has been a lawyer or a witness in the matter, has an interest in the outcome or a bias towards a party in the case, the judge should normally disqualify him or herself.<sup>a 588</sup> Courts also have an obligation to ensure the impartiality of jurors in trial by jury.<sup>589</sup>

The judiciary is required to ensure that proceedings are conducted fairly, and that the rights of all parties are respected, without discrimination.<sup>b 590</sup>

A range of human rights bodies have recommended training and sensitization of judges, prosecutors and lawyers on the rights of women and minorities in order to address discriminatory stereotypes and to ensure respect for the right to equality before the law and courts. (See **Chapter 11**, Right to equality before the law and courts.)

Human rights bodies have recommended that state officials, including law enforcement officers, serving members of the military, judges and prosecutors be excluded from serving on juries in order to preserve the independence and impartiality of the proceedings.<sup>591</sup>

Decisions about facts must be made impartially, solely on the evidence, and the facts must be applied to the applicable laws. There must be no interference, restriction, inducements, pressure or threats from any quarter.<sup>c 592</sup>

Judges should conduct themselves in a manner which preserves the impartiality and independence of the judiciary, as well as the dignity of their office.<sup>d</sup> Judges should not make any comment that might reasonably be expected to affect the outcome of a proceeding. (See **Chapter 15**, The presumption of innocence.)

### 12.5.1 CHALLENGES TO THE IMPARTIALITY OF A TRIBUNAL

The right to challenge the independence or impartiality of a court, judge or members of a jury is necessary to ensure respect for the right to an independent and impartial tribunal. States must ensure that a mechanism exists for such challenges.<sup>e 593</sup>

The Inter-American Court advised that challenges to the impartiality of a judge should be viewed not as putting the moral rectitude of a judge on trial but rather as a mechanism to build credibility and trust in the justice system.<sup>594</sup>

<sup>a</sup> Section A(5)(d) of the Principles on Fair Trial in Africa, Article 15 of the Rwanda Rules, Article 15 of the Yugoslavia Rules

<sup>b</sup> Principle 6 of the Basic Principles on the Independence of the Judiciary

<sup>c</sup> Principle 2 of the Basic Principles on the Independence of the Judiciary, Sections A(2)(h) and 5(a) and (e) of the Principles on Fair Trial in Africa

<sup>d</sup> Principle 8 of the Basic Principles on the Independence of the Judiciary

<sup>e</sup> See Section A(5)(b) of the Principles on Fair Trial in Africa

<sup>586</sup> HRC General Comment 32, §21; European Court: *Piersack v Belgium* (8692/79), (1982) §§30-32, *Sander v United Kingdom* (34129/96) (2000) §22, *Gaistyan v Armenia* (26986/03) European Court (2007) §79; *Apitz Barbera et al v Venezuela*, Inter-American Court (2008) §56; *Prosecutor v Anto Furundžija* (IT-95-17/1-A) Appeals Chamber of the ICTY (July 2000) §§189-190.

<sup>587</sup> Principle 2 of the *Bangalore Principles*; *Karttunen v Finland*, HRC, UN Doc. CCPR/C/46/D/387/1989 (1992) §7.2.

<sup>588</sup> Principles 2.5 and 4.4 of the *Bangalore Principles*; CoE *CM/Rec(2010)12* §§59-60; *Palamara-Iribarne v Chile*, Inter-American Court (2005) §§145-147, 158-161.

<sup>589</sup> *Andrews v United States* (11.139), Inter-American Commission (1996) §§147-172, 183, 187; *Hanif and Khan v United Kingdom*

(52999/08, 61779/08) European Court (2011) §138.

<sup>590</sup> Principle 5 of the *Bangalore Principles*; See Special Rapporteur on the independence of judges and lawyers, UN Doc. *A/66/289* (2011) §17.

<sup>591</sup> Special Rapporteur on the independence of judges and lawyers: Russian Federation, UN Doc. *A/HRC/11/41/Add.2* (2009) §98; CAT Concluding Observations: *Russian Federation*, UN Doc. *CAT/C/RUS/CO/4* (2006) §13.

<sup>592</sup> See CoE *CM/Rec(2010)12* §§5, 22-23, 14.

<sup>593</sup> *Apitz Barbera et al v Venezuela*, Inter-American Court (2008) §§63-67.

<sup>594</sup> *Apitz Barbera et al v Venezuela*, Inter-American Court (2008) §63.

The impartiality of tribunals is tested in two ways. One is an objective test which examines whether the judge offered procedural guarantees sufficient to exclude any legitimate doubt of partiality. The other is subjective, examining personal bias. The appearance of partiality is considered along with actual partiality, but there is a general presumption that a judge (or a jury member) is personally impartial unless one of the parties raises proof to the contrary, normally in the course of proceedings available under national law.<sup>595</sup>

In considering challenges to impartiality in criminal cases, while the opinion of the accused is important, it is not decisive; rather what is decisive is whether the doubts can be objectively justified.<sup>596</sup>

The Human Rights Committee has stated that where the grounds for disqualification of a judge are set out in law, national courts must consider these grounds and replace members of the court who fall within the disqualification criteria.<sup>597</sup>

Challenges to the impartiality of a tribunal have been raised in various contexts, including when judges had already participated in other parts of the proceedings in another capacity, when judges' identity was kept secret, and when judges had a personal stake in the proceedings or some relationship with one of the parties.

The African Commission found that the creation of a special tribunal consisting of one judge and four members of the armed forces, with exclusive power to decide, judge and sentence in cases of civil disturbance, violated Article 7(1)(d) of the African Charter. The Commission stated: “[r]egardless of the character of the individual members of such tribunals, its composition alone creates the appearance, if not the actual lack of impartiality”.<sup>598</sup>

The Inter-American Court concluded that the system of “faceless judges” violates the right to trial by an independent, impartial and competent court. Among the reasons cited by the court was that by keeping the judges' identities secret, the accused could not know whether there was any basis to request a judge's removal on grounds of impartiality or competence.<sup>599</sup>

The European Court concluded that the right to a trial before an independent and impartial court was violated where a court failed to consider an allegation that a juror had made a racist remark publicly before the trial of a man of Algerian origin in France.<sup>600</sup>

The European Court found no lack of impartiality where a trial judge had participated in pre-trial procedures, including deciding that the accused should be held in pre-trial custody, and where the presiding judge had, on the basis of the court file, decided that there was *prima facie* evidence which justified the case being brought to trial.<sup>601</sup>

**595** *Barreto Leiva v Venezuela*, Inter-American Court (2009) §98; European Court: *Piersack v Belgium* (8692/79), (1982) §30; *Sander v United Kingdom* (34129/96), (2000) §§24-25, 27, 34, *Kyprianou v Cyprus* (73797/01), Grand Chamber (2005) §§118-121; *Prosecutor v Anto Furundžija* (IT-95-17/1-A), ICTY Appeals Chamber (July 2000) §§189-191, 196-197.

**596** *Hauschildt v Denmark* (10486/83), European Court (1989) §§48-49.

**597** *Karttunen v Finland*, HRC, UN Doc. CCPR/C/46/D/387/1989 (1992) §7.2.

**598** *The Constitutional Rights Project (in respect of Zamani Lakwot and 6 Others) v Nigeria* (87/93), African Commission (1994-5) §14.

**599** *Castillo Petrucci et al v Peru*, Inter-American Court (1999)

§§132-134; See Inter-American Commission *Report on Terrorism and Human Rights*, (2002) Section D §233; HRC: *Carranza v Peru*, UN Doc. CCPR/C/85/D/1126/2002 (2005) §§6.3, 7.5, *Becerra v Colombia*, UN Doc. CCPR/C/87/D/1298/2004 (2006) §§5.2, 7.2; See also Concluding Observations: *Tunisia*, UN Doc. CCPR/C/TUN/CO/5 (2008) §15.

**600** *Remli v France* (16839/90), European Court (1996) §§46-48; See also European Court: *Sander v United Kingdom* (34129/96), (2000) §34, *Gregory v United Kingdom* (22299/93), (1997) §§45-48; *Andrews v United States*, (11.139) Inter-American Commission, Report 57/96 (1996) §§147-187.

**601** European Court: *Nortier v the Netherlands* (13924/88), (1993) §§31-35; See also *Saraiva de Carvalho v Portugal* (15651/89), (1994) §§30-40.



The European Court has, however, found a lack of impartiality in the following cases:

- where an investigating judge had interrogated the accused on a number of occasions during the investigation and was later appointed as the trial judge;<sup>602</sup>
- where a judge who had extended the detention of one of the accused, then presided over his criminal trial, confirmed the jury's verdict and passed sentence;<sup>603</sup>
- where a judge in a criminal case for defamation had previously presided over a civil case in the same matter;<sup>604</sup>
- where a police officer participated as a member of the jury although he knew and had worked with a police officer who was a witness in the case and testified about a fact disputed during the trial.<sup>605</sup>

**602** *De Cubber v Belgium* (9186/80), European Court (1984) §30.

**603** *Ekeberg and Others v Norway* (11106/04 et al), European Court (2007) §§34-44; See *Hauschildt v Denmark* (10486/83), European Court (1989) §§43-53.

**604** *Fatullayev v Azerbaijan* (40984/07), European Court (2010) §§136-139.

**605** *Hanif and Khan v United Kingdom* (52999/08, 61779/08), European Court (2011) §§138-150.

# CHAPTER 13

## RIGHT TO A FAIR HEARING

The right to a fair hearing encompasses all the minimum procedural and other guarantees of fair trial set out in international standards, but is wider in scope. It includes compliance with national procedures, provided they are consistent with international standards. Despite fulfilling all national and international procedural guarantees, however, a trial may still not meet the requirements of a fair hearing.

### 13.1 Right to a fair hearing

#### 13.2 “Equality of arms”

## 13.1 RIGHT TO A FAIR HEARING

The right to a fair hearing lies at the heart of the concept of a fair trial. Everyone is entitled to a fair hearing.<sup>606</sup>

A fair hearing requires an independent, impartial and competent court established by law. (See **Chapter 12.**)

A fair hearing requires respect for the principle of “equality of arms” between the accused and the prosecution in the context of adversarial proceedings. There is growing recognition that a fair hearing also requires respect for the rights of victims,<sup>606</sup> exercised in a manner consistent with the rights of the accused. (See **Chapter 22.4**, Rights of victims and witnesses.)

The right to a fair hearing in criminal trials is underpinned by a number of specific rights set out in international standards, sometimes referred to as “due process rights”. They include the rights to be presumed innocent, to adequate time and facilities to prepare a defence, to be tried without undue delay, to defend oneself in person or through counsel, to call and examine witnesses, not to incriminate oneself, to appeal, and to protection from retroactive criminal laws.

The international standards governing the conduct of criminal proceedings make clear that the rights specifically enumerated are “minimum” guarantees. The observance of each of these guarantees does not, in all cases and circumstances, ensure that a hearing has been fair. The right to a fair trial is broader than the sum of the individual minimum guarantees, and generally depends on the entire conduct of the criminal proceedings.<sup>607</sup>

### ICCPR, Article 14(1)

“...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....”

<sup>a</sup> Article 10 of the Universal Declaration, Article 14(1) of the ICCPR, Article 18(1) of the Migrant Workers Convention, Article 13 of the Arab Charter, Article 6(1) of the European Convention, Section A(1)-(2) of the Principles on Fair Trial in Africa, Article 67(1) of the ICC Statute, Articles 19(1) and 20(2) of the Rwanda Statute, Articles 20(1) and 21(2) of the Yugoslavia Statute; See Article 40 of the Convention on the Rights of the Child, Article 7(1) of the African Charter, Article 8 of the American Convention, Article XXVI of the American Declaration

<sup>606</sup> See *Situation in the DRC* (ICC-01/04-135-tEN), ICC Pre-Trial Chamber (2006) §§37-39.

<sup>607</sup> See *Advisory Opinion OC-11/90*, Inter-American Court (1990) §24; Inter-American Commission *Report on Terrorism and Human Rights*, (2002) Section III(D)3 §399; ICC: *Prosecutor v Lubanga*, (ICC-01/04-01/06-102) ICC Pre-Trial Chamber, *Decision on the Final*

*System of Disclosure and the Establishment of a Timetable* (15 May 2006) §97; (ICC-01/04-01/06-722) Appeals Chamber, *Judgment on the Appeal against the Decision on the Defence Challenge to the Jurisdiction of the Court pursuant to article 19(2)(a) of the Statute* (14 December 2006) §§37, 39.

The guarantee of a fair hearing does not ensure that the court has made no errors in the evaluation of the evidence or the application of the law or instructions to a jury.<sup>608</sup> Furthermore, the violation of one right guaranteed by international or national law does not necessarily render the trial as a whole unfair.<sup>609</sup>

Human rights standards do not confer the right to a jury trial, but all trials with or without a jury must respect fair trial guarantees.<sup>610</sup>

While under some treaties, including the ICCPR, some of the constituent fair trial guarantees may be temporarily restricted during times of emergency, the Human Rights Committee has clarified that deviating from the fundamental principles of fair trial is never permissible.<sup>611</sup> (See **Chapter 31**, Fair trial rights during states of emergency.)

The procedural guarantees of fairness should be guaranteed by law and the courts must guarantee the fairness of criminal proceedings.<sup>a 612</sup>

The Human Rights Committee stated “a hearing is not fair if, for instance, the defendant in criminal proceedings is faced with the expression of a hostile attitude from the public or support for one party in the courtroom that is tolerated by the court, thereby impinging on the right to defence, or is exposed to other manifestations of hostility with similar effects. Expressions of racist attitudes by a jury that are tolerated by the tribunal, or a racially biased jury selection are other instances which adversely affect the fairness of the procedure.”<sup>613</sup>

The ICC has stated that when a fair trial becomes impossible due to violations of the rights of the accused, then the proceedings must be stopped.<sup>614</sup>

## 13.2 “EQUALITY OF ARMS”

An essential criterion of a fair hearing is the principle of “equality of arms” between the parties in a case.<sup>b 615</sup>

In criminal trials, where the prosecution has all the machinery of the state behind it, the principle of equality of arms is an essential guarantee of the accused’s right to defend him or herself. It ensures that the defence has a genuine opportunity to prepare and present its case, and to contest the arguments and evidence put before the court, on a footing equal to that of the prosecution.<sup>616</sup> The requirements of the principle of “equality of arms” include the right to adequate time and facilities to prepare a defence, including disclosure by the prosecution of material information.<sup>617</sup> The requirements also include the right to legal counsel, to challenge evidence, to call and question witnesses, and to be present at the trial.<sup>c 618</sup> However, the principle does not require the parties to have equal financial or human resources.<sup>619</sup>

<sup>a</sup> Principle 6 of the Basic Principles of the Independence of the Judiciary, Guidelines 12, 13(b) and 14 of the Guidelines on the Role of Prosecutors, Article 64(2) of the ICC Statute, Article 19(1) of the Rwanda Statute, Article 20(1) of the Yugoslavia Statute

<sup>b</sup> Section A(2)(a) of the Principles on Fair Trial in Africa

<sup>c</sup> See Section N(6)(a) of the Principles on Fair Trial in Africa

<sup>608</sup> HRC General Comment 32, §26; See *Prosecutor v Lubanga* (ICC-01/04-01/06-722) ICC Appeals Chamber, *Judgment on the Appeal against the Decision on the Defence Challenge to the Jurisdiction of the Court pursuant to article 19(2)(a) of the Statute* (14 December 2006) §30.

<sup>609</sup> See *Prosecutor v Momčilo Krajišnik* (IT-00-39-A), ICTY Appeals Chamber, (17 March 2009) §135.

<sup>610</sup> *Wilson v Australia*, HRC, UN Doc. CCPR/C/80/D/1239/2004 (2004) §4.4; *Taxquet v Belgium*, (926/05), European Court Grand Chamber (2010) §§83-84.

<sup>611</sup> HRC General Comment 29, §11.

<sup>612</sup> CoE CM/Rec(2010)12, §60.

<sup>613</sup> HRC General Comment 32, §25; *Gridin v Russia*, HRC, UN Doc. CCPR/C/69/D/770/1997 (2000) §8.2.

<sup>614</sup> *Prosecutor v Lubanga* (ICC-01/04-01/06-722), ICC Appeals Chamber, *Judgment on the Appeal of Mr. Thomas Lubanga Dyilo against the Decision on the Defence Challenge to the Jurisdiction of the Court* (14 December 2006) §37.

<sup>615</sup> European Court: *Kress v France* (39594/98), Grand Chamber

(2001) §§72, 74, *Zhuk v Ukraine* (45783/05), (2010) §25; *Prosecutor v Tadić* (IT-94-1-A) ICTY Appeals Chamber (15 July 1999) §§43-44; *Situation in Uganda* (ICC-02/04-01/05-90-US-Exp) ICC, *Decision on Prosecutor’s Applications for Leave to Appeal and to Suspend or Stay Consideration of Leave to Appeal* (10 July 2006) §24.

<sup>616</sup> HRC General Comment 32, §13; *Jasper v the United Kingdom* (27052/95), European Court Grand Chamber (2000) §51.

<sup>617</sup> European Court: *Jasper v the United Kingdom* (27052/95), Grand Chamber (2000) §51; *Foucher v France* (22209/93), (1997) §34; *Prosecutor v Tadić* (IT-94-1-A), ICTY Appeals Chamber (1999) §47.

<sup>618</sup> *Nahimana et al v The Prosecutor* (ICTR-99-52-A), ICTR Appeals Chamber (28 November 2007) §181; See *Advisory Opinion OC-17/2002, Inter-American Court* (2002) §132.

<sup>619</sup> *Nahimana et al v The Prosecutor* (ICTR-99-52-A), ICTR Appeals Chamber (28 November 2007) §220; *Prosecutor v Kordić and Mario Čerkez* (IT-95-14/2-A) ICTY Appeals Chamber (2004) §§175-176.

Human rights bodies found this principle was violated, for example, when the accused was not given access to information necessary for the preparation of the defence; when the accused was unable to instruct defence counsel adequately;<sup>620</sup> when the defence was denied the opportunity to present witnesses under the same conditions as the prosecution;<sup>621</sup> when the accused was not granted a postponement of a hearing when defence counsel was absent;<sup>622</sup> and when the accused or the defence lawyer was excluded from a hearing where the prosecutor was present.<sup>623</sup>

The African Commission has clarified that equality of arms requires that the defence is the last to intervene before the court retires for deliberations.<sup>624</sup>

The Special Rapporteur on human rights and counter-terrorism has raised concerns about a number of cases in which individuals charged in connection with terrorism-related activities have not enjoyed equality of arms. He has noted the disproportion in resources between the prosecution and the defence: for example, in Spain defence lawyers were not allocated sufficient financial support to travel to meet their clients who had been dispersed throughout the country pending trial in Madrid. In Egypt, he raised concern about restrictions on consultations between the accused and their lawyers both before and during trial and about the fact that defence lawyers were denied access to the case file until the first trial hearing, rendering illusory the right of the accused to an adequate defence.<sup>625</sup>

(See also **Chapter 8**, Right to adequate time and facilities to prepare a defence, and **Chapter 11**, Right to equality before the law and courts.)

<sup>620</sup> *Wolf v Panama*, HRC, UN Doc. CCPR/C/44/D/289/1988 (1992) §6.6; *Moiseyev v Russia* (62936/00), European Court (2008) §224; *Barreto Leiva v Venezuela*, Inter-American Court (2009) §§29, 54, 62-63.

<sup>621</sup> See *Cantoral-Benavides v Peru*, Inter-American Court (2000) §127; WGAD Opinion 24/2008 (*Syria*), UN Doc. A/HRC/13/30/Add.1 (2010) §27; *Prosecutor v Oric* (IT-03-68-AR73.2), ICTY Appeals Chamber, Interlocutory Decision on Length of Defence Case (20 July 2005) §§6-11.

<sup>622</sup> *Robinson v Jamaica*, HRC, UN Doc. CCPR/C/35/D/223/1987(1989) §10.4.

<sup>623</sup> *Becerra Barney v Colombia*, HRC, UN Doc. CCPR/C/87/D/1298/2004 (2006) §7.2; *Zhuk v Ukraine* (45783/05), European Court (2010) §§25-35.

<sup>624</sup> *Avocats Sans Frontières (on behalf of Bwampamye) v Burundi* (231/99), African Commission (2000) §§26-28.

<sup>625</sup> Special Rapporteur on human rights and counter-terrorism: UN Doc. A/63/223 (2008) §27, *Spain*, UN Doc. A/HRC/13/37/Add.2 (2008) §27, *Egypt*, UN Doc. A/HRC/13/37/Add.2 (2009) §§36-37.

# CHAPTER 14

## RIGHT TO A PUBLIC HEARING

The right to a public hearing is an essential safeguard of the fairness and independence of the judicial process, and a means of protecting public confidence in the justice system.

### 14.1 Right to a public hearing

#### 14.2 Requirements of a public hearing

#### 14.3 Permissible exceptions to a public hearing

### 14.1 RIGHT TO A PUBLIC HEARING

Except in prescribed and narrowly defined circumstances, such as cases involving children, court hearings and judgments in criminal cases must be public.<sup>a</sup> Under the Arab Charter, this right is not subject to restrictions in times of emergency.<sup>b</sup>

While the right to a public hearing in criminal cases is not expressly guaranteed in the African Charter, the African Commission has concluded that the failure to hold a public hearing violated Article 7(1) of the Charter (relating to fair trial).<sup>626</sup> Furthermore, the Principles on Fair Trial in Africa include this right.

The right to a public hearing means that not only the parties in the case (and victims, in jurisdictions where they are not considered to be parties), but also the general public and the media, have the right to be present. In addition to safeguarding the rights of the accused, this right embodies and protects the public's right to know and monitor how justice is administered, and what decisions are reached by the judicial system.<sup>627</sup>

The right of trial observers and others to "attend public hearings, proceedings and trials so as to form an opinion on their compliance with national law and applicable international obligations and commitments" is expressly included in the Declaration on Human Rights Defenders.<sup>c</sup> <sup>628</sup>

#### ICCPR, Article 14(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."

<sup>a</sup> Article 10 of the Universal Declaration, Article 14(1) of the ICCPR, Article 18(1) of the Migrant Workers Convention, Article 8(5) of the American Convention, Article 13(2) of the Arab Charter, Article 6(1) of the European Convention, Principle 36(1) of the Body of Principles, Section A(1) and (3) of the Principles on Fair Trial in Africa, Article XXVI of the American Declaration, Articles 64(7), 67(1) and 68(2) of the ICC Statute, Articles 19(4) and 20(2) of the Rwanda Statute, Articles 20(4) and 21(2) of the Yugoslavia Statute; See Article 7(1) of the African Charter

<sup>b</sup> Article 4(2) of the Arab Charter

<sup>c</sup> Article 9(3)(b) of the Declaration on Human Rights Defenders

<sup>626</sup> African Commission: *Media Rights Agenda v Nigeria* (224/98) (2000) §§51-54; *Civil Liberties Organisation, Legal Defence Centre, Legal Defence and Assistance Project v Nigeria* (218/98), (2001) §§35-39.

<sup>627</sup> HRC General Comment 32, §28; European Court: *Tierce and*

*Others v San Marino* (24954/94, 24971/94 and 24972/94), (2000) §92; *Galstyan v Armenia* (26986/03), (2007) §80; *Palamara-Iribarne v Chile*, Inter-American Court (2005) §168.

<sup>628</sup> Adopted by UN General Assembly resolution 53/144.

At least one court must address the merits of the case in public, unless the case falls within one of the permissible exceptions.<sup>629</sup> Where there have been public hearings in lower courts, whether it is acceptable to hold proceedings in appeal courts in private largely depends on the nature of the appeal.<sup>630</sup> (See **Chapter 21.3**, Right to be present at appeals.)

## 14.2 REQUIREMENTS OF A PUBLIC HEARING

The right to a public hearing generally requires oral hearings on the merits of the case which the parties and members of the public, including the media, can attend. In order to guarantee this right, courts must make information about the time and venue of the oral hearings available to the parties and the public and provide adequate facilities – within reasonable limits – in a place easily accessible to the public.<sup>a 631</sup>

<sup>a</sup> Section A(3) of the Principles on Fair Trial in Africa

The Human Rights Committee found violations of the right to a fair public trial in criminal cases involving public figures. In one case, the trial took place in a small courtroom, unable to accommodate the interested public; and in another, the trial was closed to the public.<sup>632</sup>

The European Court concluded that the right to a public hearing was violated when the trial of an imprisoned man for allegedly threatening prison guards was held inside a prison. Effective public access to the hearing was unduly impeded by lack of information about how to reach the prison, the conditions of entry, and the fact that the hearing was held early in the morning.<sup>633</sup>

The right to a public hearing does not necessarily extend to all pre-trial proceedings, including decisions made by public prosecutors or public bodies.<sup>634</sup>

The European Court noted that the right to a public hearing applies to proceedings which determine a charge, but not necessarily to hearings which review the lawfulness of pre-trial detention.<sup>635</sup>

However, the Inter-American Court found a violation of the right to a public hearing during the investigation phase, in a case before a military court in Chile in which many of the accused's rights were not respected.<sup>636</sup>

Even in cases in which the public is excluded from the trial, the judgment, including the essential findings, evidence and legal reasoning must be made public, except where the interest of a child requires otherwise, or in proceedings concerning matrimonial disputes or guardianship of children.<sup>637</sup> (See **Chapter 24**, Judgments.)

## 14.3 PERMISSIBLE EXCEPTIONS TO A PUBLIC HEARING

The public's access to part of or all hearings in a criminal case may be restricted only in a limited number of specific, narrowly defined, circumstances, all of which are to be strictly construed.

<sup>629</sup> *Fredin v Sweden* (18928/91), European Court (1994) §§18-22.

<sup>630</sup> HRC *General Comment 32*, §28; European Court: *Tierce and Others v San Marino* (24954/94, 24971/94 and 24972/94), (2000) §§95, *Ekbatani v Sweden* (10563/83), (1988) §§31-33.

<sup>631</sup> HRC *General Comment 32*, §28; *Van Meurs v the Netherlands*, HRC, UN Doc. CCPR/C/39/D/215/1986 (1990) §6.2; *Riepan v Austria* (35115/97), European Court (2000) §29.

<sup>632</sup> HRC: *Marinich v Belarus*, UN Doc. CCPR/C/99/D/1502/2006 (2010) §10.5; *Kulov v Kyrgyzstan*, UN Doc. CCPR/C/99/D/1369/2005 (2010) §8.6.

<sup>633</sup> European Court: *Riepan v Austria* (35115/97), (2000) §§28-31; See also *Hummatov v Azerbaijan* (9852/03 and (13413/04), (2007) §§140-152.

<sup>634</sup> HRC *General Comment 32*, §28.

<sup>635</sup> *Reinprecht v Austria* (67175/01), European Court (2005) §41.

<sup>636</sup> *Palamara-Iribarne v Chile*, Inter-American Court (2005) §§165-174.

<sup>637</sup> HRC *General Comment 32*, §29.

These are:

- morals (for example, some hearings involving sexual offences)<sup>a</sup> 638
- public order, which relates primarily to order within the courtroom<sup>b</sup> 639
- national security in a democratic society<sup>c</sup>
- when the interests of the private lives of the parties so require (such as to protect the identity of victims of sexual violence)<sup>d</sup>
- to the extent strictly necessary, in the opinion of the court, in special circumstances where publicity would prejudice the interest of justice.<sup>e</sup>

In addition, there are explicit exceptions to protect the interests and privacy of children accused of infringing the penal law or who are victims or witnesses of crime.

A child accused of infringing the penal law is entitled to full respect for their privacy during all stages of the proceedings. To protect a child's right to privacy, the African Charter on the Rights of the Child requires media and the public to be excluded from proceedings. Other standards permit courts to hold hearings behind closed doors when the interests of children or justice so require. The Committee on the Rights of the Child recommends that states introduce rules that hearings involving a child in conflict with the law should be conducted behind closed doors. Exceptions to this rule should be very limited and clearly stated in the law. Other measures must be taken to ensure that no information or personal data that may lead to the identification of a child is published, including in court judgments or by the media. (See **Chapter 27.6.9** on confidentiality concerning children and **Chapter 24** on judgments.)

A range of international standards aims to protect the privacy and identity of child victims of crime, victims of gender-based violence and trafficked individuals. The CoE Convention on Sexual Abuse of Children permits judges to close hearings to the public.<sup>f</sup> (See **Chapter 22.4**, Rights of victims and witnesses, and **Chapter 24.1** on judgments.)

The Human Rights Committee and the European Commission found that the exclusion of the public from two cases, one involving rape of women and one involving sexual offences against children, was permissible under Article 14(1) of the ICCPR and Article 6(1) of the European Convention.<sup>640</sup>

In cases against adults that fall within the exceptions to the right to a public hearing, as an alternative to closing all of the trial, courts should consider whether closing part of the proceedings would be sufficient. Courts should also consider alternatives to closing part or all of the proceedings, including measures to protect witnesses. Such measures must be compatible with the right of the accused to a fair trial in the context of adversarial proceedings, including the principle of equality of arms.<sup>g</sup> (See **Chapter 22** on witnesses.)

While the norm is for the International Criminal Court to hold hearings in public, it may close part of a trial to protect a victim, witness or an accused or allow the presentation of evidence by electronic or other means. The reasons for the order to close a hearing must be made public.<sup>h</sup>

Concerns have been raised about the extent of closed hearings on grounds of national security, including in trials on terrorism-related charges. States do not have unfettered discretion to define for themselves what constitutes an issue of national security.<sup>i</sup>

<sup>a</sup> Article 14(1) of the ICCPR, Article 6(1) of the European Convention

<sup>b</sup> Article 14(1) of the ICCPR, Article 6(1) of the European Convention, Section A(3)(f)(ii) of the Principles on Fair Trial in Africa

<sup>c</sup> Article 14(1) of the ICCPR, Article 6(1) of the European Convention, Section A(3)(f)(ii) of the Principles on Fair Trial in Africa

<sup>d</sup> Article 14(1) of the ICCPR, Article 6(1) of the European Convention; See Section A(3)(f)(i) of the Principles on Fair Trial in Africa

<sup>e</sup> Article 14(1) of the ICCPR, Article 8(5) of the American Convention, Article 13(2) of the Arab Charter, Article 6(1) of the European Convention; See Section A(3)(f)(i) of the Principles on Fair Trial in Africa

<sup>f</sup> Article 36(2) of the CoE Convention on Sexual Abuse of Children

<sup>g</sup> See Section A(3)(g)-(i) of the Principles on Fair Trial in Africa

<sup>h</sup> Article 68(2) of the ICC Statute, Regulation 20 of the Regulations of the ICC

<sup>i</sup> See Section A(3)(f)(ii) of the Principles on Fair Trial in Africa

638 *Z.P. v Canada*, HRC, UN Doc. CCPR/C/41/D/341/1988 (1991) §4.6.

639 See *Gridin v Russian Federation*, HRC, U.N. Doc. CCPR/C/69/D/770/1997 (2000) §8.2; M. Nowak, *U.N. Covenant on Civil and Political Rights: CCPR Commentary, 2nd revised edition*,

Engel, 2005, p325 §34.

640 *Z.P. v Canada*, HRC, UN Doc. CCPR/C/41/D/341/1988 (1991) §§4.6, 5.6; *X v Austria* (1913/63), European Commission, 2 Digest of Strasbourg Case Law 438 (30 April 1965) (unpublished).

According to the Johannesburg Principles: “A restriction sought to be justified on the ground of national security is not legitimate unless its genuine purpose and demonstrable effect is to protect a country’s existence or its territorial integrity against the use or threat of force, or its capacity to respond to the use or threat of force, whether from an external source, such as a military threat, or an internal source, such as incitement to violent overthrow of the government.”<sup>641</sup>

The Special Rapporteur on human rights and counter-terrorism has reiterated that restrictions on the right to a public hearing on grounds of national security must occur only to the extent strictly necessary. To guarantee fairness, “they should be accompanied by adequate mechanisms for observation or review”. He raised concerns that in South Africa, in a criminal case related to national security, prosecutors had requested that all the proceedings be held behind closed doors.<sup>642</sup>

In its report on terrorism and human rights, the Inter-American Commission suggested that elements of the right to a public trial might be subject to restrictions, for example where, in emergency situations (of the character permitting derogations), there are threats to the lives, physical integrity and independence of judges or other officials involved in the administration of justice. It stated, however, that such restrictions must be determined on a case-by-case basis, be strictly necessary and subject to measures to ensure a fair trial, including the right to challenge the competence, independence or impartiality of the tribunal.<sup>643</sup>

The African Commission concluded that military court proceedings against alleged coup plotters in Nigeria violated the accused’s right to a public hearing. The Commission noted that the government did not provide specific reasons for excluding the public from the trials.<sup>644</sup>

Secret trials are the most flagrant violation of the right to a public hearing. The Inter-American Court ruled that secret trials of civilians in Peru before military courts of judges whose identity was concealed (“faceless judges”), which took place on military premises to which the public had no access, violated, among other things, the accused’s right to a public hearing.<sup>645</sup>

<sup>a</sup> Section A(3)(d) of the Principles on Fair Trial in Africa

Apart from the exceptions specified, a hearing must be open to the public in general, including the media, and must not be limited only to a particular category of people.<sup>a 646</sup>

<sup>641</sup> Principle 2(a) of the *Johannesburg Principles*.

<sup>642</sup> Special Rapporteur on human rights and counter-terrorism: UN Doc. *A/63/223* (2008) §30, UN Doc. *A/HRC/6/17/Add.2* (South Africa) (2007) §32.

<sup>643</sup> Inter-American Commission *Report on Terrorism and Human Rights*, (2002) Section D(3) §262(a).

<sup>644</sup> *Media Rights Agenda v Nigeria* (224/98), African Commission (2000) §§51-54.

<sup>645</sup> Inter-American Court: *Castillo-Petruzzi et al v Peru*, (1999) §§169-173, *Lori Berenson-Mejia v Peru*, (2004) §§197-199.

<sup>646</sup> HRC *General Comment 32*, §29.



# CHAPTER 15

## THE PRESUMPTION OF INNOCENCE

**A fundamental principle of the right to fair trial is the right of everyone charged with a criminal offence to be presumed innocent until and unless proved guilty according to law after a fair trial.**

### 15.1 The presumption of innocence

### 15.2 The burden and standard of proof

### 15.3 Protecting the presumption of innocence in practice

### 15.4 After acquittal

## 15.1 THE PRESUMPTION OF INNOCENCE

Everyone has the right to be presumed innocent, and treated as innocent, unless and until they are convicted according to law in the course of proceedings which meet at least the minimum prescribed requirements of fairness.<sup>a</sup>

The right to be presumed innocent is a norm of customary international law – it applies at all times, in all circumstances. It cannot be the subject of treaty reservations or lawfully restricted in times of war or other public emergency.<sup>647</sup> It is an essential element of the right to fair criminal proceedings and the rule of law.

The right to be presumed innocent applies to suspects even before formal charges are filed and continues until a conviction is confirmed following a final appeal. (See **Chapter 5.3**, Presumption of release pending trial, **Chapter 7** on the right to trial within a reasonable time or to release from detention, **Chapter 9**, Rights and safeguards during questioning, and **Chapter 10.7**, Additional guarantees for pre-trial detainees.)

Criminal procedures, their implementation in each case and the treatment of the accused must respect the presumption of innocence.

## 15.2 THE BURDEN AND STANDARD OF PROOF

The requirement that the accused be presumed innocent means that the burden of proving the charge rests on the prosecution. A court may not convict unless guilt has been proved beyond reasonable doubt. If there is reasonable doubt, the accused must be acquitted.<sup>b</sup>

Although neither the burden nor the standard of proof are explicitly set out in the ICCPR or regional human rights treaties, the Human Rights Committee, the Inter-American Court, the European Court and the African Commission have all indicated that the presumption of innocence requires the prosecution to prove guilt beyond reasonable doubt. In the words of the Human Rights Committee, the presumption of innocence “imposes on the prosecution the burden of proving the charge, guarantees that no guilt can be presumed until the charge has been proved beyond a reasonable doubt [and] ensures that the accused has the benefit of the doubt”.<sup>648</sup>

<sup>a</sup> Article 11 of the Universal Declaration, Article 14(2) of the ICCPR, Article 40(2)(b)(i) of the Convention on the Rights of the Child, Article 18(2) of the Migrant Workers Convention, Article 7(1)(b) of the African Charter, Article 8(2) of the American Convention, Article 16 of the Arab Charter, Article 6(2) of the European Convention, Principle 36(1) of the Body of Principles, Article XXVI of the American Declaration, Article 66 of the ICC Statute, Article 20(3) of the Rwanda Statute, Article 21(3) of the Yugoslavia Statute

<sup>b</sup> Section N(6)(e)(i) of the Principles on Fair Trial in Africa, Article 66(2) and (3) of the ICC Statute, Rule 87(A) of the Rwanda Rules, Rule 87(A) of the Yugoslavia Rules

<sup>647</sup> HRC: General Comment 24, §8, General Comment 29, §§11, 16, General Comment 32, §6; See *ICRC Study on Customary International Law*, Volume 1, Rule 100, pp357-358.

<sup>648</sup> HRC General Comment 32, §30; European Court: *Barberà, Messegué and Jabardo v Spain* (10590/83), (1988) §77, *Telfner v Austria* (33501/96), (2001) §15; See *Ricardo Canese v Paraguay*, Inter-American Court (2004) §§153-154.

The Yugoslavia Tribunal clarified that this standard “requires a finder of fact to be satisfied that there is no reasonable explanation of the evidence other than the guilt of the accused”.<sup>649</sup>

The African Commission concluded that the proceedings against Ken Saro-Wiwa and his co-accused violated the presumption of innocence. The trial court admitted that there was no direct evidence linking the accused to murders with which they were charged, but convicted them on grounds that they had each failed to establish their innocence. In addition, before and during their trial Nigerian government representatives pronounced the accused guilty in press conferences and at the UN.<sup>650</sup>

In accordance with the presumption of innocence, the rules of evidence and conduct of a trial must ensure that the prosecution bears the burden of proof throughout a trial.

In some countries, the law requires the accused (rather than the prosecution) to explain elements of certain offences. For example, the accused may be required to explain their presence in a given location, such as the scene of a crime, or their possession of certain items, such as drugs or stolen goods. Such requirements, when incorporated into law, are known as “statutory presumptions” or “presumptions of law and fact”. These have been challenged on the grounds that they impermissibly shift the burden of proof from the prosecution to the accused, in violation of the presumption of innocence. However, not all statutory presumptions in criminal law violate the presumption of innocence. To comply with the presumption of innocence guaranteed in international law, they must be defined by law and limited. They must be capable of rebuttal, preserving the right of the accused to a defence.<sup>a 651</sup>

<sup>a</sup> Section N(6)(e)(iii) of the Principles on Fair Trial in Africa

The Human Rights Committee has raised concern about statutory presumptions in laws criminalizing drug possession (for example where possession of a certain quantity is presumed to be for the purpose of supply) and in anti-terrorism laws (including those which require the accused to prove absence of intent).<sup>652</sup>

The Inter-American Commission considers that the definition of a criminal offence based on mere suspicion or association should be eliminated as it shifts the burden of proof and violates the presumption of innocence.<sup>653</sup>

The Human Rights Committee concluded that an element of a terrorism law in Sri Lanka violated the presumption of innocence (read together with the prohibition of torture and the right to a remedy). Rather than the prosecution having to prove that a confession was voluntary, an accused was required to prove that his confession – which he claimed had been coerced under torture – was involuntary and therefore should be excluded as evidence.<sup>654</sup> (See **Chapter 17** on exclusion of evidence.)

The ICC Statute prohibits any reversal of the burden of proof or placing any onus of rebuttal on the accused.<sup>b</sup>

<sup>b</sup> Article 67(1)(i) of the ICC Statute

<sup>649</sup> *Prosecutor v Milan Martić* (IT-95-11-A), ICTY Appeals Chamber (8 October 2008) §§55, 61.

<sup>650</sup> *International Pen, Constitutional Rights Project, Interrights on behalf of Ken Saro-Wiwa Jr. and Civil Liberties Organisation v Nigeria* (137/94 et al), African Commission (1998) §96.

<sup>651</sup> *Salabiaku v France* (10519/83), European Court (1988) §§28-30.

<sup>652</sup> HRC Concluding Observations: *New Zealand*, UN Doc. CCPR/C/NZL/CO/5 (2010) §17 (for further clarification see UN Doc. CCPR/C/NZL/Q/5 question 19 p3), *Australia*, UN Doc. CCPR/C/AUS/CO/5 (2009) §11.

<sup>653</sup> Annual Report of the Inter-American Commission: *Peru*, OEA/Ser.L/V/II.95, doc. 7 rev. (1996) Ch.V Section VIII, §4.

<sup>654</sup> *Singarasa v Sri Lanka*, HRC, UN Doc. CCPR/C/81/D/1033/2001 (2004) §7.4.

### 15.3 PROTECTING THE PRESUMPTION OF INNOCENCE IN PRACTICE

Any decision to detain a person pending trial and the length of such detention must be consistent with the presumption of innocence.<sup>a 655</sup> The treatment of pre-trial detainees and their detention conditions must also be consistent with the presumption of innocence.<sup>b 656</sup>

The Human Rights Committee has underscored that the denial of bail or length of pre-trial detention should not be taken as an indication of guilt. It considered that setting the maximum period of pre-trial detention by reference to the penalty for the alleged offence may violate the presumption of innocence as well as the right to trial within a reasonable time or release.<sup>657</sup> It also concluded that an excessive period of pre-trial detention violated the presumption of innocence.<sup>658</sup>

Similarly the Inter-American Court has clarified that pre-trial detention that is disproportionately long or without proper justification would violate the presumption of innocence as it is “tantamount to anticipating a sentence” prior to trial. It stressed that pre-trial detention is a preventive not a punitive measure; it must not exceed the limits strictly necessary to ensure that the individual will not impede the investigation or evade justice.<sup>659</sup>

(See also **Chapters 5.3, 5.4** and **7** regarding permissible reasons for and length of pre-trial detention, and **Chapter 10.7** on additional safeguards in pre-trial custody.)

The presumption of innocence requires that judges and jury members refrain from prejudging any case.<sup>660</sup> It also means that authorities, including prosecutors, police and government officials must not make statements indicating an opinion about the guilt of an accused before the conclusion of criminal proceedings, or following an acquittal.<sup>c</sup> It also means that the authorities have a duty to discourage the media from undermining the fairness of a criminal trial by prejudging or influencing its outcome, in a manner consistent with the right to freedom of expression and the public’s right to information about court proceedings.<sup>661</sup>

Informing the public that a criminal investigation is taking place, and in doing so naming a suspect, or stating that a suspect has been arrested, is not considered a violation of the presumption of innocence, so long as there is no declaration that the person is guilty.

The European Court explained that a clear distinction must be made between stating that someone is *suspected* of having committed a criminal offence, which is permissible, and declaring that a person *has* committed a crime, which, in the absence of a final conviction, violates the presumption of innocence.<sup>662</sup>

The conduct of the trial must be based on the presumption of innocence. Judges must conduct trials without previously having formed an opinion on the guilt or innocence of the accused and must ensure that the conduct of the trial conforms to this.

<sup>a</sup> Principle III(2) of the Principles on Persons Deprived of Liberty in the Americas, Rule 3.1 of the CoE Rules on remand in custody

<sup>b</sup> Principle 36(1) of the Body of Principles, Rule 84.2 of the Standard Minimum Rules; See Rule 95.1 of the European Prison Rules

<sup>c</sup> Section N(6)(e)(ii) of the Principles on Fair Trial in Africa

<sup>655</sup> See HRC General Comment 32, §30; *Van der Tang v Spain* (19382/92), European Court (1995) §55; *Pinheiro and Dos Santos v Paraguay* (11.506), Inter-American Commission (2002) §§65-66.

<sup>656</sup> Special Rapporteur on human rights and counter-terrorism, *Spain*, UN Doc. A/HRC/10/3/Add.2 (2008) §§24-25; See *Laduna v Slovakia* (31827/02) European Court (2011) §§66-72.

<sup>657</sup> HRC: General Comment 32, §30, *Italy*, HRC, UN Doc. CCPR/C/ITA/CO/5 (2006) §14.

<sup>658</sup> *Cagas et al v the Philippines*, HRC, UN Doc. CCPR/C/73/D/788/1997 (2001) §7.3.

<sup>659</sup> Inter-American Court: *Chaparro Álvarez and Lapo Íñiguez v Ecuador*, (2007) §§145-146, *Tibi v Ecuador*, (2004)§189; *Suárez-Rosero v Ecuador*, (1997) §§77-78; See Inter-American Commission Report on Terrorism and Human Rights, (2002) Chapter III, Section D, §223.

<sup>660</sup> *Telfner v Austria* (33501/96), European Court (2001) §§15, 19-20.

<sup>661</sup> HRC General Comment 32, §30; HRC: *Gridin v Russian Federation*, UN Doc. CCPR/C/69/D/770/1997 (2000) §§3.5, 8.3, *Engo v Cameroon*, UN Doc. CCPR/C/96/D/1397/2005 (2009) §7.6; *Law Office of Ghazi Suleiman v Sudan* (222/98 and 229/99), African Commission (2003) §§54, 56; *Lori Berenson-Mejia v Peru*, Inter-American Court (2004) §§158-161; European Court: *G.C.P. v Romania* (20899/03), (2011) §§54-61 and 46; *Nestak v Slovakia* (65559/01), (2007) §§88-91; CERD General Recommendation XXXI, §29; See *Papon v France (No 2)* (54210/00), European Court (2001) §6(d).

<sup>662</sup> *Krause v Switzerland*, (7986/77), European Commission Decision (1978) §3, European Court: *Fatullayev v Azerbaijan* (40984/07), (2010) §§160-163, *Khuzhin and Others v Russia* (13470/02), (2008) §§93-97.

The Human Rights Committee concluded that the presumption of innocence was violated in a case where the trial judge asked the prosecution a number of leading questions and refused to allow several defence witnesses to testify about the accused's alibi, and where senior officials made widely reported public statements portraying the accused as guilty.<sup>663</sup>

(See **Chapter 12.5**, Right to be heard by an impartial tribunal.)

The right not to be compelled to testify against oneself or confess guilt and the related right to remain silent are rooted in the presumption of innocence. Allowing confessions elicited under torture or other ill-treatment or coercion to be used as evidence has been found to violate the presumption of innocence.<sup>664</sup> (See **Chapter 9**, Rights and safeguards during questioning, **Chapter 16**, Right not to be compelled to incriminate oneself, and **Chapter 17** on exclusion of evidence.)

Care must be taken to ensure that no attributes of guilt are attached to the accused during the trial which might impact on the presumption of innocence. Such attributes could include holding the accused in a cage within the courtroom or requiring the accused to appear in court wearing handcuffs, shackles or uniforms worn by convicted prisoners.<sup>a 665</sup>

<sup>a</sup> See Rule 17(3) of the Standard Minimum Rules, Rule 97.2 of the European Prison Rules

Low rates of acquittal in criminal cases can raise doubts as to whether the presumption of innocence is being respected.<sup>666</sup>

## 15.4 AFTER ACQUITTAL

If a person is acquitted by final judgment of a court (including on procedural grounds, such as expiry of a time limit for prosecution), the judgment is binding on all state authorities. Therefore, the public authorities, particularly courts, prosecutors and the police, should refrain from implying that the person may have been guilty, so as not to undermine the presumption of innocence, respect for the judgments of a court and the rule of law.<sup>667</sup>

The European Court has held that the presumption of innocence was violated when, after the accused was acquitted or proceedings were terminated, courts voiced suspicions about the individual's innocence when explaining a decision to refuse compensation for pre-trial detention.<sup>668</sup>

Some legal systems separate criminal from non-criminal (civil) jurisdiction. In such states, being acquitted of a criminal offence does not prohibit civil courts from establishing civil liability based on the same set of facts,<sup>669</sup> but using a different (lower) standard of proof. However, decisions in such cases must respect the presumption of innocence and must not impute criminal liability to a person who has been previously acquitted of a criminal offence.<sup>670</sup>

<sup>663</sup> *Larrañaga v The Philippines*, HRC, UN Doc. CCPR/C/87/D/1421/2005 (2006) §7.4.

<sup>664</sup> Inter-American Commission: *Alfonso Martín Del Campo Dodd v Mexico* (12.228), (2009) §§45-63, 76, *Manriquez v Mexico* (11.509), (1999) §85.

<sup>665</sup> HRC *General Comment 32*, §30; Special Rapporteur on the independence of judges and lawyers, *Russian Federation*, UN Doc. A/HRC/11/41/Add.2 (2009) §37(2); See European Court: *Samola and Cionca v Romania* (33065/2003), (2008) §§99-100, *Ramishvili and Kohredidze v Georgia* (174/06), (2009) §§94-102, 132.

<sup>666</sup> See Special Rapporteur on the independence of judges and lawyers, *Russian Federation*, UN Doc. A/HRC/11/41/Add.2 (2009) §37(1).

<sup>667</sup> See *Allen v United Kingdom* (25404/09) European Court Grand Chamber (2013) §103.

<sup>668</sup> European Court: *Sekanina v Austria* (13126/78), (1993) §§30-31, *Asan Rushiti v Austria* (28389/95), (2000) §§31-32, *Tendam v Spain* (25720/05), (2010) §§35-41; See European Court: *Geerings v Netherlands* (30810/03), (2007) §§41-51, *Minelli v Switzerland* (8660/79), (1983), *Hammer v Norway* (30287/96), (2003) §§47-49.

<sup>669</sup> *X v Austria* (9295/81), European Commission Decision (1982).

<sup>670</sup> See European Court: *Allen v United Kingdom* (25404/09) Grand Chamber (2013) §§101,123, *Ringvold v Norway* (34964/97) §38.

# CHAPTER 16

## RIGHT NOT TO BE COMPELLED TO INCRIMINATE ONESELF

No one charged with a criminal offence may be compelled to testify against him or herself or to confess guilt, in accordance with the presumption of innocence.

### 16.1 Right not to be compelled to incriminate oneself

#### 16.2 Right to remain silent

##### 16.2.1 Can adverse inferences be drawn from an accused's silence?

#### 16.3 Allegations of compulsion

## 16.1 RIGHT NOT TO BE COMPELLED TO INCRIMINATE ONESELF

No one charged with a criminal offence may be compelled to testify against him or herself or to confess guilt. This prohibition is a fundamental aspect of the presumption of innocence, which places the burden of proof on the prosecution. It also reinforces the prohibition against torture and other cruel, inhuman or degrading treatment and the requirement that evidence acquired as a result of such mistreatment must be excluded from proceedings.<sup>a</sup> (See **Chapter 15**, The presumption of innocence, and **Chapter 17** on exclusion of evidence.)

The European Court has stated that “the right to remain silent under police questioning and the privilege against self-incrimination are generally recognised international standards which lie at the heart of the notion of a fair procedure”.<sup>671</sup>

The right not to be compelled to incriminate oneself or confess guilt is broad. It prohibits any form of coercion, whether direct or indirect, physical or psychological. Such coercion includes, but is not limited to, torture and other cruel, inhuman or degrading treatment.<sup>672</sup> The right also prohibits the introduction as evidence of admissions or confessions extracted as a result of such coercion. (See **Chapter 10** on humane conditions of detention and freedom from torture.) It also prohibits the imposition of judicial sanctions to compel the accused to testify.<sup>673</sup>

The prohibition against compelling an accused to incriminate themselves or confess applies during questioning by the police and during trial. (See **Chapter 9** on rights during questioning.)

Holding a person in prolonged incommunicado detention or in secret detention violates the prohibition against torture and other ill-treatment.<sup>674</sup> The Principles on Fair Trial in

<sup>a</sup> Article 14(3)(g) of the ICCPR, Article 40(2)(b)(iv) of the Convention on the Rights of the Child, Article 18(3)(g) of the Migrant Workers Convention, Article 8(2)(g) and (3) of the American Convention, Article 16(6) of the Arab Charter, Principle 21 of the Body of Principles, Section N(6)(d) of the Principles on Fair Trial in Africa, Article 67(1)(g) of the ICC Statute, Article 20(4)(g) of the Rwanda Statute, Article 21(4)(g) of the Yugoslavia Statute

### ICCPR, Article 14(3)(g)

“In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality:

(g) Not to be compelled to testify against himself or to confess guilt.”

<sup>671</sup> European Court: *John Murray v United Kingdom* (18731/91), Grand Chamber (1996) §45, *Allan v United Kingdom* (48539/99), (2002) §44.

<sup>672</sup> HRC: *General Comment 32*, §41, *Berry v Jamaica*, UN Doc. CCPR/C/50/D/330/1988 (1994) §11.7.

<sup>673</sup> See M. Nowak, *U.N. Covenant on Civil and Political Rights: CCPR Commentary, 2nd revised edition*, Engel, 2005, p345, §75.

<sup>674</sup> UN Mechanisms Joint Study on secret detention, UN Doc. A/HRC/13/42 (2010) p2, p6 §(f), §§27, 28, 292(f); Special Rapporteur on human rights and counter-terrorism, UN Doc. A/63/223 (2008) §§33, 45(d); *Asencios Lindo et al v Peru* (11.182), Inter-American Commission (2000) §§97-103.

<sup>a</sup> Section N6(d)(i) of the Principles on Fair Trial in Africa

Africa state that “any confession or admission obtained during incommunicado detention shall be considered to be obtained by coercion”.<sup>a</sup>

Holding a person in solitary confinement during pre-trial detention creates psychological pressure on an accused and may amount to coercion to confess. The Special Rapporteur against torture has stated that intentionally placing an individual in solitary confinement during pre-trial detention for the purpose of obtaining information or a confession amounts to torture or other ill-treatment.<sup>675</sup> (See **Chapters 10.9** and **17.**)

Rules requiring the accused to disclose, in advance of the trial, defences or evidence they intend to rely on (such as an alibi) must be implemented in a manner that is consistent with the prohibition against self-incrimination and the right to remain silent.<sup>676</sup>

The prohibition against self-incrimination requires a court to establish before a guilty plea is accepted that the plea is voluntary (no pressure was put on the individual to plead guilty), that the accused understands the nature of the charges and the consequences of the plea, and that the accused is competent.<sup>677</sup>

## 16.2 RIGHT TO REMAIN SILENT

The right of an accused to remain silent during police questioning and at trial is considered to be implicit in two internationally protected rights: the right to be presumed innocent and the right not to be compelled to testify against oneself or to confess guilt.

The right of an accused to remain silent is expressly recognized in the ICC Statute, the Rules of the Rwanda and Yugoslavia Tribunals and the Principles on Fair Trial in Africa. It applies even when the suspect is accused of the worst possible crimes.<sup>b</sup>

<sup>b</sup> Section N6(d)(ii) of the Principles on Fair Trial in Africa, Article 55(2)(b) of the ICC Statute, Rule 42(A)(iii) of the Rwanda Rules, Rule 42(A)(iii) of the Yugoslavia Rules

While not expressly guaranteed in the ICCPR or the European Convention, the Human Rights Committee and the European Court consider the right to remain silent to be implicit in the guarantees which lie at the heart of a fair trial.<sup>678</sup>

The European Court ruled that the introduction into evidence at a criminal trial of transcripts of statements made under compulsion to non-prosecutorial inspectors violated the right not to incriminate oneself.<sup>679</sup> In another case, the Court found that when a man was prosecuted for refusing to hand over documents to customs officials, this was a violation of the right of anyone charged with a criminal offence to remain silent and not to incriminate themselves.<sup>680</sup>

### 16.2.1 CAN ADVERSE INFERENCES BE DRAWN FROM AN ACCUSED'S SILENCE?

The ICC Statute and the Principles on Fair Trial in Africa expressly prohibit adverse inferences being drawn at trial from an accused's exercise of the right to remain silent.<sup>c</sup>

<sup>c</sup> Section N(6)(d)(ii) of the Principles on Fair Trial in Africa, Article 67(1)(g) of the ICC Statute

The Human Rights Committee has raised concern about laws in the UK which permit drawing adverse inferences at trial from an accused's silence.<sup>681</sup>

<sup>675</sup> *Special Rapporteur on torture*, UN Doc. A/66/268 (2011), §73.

<sup>676</sup> See *Prosecutor v Lubanga* (ICC-01/04-01/06-1235) ICC Trial Chamber, Decision on disclosure by the defence (20 March 2008).

<sup>677</sup> *Jean Kambanda v the Prosecutor* (ICTR-97-23-A), ICTR Appeals Chamber (2000) §61.

<sup>678</sup> *John Murray v United Kingdom* (18731/91), European Court Grand Chamber (1996) §45; HRC Concluding Observations: *France*, UN Doc. CCPR/C/FRA/CO/4 (2008) §14, *Algeria*, UN Doc. CCPR/C/DZA/CO/3 (2007) §18.

<sup>679</sup> *Saunders v United Kingdom* (19187/91), European Court Grand Chamber (1996) §§75-76.

<sup>680</sup> *Funke v France* (10828/84), European Court (1993) §44; See European Court: *Heaney and McGuinness v Ireland* (34720/97), (2000) §§55-59, *J. B. v Switzerland* (31827/96), (2001) §§65-71.

<sup>681</sup> HRC Concluding Observations: *United Kingdom*, UN Doc. CCPR/C/CO/73/UK (2001) §17; See also HRC Concluding Observations: *Ireland*, UN Doc. CCPR/C/IRL/CO/3 (2008) §14; *Malawi African Association and Others v Mauritania* (54/91 et al), African Commission (2000) §95.

The European Court, taking a somewhat different position, has stated that drawing adverse inferences against an accused for remaining silent would violate the presumption of innocence and the privilege against self-incrimination, if a conviction was based solely or mainly on the accused's silence or refusal to provide evidence. While the European Court has repeatedly emphasized that courts must exercise particular caution before allowing silence to be used against an accused, it has also held that the right to remain silent is not absolute. Rather, the European Court considers that the question of whether fair trial rights are infringed if a court draws adverse inferences from the accused's silence is to be determined in light of all the circumstances of a case. Factors the Court has taken into account include: the individual's access to their lawyer and the assistance of their lawyer during questioning; warnings given to the accused about the consequences of silence; and the permissible weight afforded to the silence when evaluating the evidence.<sup>682</sup>

(See **Chapter 9.4**, Right to remain silent.)

### 16.3 ALLEGATIONS OF COMPULSION

If an accused alleges during the course of proceedings that he or she has been compelled to make a statement or to confess guilt, the judge should have the authority to consider the allegation at any stage.

Consistent with the presumption of innocence, the burden of proof is on the prosecution to show that statements of the accused have been given voluntarily.<sup>683</sup> The standard of proof should, in principle, be the same on this question as for the criminal trial overall: beyond reasonable doubt.

Where the coercion takes the form of torture or other ill-treatment, the right not to be compelled to incriminate oneself overlaps with the separate rule that specifically prohibits admission of statements obtained by such abuse into evidence (except in proceedings against the alleged perpetrator of the abuse). This prohibition is guaranteed by, among others, Article 15 of the Convention against Torture and Article 7 of the ICCPR, as interpreted by the Human Rights Committee.<sup>684</sup>

The Human Rights Committee has stated that the prosecution should bear the burden of proving that a confession was voluntary. This burden is triggered once an accused has made a *prima facie* case, advanced a plausible reason or produced a credible complaint or evidence of ill-treatment.<sup>685</sup>

The Special Rapporteur on human rights and counter-terrorism has stated that if there are doubts about the voluntariness of statements by the accused or witnesses – for example, when no information about the circumstances is provided or if the person is arbitrarily or secretly detained – a statement should be excluded irrespective of direct evidence of physical abuse.<sup>686</sup>

(See **Chapter 17**, Exclusion of evidence obtained in violation of international standards. See also **Chapter 9**, Rights and safeguards during questioning, and **Chapter 10.10**, Right to freedom from torture and other ill-treatment.)

<sup>682</sup> For the specific factors that the European Court says should be taken into account see: *John Murray v United Kingdom* (18731/91), (1996) §§46-70, *Condron v United Kingdom* (35718/97), (2000) §§55-68, *Heaney and McGuinness v Ireland* (34720/97), (2000) §§55-58, *Funke v France* (10828/84), (1993) §§41-44.

<sup>683</sup> HRC General Comment 32, §41; HRC: *Singarasa v Sri Lanka*, UN Doc. CCPR/C/81/D/1033/2001 (2004) §7.4, *Koreba v Belarus*, UN Doc. CCPR/C/100/D/1390/2005 (2010) §7.3.

<sup>684</sup> HRC: General Comment 20, §12, General Comment 32, §41.

<sup>685</sup> HRC: *Deollal v Guyana*, UN Doc. CCPR/C/82/D/912/2000 (2004) §5.1-5.2, *Singarasa v Sri Lanka*, UN Doc. CCPR/C/81/D/1033/2001 (2004) §7.4; See Special Rapporteur on torture, UN Doc. A/61/259 (2006) §65.

<sup>686</sup> Special Rapporteur on human rights and counter-terrorism, UN Doc. A/63/223 (2008) §45(d).

## CHAPTER 17

# EXCLUSION OF EVIDENCE OBTAINED IN VIOLATION OF INTERNATIONAL STANDARDS

Statements and other forms of evidence elicited as a result of torture, ill-treatment or other forms of coercion must be excluded from evidence in all proceedings. The only exception is as evidence of abuse in a case against an alleged perpetrator of torture or other ill-treatment. Respect for the right to a fair trial may also require the exclusion of evidence obtained in a manner that violates other international human rights standards.

### 17.1 Exclusion of statements elicited by torture, ill-treatment or coercion

#### 17.1.1 Challenges to the admissibility of statements

### 17.2 Exclusion of other evidence derived from torture or ill-treatment

#### 17.2.1 Rulings of the European Court

### 17.3 Exclusion of evidence obtained in violation of other standards

## 17.1 EXCLUSION OF STATEMENTS ELICITED BY TORTURE, ILL-TREATMENT OR COERCION

Statements elicited as a result of torture, ill-treatment or other forms of coercion must be excluded as evidence in criminal proceedings, except those brought against suspected perpetrators of such abuse (as evidence that the statement was made). These exclusionary rules are inherent in the prohibition against torture and other ill-treatment as well as the right of accused people not to be compelled to testify against themselves or confess guilt and the right to remain silent. Respect for these rights requires that the prosecution prove its case without reliance on evidence obtained by torture or other ill-treatment, coercion or oppression.<sup>687</sup> (See **Chapters 10 and 16.**)

The rule requiring exclusion of statements elicited as a result of torture or other ill-treatment applies not only to statements made by the accused, but also to statements made by any person, whether or not called to testify as a witness. It also applies regardless of where the torture or other ill-treatment took place (including outside the state) and whether the perpetrator of the prohibited treatment was an agent of a foreign state.<sup>688</sup> The exclusionary rule applies regardless of the seriousness of the alleged crime with which the accused is charged or its context.<sup>689</sup> It applies at all times, including during times of emergency,<sup>690</sup> because the prohibition of torture and other ill-treatment is non-derogable under human rights treaty law and is a norm of customary international law.<sup>691</sup> (See **Chapter 31**, Fair trial rights during states of emergency.)

<sup>687</sup> HRC General Comment 32, §§6, 41, 60; *Cabrera-García and Montiel Flores v Mexico*, Inter-American Court (2010) §165; *Gäfgen v Germany* (22978/05), European Court Grand Chamber (2010) §§165-168; See *Othman v United Kingdom* (8139/09), European Court (2012) §§264-267.

<sup>688</sup> *Cabrera-García and Montiel Flores v Mexico*, Inter-American Court (2010) §167; European Court: *El-Haski v Belgium* (649/08), (2012) §§87-88, 91; *Othman v United Kingdom* (8139/09), (2012) §§263-267, 282; See, CAT: *Concluding Observations: United Kingdom*, UN Doc. CAT/C/CR/33/3 (2004) §4(a)(i), 5(d); *P.E. v France*, UN Doc. CAT/C/29/D/193/2001 (2002) §6.3, *G.K. v*

*Switzerland*, UN Doc. CAT/C/30/D/219/2002 (2003) §§6.9-6.10.

<sup>689</sup> See, CAT General Comment 2, §§5, 6; CAT *Concluding Observations: United Kingdom*, UN Doc. A/54/44 (1999) §76(d).

<sup>690</sup> HRC General Comment 32, §6; See HRC General Comment 29, §§7, 15; *Cabrera-García and Montiel Flores v Mexico*, Inter-American Court (2010) §165.

<sup>691</sup> HRC General Comment 32, §6; *Case Concerning Ahmadou Diallo (Republic of Guinea v Democratic Republic of Congo)*, ICJ (2010) §87; JM. Henckaerts and L. Doswald-Bec, *ICRC Study on Customary International Humanitarian Law, Volume 1: Rules*, 2006, Rules 90 and 100, pp315-319, 367.



The Convention against Torture and the Inter-American Convention against Torture contain explicit rules requiring the exclusion of statements elicited by torture (except in proceedings against alleged perpetrators).<sup>a</sup>

However, the scope of the exclusionary rule goes beyond these specific rules. Both torture and other cruel, inhuman or degrading treatment are absolutely prohibited under all circumstances by a range of treaty and non-treaty standards and by customary international law. The Human Rights Committee, the Committee against Torture, other UN experts and regional human rights courts and bodies have held that the exclusionary rule arises out of the prohibition and therefore applies also to cruel, inhuman or degrading treatment other than torture.<sup>b</sup> 692

Although not specified in the European Convention, the European Court has ruled that statements elicited by torture or other ill-treatment must be excluded from evidence in criminal proceedings, except those brought against an alleged perpetrator of such treatment. It has ruled that the right to a fair trial was violated when statements elicited by torture or other ill-treatment were admitted as evidence, even in cases when these statements were not decisive and the court relied on other evidence.<sup>693</sup>

Statements by the accused elicited as a result of coercion must also be excluded from evidence.

For example, the Inter-American Court has clarified that the American Convention requires the exclusion of confessions of guilt made as a result of coercion of any kind, including conduct which, while coercive, might not amount to torture or other ill-treatment (see **Chapter 16**).<sup>c</sup> The Inter-American Court clarified that the exclusionary rule also applies to statements resulting from coercion of third parties, such as witnesses, and to evidence derived from information obtained by duress.<sup>694</sup>

The Principles on Fair Trial in Africa explicitly prohibit confessions or other evidence obtained by any form of coercion or force from consideration at trial or in sentencing.<sup>695</sup> Any confession or admission obtained during incommunicado detention is to be considered to have been obtained by coercion.<sup>d</sup>

The exclusionary rule must therefore be applied to statements by any person obtained as a result of torture or other ill-treatment and to statements, particularly by the accused, obtained as a result of compulsion, whether physical or psychological. This includes, for example, prolonged incommunicado detention (including in the context of enforced disappearances) and secret detention.<sup>696</sup> (See **Chapters 4.3, 9.3 and 16.**)

#### Convention against Torture, Article 15

“Each State Party shall ensure that any statement which is established to have been made as a result of torture shall not be invoked as evidence in any proceedings, except against a person accused of torture as evidence that the statement was made.”

#### Declaration against Torture, Article 12

“Any statement which is established to have been made as a result of torture or other cruel, inhuman or degrading treatment or punishment may not be invoked as evidence against the person concerned or against any other person in any proceedings.”

<sup>a</sup> Article 15 of the Convention against Torture, Article 10 of the Inter-American Convention against Torture

<sup>b</sup> Article 12 of the Declaration against Torture, Guideline 29 of the Robben Island Guidelines, Principle V of the Principles on Persons Deprived of Liberty in the Americas; See Article 7 of the ICCPR, Article 5 of the African Charter, Article 5 of the American Convention, Article 8 of the Arab Charter, Article 3 of the European Convention, Principles 21 and 27 of the Body of Principles

<sup>c</sup> Article 8(3) of the American Convention

<sup>d</sup> Section N(6)(d)(i) of the Principles on Fair Trial in Africa

<sup>692</sup> Special Rapporteur on torture, UN Doc. *A/54/426* (1999) §12(e); HRC: General Comment 20, §12, General Comment 32, §60; CAT: General Comment 2, §6, Concluding Observations: Mongolia, UN Doc. CAT/C/MNG/CO/1 (2010) §18; *Söylemez v Turkey* (46661/99), European Court (2006) §§121-125; See *Malawi African Association and Others v Mauritania* (54/91 et al), African Commission, 13th Annual Report (2000) §§3, 8, 11, 115.

<sup>693</sup> European Court: *Harutyunyan v Armenia* (36549/03), (2007) §§63-66, *Levinta v Moldova* (17332/03), (2008) §100; *Stanimirovic v*

*Serbia* (26088/06), (2011) §52.

<sup>694</sup> *Cabrera-García and Montiel Flores v Mexico*, Inter-American Court (2010) §§166-167.

<sup>695</sup> See also, *African Commission Concluding Observations: Benin*, (2009) §50.

<sup>696</sup> Special Rapporteur on torture, UN Doc. *A/61/259* (2006) §56; Special Rapporteur on human rights and counter-terrorism, UN Doc. *A/63/223* (2008) §45(d); *Inter-American Commission, Resolution no. 29/89: Nicaragua* (10.198), (1990).

Statements made by the accused as a result of coercion have been used in many countries in proceedings against people suspected of involvement in terrorism, in violation of international standards.<sup>697</sup>

The Committee against Torture has expressed concern about reports that women in Chile needing life-saving medical care following illegal abortions received treatment only if they gave information on those performing such abortions, and that these statements, obtained through coercion, were used in subsequent criminal proceedings.<sup>698</sup>

The Special Rapporteur on torture has recommended that confessions made by people in custody should only be admissible as evidence if they are recorded, made in the presence of a competent and independent lawyer and confirmed before a judge. They should never be the sole basis for a conviction.<sup>699</sup> Even if such safeguards are in place, the exclusionary rule must be applied to statements obtained as result of torture, other ill-treatment or other forms of compulsion.

### 17.1.1 CHALLENGES TO THE ADMISSIBILITY OF STATEMENTS

Statements by the accused in criminal proceedings should not in principle be admitted as evidence unless they are proved to have been given voluntarily. This principle should provide substantial protection against the admission of statements obtained through coercion. (See **Chapter 16.**)

More generally, when it is alleged that statements – whether by the accused or by other people – have been obtained as a result of violations of human rights, or there is otherwise reason to believe that this may be so, the authorities are required to give the accused and the court information about the circumstances in which the evidence was obtained. The court must then assess the issue in a separate hearing before the evidence is admitted in the trial. Consistent with the presumption of innocence, the prosecution bears the burden of proving beyond reasonable doubt that the evidence was obtained lawfully.<sup>700</sup>

The Human Rights Committee concluded that an element of a terrorism law in Sri Lanka, which placed the burden on the accused to prove that his confession was made under duress and thus should be excluded as evidence, violated the presumption of innocence and the prohibition against coerced confessions.<sup>701</sup>

The Inter-American Court has ruled that since the burden of proof is on the state, the accused need not fully prove the allegation that the evidence was obtained as a result of torture or other ill-treatment.<sup>702</sup>

The European Court and the Inter-American Court have both ruled that if a person who has made a statement as a result of torture or other ill-treatment confirms or repeats that statement before a different authority (including a court), this should not automatically lead to the conclusion that the statement was voluntary and is admissible.<sup>703</sup> The court still needs to evaluate the voluntariness of the confirmation or repetition, in the light of the past abuse and the person's current situation.

<sup>697</sup> HRC Concluding Observations: Russia, UN Doc. CCPR/C/RUS/CO/6 (2009) §8; Special Rapporteur on torture: UN Doc. A/HRC/13/39/Add.5 (2010) §96, UN Doc. A/61/259 (2006) §46.

<sup>698</sup> CAT Concluding Observations: Chile, UN Doc. CAT/C/CR/32/5 (2004) §§6(j), 7(m).

<sup>699</sup> Special Rapporteur on torture: UN Doc. A/56/156 (2001) §39(d), (f), UN Doc. A/HRC/13/39/Add.5 (2010) §§100-101; See CAT Concluding Observations: Chad, UN Doc. CAT/C/TCD/CO/1 (2009) §29.

<sup>700</sup> *Cabrera-García and Montiel Flores v Mexico*, Inter-American Court (2010) §173-177; HRC: *Singarasa v Sri Lanka*, UN Doc. CCPR/C/81/D/1033/2001 (2004) §7.4, *General Comment 32*, §§33,

41, *Idieva v Tajikistan*, UN Doc. CCPR/C/95/D/1276/2004 (2009) §§9.3, 9.6; Special Rapporteur on torture: UN Doc. A/56/156 (2001) §39(j), UN Doc. A/61/259 (2006) §65, UN Doc. A/HRC/13/39/Add.5 (2010) §98.

<sup>701</sup> *Singarasa v Sri Lanka*, HRC, UN Doc. CCPR/C/81/D/1033/2001 (2004) §§3.7, 7.4.

<sup>702</sup> *Cabrera-García and Montiel Flores v Mexico*, Inter-American Court (2010) §§176, 177.

<sup>703</sup> European Court: *Harutyunyan v Armenia* (36549/03), (2007) §§65-66, *Stanimirovic v Serbia* (26088/06), (2011) §52; *Cabrera-García and Montiel Flores v Mexico*, Inter-American Court (2010) §§173-174.

In cases where evidence was obtained in another country, the European Court and the Special Rapporteur on torture have stated that where there is a real risk that evidence was obtained as a result of torture or other ill-treatment, the admission of evidence would violate the right to a fair trial. The only exception would be if, having examined the allegations to the contrary, the court was convinced that the evidence had not been elicited as a result of such treatment, on the basis of objective and specific proof.<sup>704</sup>

The Special Rapporteur on human rights and counter-terrorism has stated that if there are doubts about the voluntariness of statements by an accused or witnesses, for example when no information about the circumstances is provided or if the person is arbitrarily or secretly detained, a statement should be excluded, even in the absence of direct evidence of physical abuse.<sup>705</sup>

## 17.2 EXCLUSION OF OTHER EVIDENCE DERIVED FROM TORTURE OR ILL-TREATMENT

Respect for the right to a fair trial and the prohibition against torture requires the exclusion not only of statements elicited by torture, but also of other forms of evidence obtained as a result of torture.<sup>706</sup> This includes evidence, such as physical evidence of a crime, derived from information extracted through torture. This exclusionary rule also applies at all times, including times of emergency.<sup>707</sup>

In addition, the Principles on Fair Trial in Africa and jurisprudence of the Inter-American Court expressly require exclusion of all forms of evidence elicited as a result of torture, other ill-treatment or other forms of coercion.<sup>a 708</sup>

The Human Rights Committee has similarly stated that the ICCPR requires the exclusion not only of statements and confessions but also, in principle, all other forms of evidence elicited as a result of torture or other ill-treatment, at all times.<sup>709</sup>

### 17.2.1 RULINGS OF THE EUROPEAN COURT

The European Court has explained that the use of “real evidence” (for example, physical evidence) obtained as a direct result of torture should never be relied on as proof of a person’s guilt.<sup>710</sup> The Court has stated: “Torture evidence is excluded to protect the integrity of the trial process and, ultimately, the rule of law itself.”<sup>711</sup>

The European Court has also held that the introduction of “real evidence” derived from ill-treatment not amounting to torture may render a trial unfair.<sup>712</sup> However, by June 2013, it had not yet ruled that the right to a fair trial requires all “real evidence” obtained as a result of inhuman treatment to be excluded in all circumstances.<sup>713</sup> The key issues in two cases examined by the Grand Chamber (with differing results) appear to be whether the evidence had a bearing on the conviction and sentence and whether the accused’s defence rights were respected.

<sup>a</sup> Section N(6)(d)(i) of the Principles on Fair Trial in Africa

<sup>704</sup> European Court: *El-Haski v Belgium* (649/08), (2012) §§87, 99; See, *Othman v United Kingdom* (8139/09), §§281-282 (extradition case); Special Rapporteur on torture, UN Doc. *A/61/259* (2006) §65.

<sup>705</sup> Special Rapporteur on human rights and counter-terrorism, UN Doc. *A/63/223* (2008) §45(d).

<sup>706</sup> CAT Concluding Observations: *Israel*, UN Doc. A/57/44 (Supp) (2002) §§52(k), 53(j) (or §§6(k), 7(j) of the excerpted document), *Belgium*, UN Doc. CAT/C/CR/30/6 (2003) §§5(o), 7(n), *United Kingdom*, UN Doc. CAT/C/CR/33/3 (2004) §4(a)(i), 5(d); *HRC General Comment 32*, §6; *Inter-American Commission: Venezuela*, (2003) §364(8).

<sup>707</sup> *HRC General Comment 32*, §6; See *HRC General Comment 29*, §§7, 15; *Cabrera-García and Montiel Flores v Mexico*, Inter-American Court (2010) §165.

<sup>708</sup> *Cabrera-García and Montiel Flores v Mexico*, Inter-American Court (2010) §§165-168; *CAT Inquiry Report: Mexico*, UN Doc. CAT/C/75 (2003) §220(d) and (f).

<sup>709</sup> *HRC General Comment 32*, §6.

<sup>710</sup> European Court Grand Chamber: *Gäfgen v Germany* (22978/05), (2010) §167, *Jalloh v Germany* (54810/00), (2006) §105.

<sup>711</sup> *Othman v United Kingdom* (8139/09), European Court (2012) §§264, 267.

<sup>712</sup> *Jalloh v Germany* (54810/00), European Court Grand Chamber (2006) §§106-108.

<sup>713</sup> *Gäfgen v Germany* (22978/05), European Court Grand Chamber (2010) §167.

In the case of *Jalloh v Germany*, the Court found that the introduction of physical evidence gained as a result of inhuman treatment violated his right to a fair trial. In this case, an individual suspected of selling drugs swallowed a bag when he was arrested. In hospital he was held down by four police officers while medication to induce vomiting was forcibly administered. (The Court considered this treatment to be inhuman or degrading.) The bag of drugs obtained as a result was the decisive evidence against him.<sup>714</sup>

In the subsequent case of *Gäfgen v Germany*, the Court ruled that the introduction of evidence gathered as a result of statements by a suspect after he was threatened with torture (treatment which the Court characterized as inhuman) did not render the trial as a whole unfair. It considered that the failure to exclude this tainted evidence did not have a bearing on the accused's conviction for kidnapping and murdering a child and that his rights to a defence and not to incriminate himself were respected. In reaching this conclusion the majority of the Court found the following facts decisive:

- The trial court had ruled that the *statements* made following the ill-treatment could not be introduced as evidence;
- The accused could and did challenge the admissibility of the *physical evidence* gathered as a consequence of the statements following ill-treatment;
- The trial court had the discretion to exclude this physical evidence;
- The conviction was not based on this physical evidence, but on two confessions the accused made during the trial, after the court had made admissibility rulings and had reminded him of his right to remain silent;
- The accused stated that his confessions at trial were made freely;
- The impugned evidence was not necessary to prove him guilty or determine his sentence.<sup>715</sup>

### 17.3 EXCLUSION OF EVIDENCE OBTAINED IN VIOLATION OF OTHER STANDARDS

Respect for the right to a fair trial may also require, in certain circumstances, the exclusion of evidence obtained in violation of other international human rights standards.

The Special Rapporteur on human rights and counter-terrorism has stated that in addition to the prohibition against the use of evidence obtained by torture or other ill-treatment, the use of evidence obtained otherwise in breach of human rights or domestic law generally renders a trial unfair.<sup>716</sup>

The Inter-American Commission stated that the exclusionary rule should apply to any evidence arising from procedures that are irregular or in violation of due process.<sup>717</sup>

Some non-treaty standards require exclusion of evidence (including statements) obtained by means which constitute a serious violation of human rights.<sup>a</sup>

The Guidelines on the Role of Prosecutors state that when prosecutors come into possession of evidence that they have reason to believe was obtained through unlawful methods which constitute grave violations of the suspect's human rights, they must refuse to use such evidence against anyone other than those accused of such conduct.<sup>b</sup>

<sup>a</sup> Guideline 16 of the Guidelines on the Role of Prosecutors, Section N(6)(g) of the Principles on Fair Trial in Africa; See Principle 27 of the Body of Principles, Article 69(7) of the ICC Statute

<sup>b</sup> Guideline 16 of the Guidelines on the Role of Prosecutors

<sup>714</sup> *Jalloh v Germany* (54810/00), European Court Grand Chamber (2006) §§118-123.

<sup>715</sup> *Gäfgen v Germany* (22978/05), European Court Grand Chamber (2010) §§169-188.

<sup>716</sup> Special Rapporteur on human rights and counter-terrorism, UN Doc. A/63/223 (2008) §45(d).

<sup>717</sup> Inter-American Commission: *Venezuela*, (2003) §364(8).

Confidential communications between detained or imprisoned individuals and their lawyers must be excluded as evidence, unless they concern a continuing or contemplated crime.<sup>a</sup> (See **Chapter 20.4.**)

The Body of Principles states that non-compliance with the principles they enshrine “shall be taken into account when determining the admissibility of... evidence against a detained or imprisoned person”.<sup>b</sup>

The Principles on Legal Aid list the exclusion of evidence as one of the possible remedies which are required if an individual has not been adequately informed of the right to legal aid.<sup>c</sup>

In recent years, some human rights courts, bodies and mechanisms have examined whether the failure to exclude evidence obtained as a result of other violations of human rights renders criminal proceedings unfair. The cases have involved, for example: evidence obtained while a person was held in incommunicado or arbitrary detention;<sup>718</sup> statements obtained without defence counsel present;<sup>719</sup> evidence obtained in violation of the right to remain silent;<sup>720</sup> and evidence gained as a result of entrapment.<sup>721</sup> (See also **Chapter 16.2.1.**)

<sup>a</sup> Principle 18(5) of the Body of Principles; See Section N(3)(ii) of the Principles on Fair Trial in Africa

<sup>b</sup> Principle 27 of the Body of Principles

<sup>c</sup> Guideline 2 §42(e) and Principle 9 of the Principles on Legal Aid

#### Principles on Fair Trial in Africa, Section N(6)(g)

“Evidence obtained by illegal means constituting a serious violation of internationally protected human rights shall not be used as evidence against the accused or against any other person in any proceeding, except in the prosecution of the perpetrators of the violations.”

**718** Inter-American Commission resolution 29/89: Nicaragua (10.198), (1990); See Special Rapporteur on human rights and counter-terrorism, Spain, UN Doc. A/HRC/10/3/Add.2 (2008) §43. Prolonged incommunicado detention can, in itself, constitute cruel, inhuman or degrading treatment or torture. (See **Chapter 4.3.**)

**719** European Court: *Salduz v Turkey* (36391/02), Grand Chamber (2008) §§56-58, *Yaremenko v Ukraine* (32092/02), (2008) §§85-91, *Ocalan v Turkey* (46221/99), Grand Chamber (2005) §131.

**720** European Court: *Saunders v United Kingdom* (19187/91), Grand Chamber (1996) §§68-76, *Heaney and McGuinness v Ireland* (34720/97), (2001) §§47-59, *Allan v United Kingdom* (48539/99), (2002) §§52-53.

**721** *Teixeira de Castro v Portugal* (25829/94), European Court (1998) §§34-39; See, European Court: *Edwards and Lewis v United Kingdom* (39647/98 and 40461/98), (2003) §§49-59, *Ramanauskas v Lithuania* (74420/01), Grand Chamber (2008) §§54-74.

# CHAPTER 18

## THE PROHIBITION OF RETROACTIVE APPLICATION OF CRIMINAL LAWS AND OF DOUBLE JEOPARDY

No one may be prosecuted for an act or omission that did not constitute a criminal offence in national or international law when it was committed. Criminal offences must be defined clearly and applied precisely. No one may be prosecuted more than once in the same jurisdiction for the same offence.

### 18.1 No prosecution for acts that were not crimes when committed

#### 18.1.1 The principle of legality

#### 18.2 The prohibition of double jeopardy

#### 18.3 International criminal courts

### 18.1 NO PROSECUTION FOR ACTS THAT WERE NOT CRIMES WHEN COMMITTED

No one may be convicted for an act or an omission that did not constitute a criminal offence under national or international law at the time it was committed.<sup>a 722</sup>

The prohibition on retroactive application of criminal laws (also referred to as *nullem crimen sine lege*) may not be restricted in any circumstances, including during states of emergency.<sup>b</sup> (See **Chapter 31**, Fair trial rights during states of emergency.)

The criminal offences referred to in these standards include:

- offences that arise from national law – both statute and norms of common law – as interpreted by the courts;<sup>723</sup> and
- acts or omissions criminalized by international treaty law or customary international law.

This means that a person may be prosecuted if accused of acts that were criminal under international law when they were committed, such as genocide, crimes against humanity, war crimes, slavery, torture and enforced disappearance, even if these were not defined as criminal under national law at the time.<sup>724</sup>

#### ICCPR, Article 15(1)

“No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed.”

<sup>a</sup> Article 11(2) of the Universal Declaration, Article 15 of the ICCPR, Article 19(1) of the Migrant Workers Convention, Article 7(2) of the African Charter, Article 9 of the American Convention, Article 15 of the Arab Charter, Article 7 of the European Convention, Section N7(a) of the Principles on Fair Trial in Africa; See Article 22 of the ICC Statute

<sup>b</sup> Article 4(2) of the ICCPR, Article 27(2) of the American Convention, Article 4(2) of the Arab Charter, Article 15(2) of the European Convention

<sup>722</sup> European Court: *Veeber v Estonia* No 2 (45771/99), (2003) §§37-39; *Korbely v Hungary* (9174/02), Grand Chamber (2008) §§69-95; *De La Cruz-Flores v Peru*, Inter-American Court (2004) §§104-109, 110-114; *Dawda Jawara v The Gambia* (147/95 and 149/96), African Commission, 13th Annual Report (2000) §§62-63.

<sup>723</sup> European Court: *Cantoni v France* (17862/91), (1996) §29; *Saiz Ojea and others v Spain* (74182/01, 74186/01, 74191/01), (inadmissibility decision) (2007), En Droit §2.

<sup>724</sup> European Court: *Papon v France* (No 2) (54210/00), (inadmissibility decision) (15 November 2001) The Law, §5, *Kolk and Kislyiy v Estonia* (23052/04 and 24018/04), (2006); *Baumgarten v Germany*, HRC, UN Doc. CCPR/C/78/D/960/2000 (2003) §9.3-9.5; See *Interlocutory Decision on the Applicable Law* (STL-II-0111), Appeals Chamber of the Special Tribunal for Lebanon (16 February 2011) §133.

For a continuing crime, such as enforced disappearance,<sup>725</sup> a prosecution would not be considered retroactive if the criminal conduct on which the prosecution was based was defined in national or international law before the crime was complete. In cases of enforced disappearance, the offence is considered to be ongoing until the fate and whereabouts of the victim are disclosed.<sup>a 726</sup>

The standards cited above provide safeguards against arbitrary prosecution, conviction and punishment.<sup>727</sup>

They also embody the rule of lenity: the principle that when there are differences between the criminal law in force at the time of an offence and criminal laws enacted after the offence was committed but before a final judgment, the courts must apply the law whose provisions are most favourable to the accused.<sup>728</sup>

Furthermore, they mean that a person cannot be prosecuted for an act that was prohibited by law when committed, if, as a result of a change in law, the act no longer constitutes a crime when the individual is charged or finally convicted.<sup>729</sup>

These standards also:

- prohibit the imposition of a heavier penalty than was in force at the time of the crime (see **Chapter 25**);
- require the application of changes to the law that reduce the penalty (see **Chapter 25.3**); and
- require respect for the principle of legality.

### 18.1.1 THE PRINCIPLE OF LEGALITY

The principle of legality imposes an obligation on states to define criminal offences precisely within the law.

The principle of legality is satisfied when an individual can know from the wording of the relevant legal provision, as interpreted by the courts, what acts and omissions will make him or her criminally liable.<sup>730</sup> The fact that a person may require legal advice to understand the law does not necessarily render that law too vague.<sup>731</sup>

As a general rule, the definition of a crime must be strictly construed – not extended by analogy<sup>732</sup> – and, in case of ambiguity, must be interpreted in favour of the accused.

The Inter-American Court explained: “crimes must be classified and described in precise and unambiguous language that narrowly defines the punishable offense...

This means a clear definition of the criminalized conduct, establishing its elements and the factors that distinguish it from behaviors that are either not punishable offences or are punishable but not with imprisonment. Ambiguity in describing crimes creates doubts and the opportunity for abuse of power, particularly when it comes to

<sup>a</sup> See Article 17(1) of the Declaration on Disappearance

**725** *Bámaca-Velásquez v Guatemala*, Inter-American Court (2000) §128; European Court Grand Chamber: *Varnava and Others v Turkey* (16064/90-16066/90 and 16068/90-16073/90), (2009) §148, *El-Masri v The Former Yugoslav Republic of Macedonia* (39630/09), (2012) §240.

**726** WGEID General Comment on Enforced Disappearance as a continuing crime; See Article 14(2) of the draft *Articles on State Responsibility for Internationally Wrongful Acts*.

**727** European Court: *Streletz and others v Germany* (34044/96, 35532/97 and 44801/98), (2001) §50, *S.W. v the United Kingdom* (20166/92), (1995) §§34-36, *Korbely v Hungary* (9174/02), Grand Chamber (2008) §69; *Pietraroia v Uruguay* (44/1979), HRC, UN Doc. CCPR/C/OP/1 (1984) p76, §§13.2, 17.

**728** *Scoppola v Italy* (No.2) (10249/03), European Court Grand Chamber (2009) §§106-109; See *Cochet v France*, HRC, UN Doc.

CCPR/C/100/D/1760/2008 (2010) §7.2-7.4.

**729** *Cochet v France*, HRC, UN Doc. CCPR/C/100/D/1760/2008 (2010) §7.2-7.4.

**730** European Court: *Kokkinakis v Greece* (14307/88), (1993) §52, *S.W. v the United Kingdom* (20166/92), (1995) §§34-36, *Korbely v Hungary* (9174/02), Grand Chamber (2008) §§69-70; *Prosecutor v Mitar Vasiljević* (IT-98-32-T), ICTY Trial Chamber (29 November 2002) §§201-204; *Prosecutor v Zlatko Aleksovski* (IT-95-14/1-A), ICTY Appeals Chamber (24 March 2000) §§126-127.

**731** European Court: *Cantoni v France* (17862/91), (1996) §§29, 35, *Korbely v Hungary* (9174/02), Grand Chamber (2008) §§69-70, *Sunday Times v United Kingdom* (No 1) (6538/74), (1979) §§49-53.

**732** See, European Court: *Korbely v Hungary* (9174/02), Grand Chamber (2008) §§69-70, *Veeber v Estonia* No. 2 (45771/99), (2003) §31.

ascertaining the criminal responsibility of individuals and punishing their criminal behavior with penalties that exact their toll on the things that are most precious, such as life and liberty.”<sup>733</sup>

A number of human rights bodies and mechanisms have raised concern over the lack of precision of anti-terrorism laws and national security laws.<sup>734</sup> The UN General Assembly has urged states to ensure that laws criminalizing acts of terrorism are accessible, formulated with precision, non-discriminatory and non-retroactive and comply with international law, including human rights law.<sup>735</sup>

The principle of legality requires criminal courts to ensure that they do not punish acts that are not punishable under the law(s) cited in the charges.<sup>736</sup> It also requires that the prosecution prove each element of the crime to the required legal standard.<sup>737</sup> (See **Chapter 15.2** on burden of proof.)

The Inter-American Court ruled that a conviction violated the principle of legality as it was based on membership of a terrorist organization and failing to report information – rather than the crime of collaboration with terrorism with which the individual was charged.<sup>738</sup>

## 18.2 THE PROHIBITION OF DOUBLE JEOPARDY

No one may be tried or punished again in the same jurisdiction for a criminal offence if they have been finally convicted or acquitted of that offence.

The prohibition against double jeopardy, also known as the principle of *ne bis in idem*, prevents a person from being tried or punished more than once in the same jurisdiction for the same crime. Under some international standards it prevents a person being tried more than once for conduct arising from the same or similar set of facts.<sup>a</sup>

The prohibition under the American Convention expressly covers new trials based on “the same cause”. This means that if the charges relate to the same matter or set of facts, a subsequent trial is prohibited even if the accused is charged with a different offence.

While Article 4 of Protocol 7 to the European Convention expressly prohibits trials for the same offence, the European Court has clarified that the prohibition of double jeopardy prohibits a subsequent prosecution for a second offence if it arises from facts that are identical to or substantially the same as those which gave rise to the first trial.

<sup>a</sup> Article 14(7) of the ICCPR, Article 18(7) of the Migrant Workers Convention, Article 8(4) of the American Convention, Article 19 of the Arab Charter, Article 4 of Protocol 7 to the European Convention, Section N(8) of the Principles on Fair Trial in Africa

### ICCPR, Article 14(7)

“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.”

### American Convention, Article 8(4)

“An accused person acquitted by a nonappealable judgment shall not be subjected to a new trial for the same cause.”

<sup>733</sup> *Castillo Petrucci et al v Peru*, Inter-American Court (1999) §121.

<sup>734</sup> Special Rapporteur on human rights and counter-terrorism: UN Doc. *E/CN.4/2006/98* (2005) §§13, 26-27, 42-50, 72, Spain, UN Doc. *A/HRC/10/3/Add.2* (2008) §§6-14, Israel, UN Doc. *A/HRC/6/17/Add.4* §16; HRC Concluding Observations: Hungary, UN Doc. *CCPR/C/HUN/CO/5* (2010) §9, Russia, UN Doc. *CCPR/C/RUS/CO/6* (2009) §§7, 24, USA, UN Doc. *CCPR/C/USA/CO/3/REV.1* (2006) §11, Libya, UN Doc. *CCPR/C/LBY/CO/4* (2007) §12; *CAT Concluding Observations: Algeria*, UN Doc. *CAT/C/DZA/CO/3* (2008) §4; *CoE Venice*

*Commission, Report on Counter-Terrorism Measures and Human Rights*, CoE Doc. *CDL-AD(2010)022* (2010) §§32-34; WGAD, UN Doc. *E/CN.4/1995/31* (1994) §25(d); HRC *Concluding Observations: Hong Kong Special Administrative Region*, UN Doc. *CCPR/C/HKG/CO/2* (2006) §14.

<sup>735</sup> UN General Assembly resolution 65/221, §6(l).

<sup>736</sup> *De La Cruz-Flores v Peru*, Inter-American Court (2004) §§81-82.

<sup>737</sup> *Nicholas v Australia*, HRC, UN Doc. *CCPR/C/80/D/1080/2002* (2004) §7.5.

<sup>738</sup> *De La Cruz-Flores v Peru*, Inter-American Court (2004) §§77-103.



The prohibition is violated even if the person is acquitted in the second case. The Court found that the prohibition of double jeopardy was violated when an individual was charged under the penal code with disorderly conduct for the same acts that had already resulted in his serving a three-day “administrative” sentence.<sup>739</sup>

The repeated punishment of conscientious objectors for refusing renewed orders to serve in the military may violate the prohibition of double jeopardy, if the subsequent refusal “is based on the same constant resolve, grounded in reasons of conscience”.<sup>740</sup>

The prohibition against double jeopardy applies to all criminal offences, regardless of their seriousness. Even though an offence is not characterized as “criminal” under the law of a state, it may be deemed a “criminal offence” under international human rights law, depending on the nature of the offence and the potential penalties. (See **Definitions of Terms**, Criminal offence.) The prohibition does not apply to disciplinary measures that do not amount to sanctions for a criminal offence.<sup>741</sup>

The prohibition applies at all times, including during times of emergency under the Arab Charter and Protocol 7 to the European Convention,<sup>a</sup> and is expressly guaranteed under international humanitarian law applicable during armed conflict. (See **Chapters 31** and **32**.)

Under the ICCPR, the Migrant Workers Convention and Protocol 7 to the European Convention, the prohibition against double jeopardy applies expressly after a final judgment of conviction or acquittal. In contrast, the prohibition under the American Convention applies only to acquittals.<sup>b</sup>

All applicable judicial reviews and appeals must be finally exhausted or their time limits must have passed. Therefore, if a higher court considering the (first) trial proceedings quashes a conviction and orders a re-trial, the prohibition against double jeopardy is not violated.<sup>742</sup>

The prohibition prevents new prosecutions, trials or punishments in the same jurisdiction. Subsequent trials for different offences or for the same offence in different jurisdictions do not violate the prohibition against double jeopardy.<sup>743</sup>

The prohibition does not, however, prevent the re-trial of a person tried and convicted *in absentia*, if requested by the accused.<sup>744</sup> (See **Chapter 21.2**, Trials *in absentia*.)

Nor does the prohibition prevent the reopening of cases (including new trials) when there has been a miscarriage of justice, if the trial proceedings were unfair or if there is new or newly discovered evidence.<sup>c</sup>

A distinction must be made between the reopening or new trial of a case justified by such exceptional circumstances (which is permissible) and a second or subsequent trial or punishment for the same offence (which is prohibited). Therefore, new trials may be held, for example, when evidence emerges of serious procedural flaws, including lack of independence or impartiality of the court, or in the event of new or newly discovered facts or evidence.<sup>745</sup> (See **Chapter 26.6**.)

<sup>a</sup> Article 4(2) of the Arab Charter, Article 4(3) of Protocol 7 to the European Convention

<sup>b</sup> Article 8(4) of the American Convention

<sup>c</sup> Article 4(2) of Protocol 7 to the European Convention

<sup>739</sup> *Zolotukhin v Russia* (14939/03), European Court Grand Chamber (2009) §§82-83, 110-111.

<sup>740</sup> HRC General Comment 32, §55; WGAD Opinion No 24/2003 (Israel), UN Doc. E/CN.4/2005/6/Add.1 (2004) pp18-22 §30; CHR resolution 1998/77, §5.

<sup>741</sup> HRC General Comment 32, §57; *Gerardus Strik v The Netherlands*, HRC, UN Doc.CCPR/C/76/D/1001/2001 (2002) §7.3.

<sup>742</sup> HRC General Comment 32, §56; *Zolotukhin v Russia* (14939/03), European Court Grand Chamber (2009) §§107-110.

<sup>743</sup> HRC: *A.P. v Italy* (204/1986), (1987) §7.3, *A.R.J. v Australia*, UN Doc. CCPR/C/60/D/692/1996 (1997) §6.4.

<sup>744</sup> HRC General Comment 32, §54.

<sup>745</sup> HRC General Comment 32, §56; *Almonacid-Arellano et al v Chile*, Inter-American Court (2006) §154.

<sup>a</sup> Article 9(2) of the Rwanda Statute, Article 9(2) of the Statute of the Special Court for Sierra Leone, Article 10(2) of the Yugoslavia Statute

<sup>b</sup> Article 20(3) of the ICC Statute

<sup>c</sup> Article 20(3) of the ICC Statute

<sup>d</sup> Article 20(2) of the ICC Statute, Article 9(1) of the Rwanda Statute, Article 9(1) of the Statute of the Special Court for Sierra Leone, Article 10 of the Yugoslavia Statute

### 18.3 INTERNATIONAL CRIMINAL COURTS

People who have already been tried in national courts for acts which fall within the jurisdiction of the International Criminal Court and other international criminal courts may be tried again before these international criminal courts without violating the principle of double jeopardy if:<sup>a</sup>

- the act for which the person was tried before the national court was characterized as an ordinary crime under national law (as opposed to genocide, a crime against humanity or a war crime); or
- the proceedings in the national court were designed to shield the person concerned from responsibility for such crimes or were otherwise not conducted independently or impartially, in a manner designed to avoid the person being brought to justice; or<sup>b</sup>
- the case before the national court was not diligently prosecuted.<sup>c</sup>

However, people who have been tried before the International Criminal Court or other international criminal courts for acts falling within their jurisdiction may not subsequently be tried again for those acts before a national court.<sup>d</sup>

# CHAPTER 19

## RIGHT TO BE TRIED WITHOUT UNDUE DELAY

Everyone charged with a criminal offence has the right to be tried without undue delay. The length of time judged reasonable will depend on the circumstances of the case.

### 19.1 Right to trial without undue delay

#### 19.2 What is a reasonable time?

##### 19.2.1 Complexity of the case

##### 19.2.2 Conduct of the accused

##### 19.2.3 Conduct of the authorities

## 19.1 RIGHT TO TRIAL WITHOUT UNDUE DELAY

Criminal proceedings must be started and completed within a reasonable time.<sup>a</sup>

The American Convention and the European Convention differ from other standards cited in two aspects. First, they are not expressly limited to criminal proceedings. Second, they require proceedings to be conducted “within a reasonable time”, rather than “without undue delay”, although this variation in language does not appear to be significant.

The Committee on the Rights of the Child has explained that the obligation under the Convention on the Rights of the Child to complete proceedings against children “without delay”, requires even more expedition.<sup>746</sup> (See **Chapter 27.6.8.**)

In scheduling trials, courts must:

- ensure the right of the defence to adequate time and facilities to prepare the defence (see **Chapter 8**);
- consider the needs of the fair administration of justice (see **Chapter 13**); and
- respect the right of the accused to have criminal proceedings start and be completed without undue delay.<sup>747</sup>

The International Criminal Court has warned that the need for expedition cannot justify courts taking measures that are inconsistent with the rights of the accused or with the fairness of the trial generally.<sup>748</sup>

### ICCPR, Article 14(3)(c)

“In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality:

(c) To be tried without undue delay;”

<sup>a</sup> Article 14(3)(c) of the ICCPR, Article 40(2)(b)(iii) of the Convention on the Rights of the Child, Article 18(3)(c) of the Migrant Workers Convention, Article 7(1)(d) of the African Charter, Article 8(1) of the American Convention, Article 6(1) of the European Convention, Article 67(1)(c) of the ICC Statute, Article 20(4)(c) of the Rwanda Statute, Article 21(4)(c) of the Yugoslavia Statute

<sup>746</sup> CRC General Comment 10, §52.

<sup>747</sup> See *Coëme and others v Belgium* (32492/96; 32547/96; 32548/96; 33209/96; 33210/96), European Court (2000) §140.

<sup>748</sup> *Prosecutor v Jean-Pierre Bemba Gombo* (ICC-01/05-01/08-1386), ICC Appeals Chamber (3 May 2011) §55.

If the accused is detained pending trial, the obligation on the state to expedite the trial is even more pressing, since less delay is considered reasonable. International standards, including Article 9(3) of the ICCPR, require an accused who is detained pre-trial to be released from detention pending trial if the time deemed reasonable in the circumstances is exceeded. (See **Chapter 7**, Right of detainees to trial within a reasonable time or to release.)

The right to trial without undue delay is linked to other rights, including the rights to liberty, to be presumed innocent and to defend oneself. It aims to limit the uncertainty faced by an accused person and any stigma attached to the accusation, despite the presumption of innocence.<sup>749</sup> Moreover, if there is inordinate delay, this may impair the quality or availability of the evidence,<sup>750</sup> for example as witnesses' memories fade, witnesses become unavailable or evidence disappears, degrades or is destroyed. The guarantee of a prompt trial serves the interests of justice for the accused, victims of the crime and the public at large,<sup>751</sup> while the violation of this guarantee encapsulates the maxim that "justice delayed is justice denied".

The state's duty to respect the right to trial within a reasonable time is not dependent on an accused asking the authorities to expedite proceedings.<sup>752</sup> The accused is not required to prove that the delay caused particular prejudice in order to show that the right to trial without undue delay has been violated. Rather, the burden of proof lies with the state to show that the delay was justifiable.<sup>753</sup>

The standards do not guarantee that proceedings will take place without *any* delay; they prohibit *undue* delay.

In assessing delays, the relevant time period begins when a suspect is informed that the authorities are taking specific steps towards prosecuting them, such as on arrest or when charged.<sup>754</sup> It ends when the investigation is closed (if the charges are dropped) or final appeal avenues have been exhausted or deadlines have passed and final judgments have been issued.<sup>a 755</sup>

The guarantee of the right to trial without undue delay requires states to organize and make available sufficient resources for their legal systems.<sup>756</sup> Undue delays arising from court backlogs, adverse economic or other conditions,<sup>757</sup> a shortage of judges, or increased criminality following an attempted coup,<sup>758</sup> have all been held to be insufficient justification for a state's failure to guarantee this right.

## 19.2 WHAT IS A REASONABLE TIME?

What constitutes a "reasonable time" is judged according to the circumstances of the individual case. Factors to be considered include: the complexity of the case; the conduct of the accused; the conduct of the authorities; what is at stake for the accused, including whether they are in custody and their state of health; and the seriousness of the charges and potential penalties.<sup>b 759</sup>

<sup>a</sup> Section N(5)(b) of the Principles on Fair Trial in Africa

<sup>b</sup> Section N5(c) of the Principles on Fair Trial in Africa; See Principle V of the Principles on Persons Deprived of Liberty in the Americas

<sup>749</sup> HRC General Comment 32, §35; *McFarlane v Ireland* (31333/06) European Court Grand Chamber (2010) §155; *Prosecutor v Sefer Halilović* (IT-01-48-A) ICTY Appeals Chamber, Decision on Defence Motion for Prompt Scheduling of Appeal Hearing (27 October 2006) §19; See, *Suárez-Rosero v Ecuador*, Inter-American Court (1997) §70.  
<sup>750</sup> See *Massey v United Kingdom* (14399/02), European Court (2004) §27.

<sup>751</sup> See HRC General Comment 32, §35; European Court: *Selmouni v France* (25803/94), Grand Chamber (1999) §§107-118, *Opuz v Turkey* (33401/02), (2009) §§150-151; Inter-American Court: *Radilla-Pacheco v Mexico*, (2009) §191, *Las Palmeras v Colombia*, (2001) §§62-66; See also *Case of the "Mapiripán Massacre" v Colombia*, Inter-American Court (2005) §222; CEDAW Committee: *Tayag Vertido v Philippines*, UN Doc. CEDAW/C/46/D/18/2008 (2010) §8.3; *A.T. v Hungary* (2/2003), UN Doc. A/60/38 (Part I) (2005), Annex III §8.4.  
<sup>752</sup> *McFarlane v Ireland* (31333/06), European Court Grand Chamber (2010) §152.

<sup>753</sup> See, *Barroso v Panama*, HRC, UN Doc. CCPR/C/54/D/473/1991 (1995) §8.5; *Hilaire, Constantine and Benjamin et al v Trinidad and Tobago*, Inter-American Court (2002) §145.

<sup>754</sup> *McFarlane v Ireland* (31333/06), European Court Grand Chamber (2010) §§143-144; *Suárez-Rosero v Ecuador*, Inter-American Court (1997) §70.

<sup>755</sup> HRC General Comment 32, §35; HRC: *Mwamba v Zambia*, UN Doc. CCPR/C/98/D/1520/2006 (2010) §6.6, *Kennedy v Trinidad and Tobago*, UN Doc. CCPR/C/74/D/845/1998 (2002) §7.5.

<sup>756</sup> *Caillot v France* (36932/97), European Court (1999) §27.

<sup>757</sup> *Lubuto v Zambia*, HRC, UN Doc. CCPR/C/55/D/390/1990/Rev.1 (1995) §7.3; *García-Asto and Ramírez-Rojas v Peru*, Inter-American Court (2005) §§162-172.

<sup>758</sup> *Sextus v Trinidad and Tobago*, HRC, UN Doc. CCPR/C/72/D/818/1998 (2001) §7.2.

<sup>759</sup> HRC General Comment 32, §35; European Court: *Kemmache v France (nos 1 and 2)* (12325/86 and 14992/89), (1991) §60, *McFarlane v Ireland* (31333/06), Grand Chamber (2010) §§140-156, *Kudła v Poland* (30210/96), Grand Chamber (2000) §§124-131; Inter-American Court: *Hilaire, Constantine and Benjamin et al v Trinidad and Tobago*, (2002) §143; *Suárez-Rosero v Ecuador*, (1997) §72.

### 19.2.1 COMPLEXITY OF THE CASE

Many factors are taken into consideration in examining whether the time within which proceedings have been completed is reasonable in view of the complexity of the case. They include the nature and seriousness of the alleged offence(s); the number of charges; the nature and type of the investigation required; the number of people allegedly involved in the crime; the volume of evidence; the number of witnesses; and the complexity of the facts and any legal issues arising.<sup>760</sup> Even in complex cases, however, particular diligence to administer justice expeditiously is required if the accused is detained pending trial.<sup>761</sup>

The Human Rights Committee has repeatedly stated that in cases involving serious charges, such as murder, and where the accused is denied bail, the accused must be tried in as expeditious a manner as possible.<sup>762</sup> In the case of a murder suspect held for more than three and a half years before acquittal, the Human Rights Committee found that the delay between indictment and trial could not be justified.<sup>763</sup>

Economic or drug crimes involving several defendants, cases with international dimensions, multiple murder cases and cases involving crimes defined as terrorism have been accepted as being more difficult and complex than routine criminal cases, and longer delays have been considered reasonable.

After considering national legislation, the complexity of the case and the conduct of the authorities in Ecuador, the Inter-American Court considered that a period of 50 months to complete proceedings violated the American Convention.<sup>764</sup>

In a case involving 723 accused and 607 criminal offences, the European Court held that it was reasonable that the trial lasted about eight and a half years. However, it held that subsequent periods of delay and inactivity, including three years before a court issued written reasons for its judgment, and appeals processes in two courts which lasted more than six years, were not reasonable.<sup>765</sup>

The Human Rights Committee considered that a three-and-a-half-year investigation in Belgium into allegations of criminal association and money laundering against two people on UN and EU post-9/11 sanctions lists did not violate the reasonable time requirement.<sup>766</sup>

UN human rights mechanisms have expressed concern about delays in proceedings for detainees held by the USA in Guantánamo Bay, noting that the right to trial without undue delay under the ICCPR relates both to the time within which a trial should start and the time within which it should end. The human rights mechanisms considered that the right to trial without undue delay was violated by the US authorities holding detainees for years without charge.<sup>767</sup>

### 19.2.2 CONDUCT OF THE ACCUSED

The conduct of the accused is taken into consideration in determining whether there was undue delay.<sup>768</sup> For example, delays caused by the accused absconding have been taken into account when determining whether proceedings were conducted within a reasonable time.<sup>769</sup>

<sup>760</sup> *Prosecutor v Prosper Mugiraneza* (ICTR-99-50-AR73), ICTR Appeals Chamber (27 February 2004) preambular §6(2).

<sup>761</sup> *Pishchalnikov v Russia* (7025/04), European Court (2009) §49.

<sup>762</sup> *Sextus v Trinidad and Tobago*, HRC, UN Doc.CCPR/C/72/D/818/1998 (2001) §7.2

<sup>763</sup> *Barroso v Panama*, HRC, UN Doc. CCPR/C/54/D/473/1991 (1995) §8.5.

<sup>764</sup> *Suárez-Rosero v Ecuador*, Inter-American Court (1997) §73.

<sup>765</sup> European Court: *Mitap and Müftüoğlu v Turkey* (15530/89 and 15531/89), (1996) §§33-37; See *Coëme and others v Belgium*

(32492/96, 32547/96, 32548/96, 33209/96 and 33210/96), (2000) §§137-141.

<sup>766</sup> *Sayadi and Vinck v Belgium*, HRC, UN Doc. CCPR/C/94/D/1472/2006 (2008) §10.10.

<sup>767</sup> UN Mechanisms Joint Report on detainees at Guantánamo Bay, UN Doc. E/CN.4/2006/120 (2006) §38.

<sup>768</sup> *McFarlane v Ireland* (31333/06), European Court Grand Chamber (2010) §§148-150.

<sup>769</sup> *Sari v Turkey and Denmark* (21889/93), European Court (2001) §§73-100.

However, an accused is not obliged to cooperate actively in criminal proceedings against him or herself. Furthermore, delays attributable to the exercise of procedural rights in good faith must not be taken into account when evaluating whether proceedings were conducted within a reasonable time.<sup>770</sup>

### 19.2.3 CONDUCT OF THE AUTHORITIES

The authorities have a duty to expedite proceedings. If they fail to advance the proceeding at any stage due to neglect, allow the investigation and proceedings to stagnate or if they take an excessive time to complete specific measures, the time will be deemed unreasonable. Similarly, if the criminal justice system itself inhibits the speedy conclusion of trials, the right to trial within a reasonable time may be violated.

A delay of almost three years in an appeal in Canada, largely caused by the 29 months it took to produce the trial transcripts, was found by the Human Rights Committee to violate Article 14 of the ICCPR.<sup>771</sup>

The European Court considered that a lapse of more than 15 months between the filing of an appeal and its transfer to the relevant court of appeal was unreasonable.<sup>772</sup> In a complex case involving organized criminal activity, the Court found that the duration of proceedings against an accused held in custody – approximately four years and eight months for two levels of jurisdiction – was excessive. There had been substantial periods of inactivity attributable to the authorities for which the government had submitted no satisfactory explanation.<sup>773</sup>

**770** *Yagci and Sargin v Turkey* (16419/90; 16426/90), European Court (1995) §66; HRC: *Taright et al v Algeria*, UN Doc. CCPR/C/86/D/1085/2002 (2006) §§8.4-8.5, *Engo v Cameroon*, UN Doc. CCPR/C/96/D/1397/2005 (2009) §7.9, *Rouse v Philippines*, UN Doc. CCPR/C/84/D/1089/2002 (2005) §7.4.

**771** *Pinkney v Canada* (R.7/27), HRC, UN Doc. CCPR/C/OP/1

(1981), p95, §§10, 22.

**772** *Bunkate v the Netherlands* (13645/88), European Court (1993) §§22-23.

**773** *Pishchalnikov v Russia* (7025/04), European Court (2009) §§48-53.

# CHAPTER 20

## RIGHT TO DEFEND ONESELF IN PERSON OR THROUGH COUNSEL

All those charged with criminal offences have the right to defend themselves, in person or through a lawyer. They have the right to be assisted by a lawyer of their choice, or to have a competent lawyer assigned to assist them if required in the interests of justice, free of charge if they cannot afford to pay. They have the right to confidential communications with their lawyer.

### 20.1 Right to defend oneself

#### 20.2 Permissible restrictions on the right to represent oneself

#### 20.3 Right to be assisted by counsel

##### 20.3.1 Right to choose defence counsel

##### 20.3.2 Right to have defence counsel assigned; right to free legal assistance

#### 20.4 Right to confidential communications with counsel

#### 20.5 Right to competent and effective defence counsel

#### 20.6 The prohibition on harassment and intimidation of counsel

## 20.1 RIGHT TO DEFEND ONESELF

Everyone charged with a criminal offence has the right to defend him or herself against the charges.<sup>a</sup>

The right to defend oneself may be exercised either by the accused representing him or herself or through the assistance of a lawyer, although the accused may not be entirely free to choose between these alternatives.<sup>774</sup> (See **20.2** below on restrictions on the right to represent oneself.)

All individuals charged with a criminal offence must be informed of their right to counsel.<sup>b</sup> This notice must be given far enough in advance of the trial to allow adequate time and facilities to prepare a defence. (See **Chapter 2.2.1** on notification of the right to legal counsel pre-trial.)

A person's decision to waive the right to legal representation, including during questioning, must be established in an unequivocal manner and accompanied by adequate safeguards.<sup>c</sup> (See **Chapter 3.7**, Waiver of the right to counsel.)

### ICCPR, Article 14(3)(d)

"In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality:

(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;"

<sup>a</sup> Article 11(1) of the Universal Declaration, Article 14(3)(d) of the ICCPR, Article 40(2)(b)(ii) of the Convention on the Rights of the Child, Article 18(3)(d) of the Migrant Workers Convention, Article 7(1)(c) of the African Charter, Article 8(2)(d) of the American Convention, Article 16(3) of the Arab Charter, Article 6(3)(c) of the European Convention, Section N(2)(a) of the Principles on Fair Trial in Africa, Principle V of the Principles on Persons Deprived of Liberty in the Americas, Article 67(1)(d) of the ICC Statute, Article 20(4)(d) of the Rwanda Statute, Article 21(4)(d) of the Yugoslavia Statute

<sup>b</sup> Principle 5 of the Basic Principles on the Role of Lawyers, Guideline 3 §43 of the Principles on Legal Aid, Section N(2)(b) of the Principles on Fair Trial in Africa, Article 67(1)(d) of the ICC Statute, Article 20(4)(d) of the Rwanda Statute, Article 21(4)(d) of the Yugoslavia Statute; See Article 14(3)(d) of the ICCPR

<sup>c</sup> See Principle 8 §29 and Guideline 3 §43(i) of the Principles on Legal Aid, Rule 112(1)(b) of the ICC Rules of Procedure and Evidence

<sup>774</sup> See e.g., *Mayzit v Russia* (63378/00), European Court (2005) §65.

An accused who decides not to represent him or herself has the right to be represented by counsel. Choosing to be assisted by counsel does not preclude the accused participating in his or her own defence.<sup>775</sup>

For the right to defence to be meaningful, the accused and defence counsel, if any, must be given adequate time and facilities as well as information to prepare the defence (see **Chapter 8**). The accused and their counsel must have the right to be present at trial, and there must be an oral hearing (see **Chapter 21**). Further, the principle of equality of arms must be respected, including the right to present a case (see **Chapter 13.2**, “Equality of arms”), and to call and question witnesses (see **Chapter 22**).

The European Court has stated that where an accused person is detained pending trial, the conditions of detention, including within the courthouse, must not hinder the preparation of the accused’s defence.<sup>776</sup> (See **Chapter 10**.)

The African Commission concluded that restricted access to counsel violated the rights to defence guaranteed under Article 7(1)(c) of the African Charter.<sup>777</sup>

Trials where the accused and defence counsel have no right to be present or to examine witnesses violate the right to a public hearing and to defend oneself in person or through counsel.<sup>778</sup>

## 20.2 PERMISSIBLE RESTRICTIONS ON THE RIGHT TO REPRESENT ONESELF

The right to represent oneself in person at trial or on appeal is not absolute.

It may be restricted where a court determines that, in the specific case, the interests of justice require the assignment of a lawyer against the wishes of the accused. For example such restrictions may be warranted if the accused faces particularly serious charges and the court determines that the individual is unable to act in his or her own interests; or where, despite warnings from the court, the accused persistently and substantially obstructs or disrupts the proper conduct of the trial; or where this is necessary to protect a vulnerable witness from distress or intimidation if questioned by the accused.<sup>779</sup>

Restrictions on self-representation, however, must not go beyond what is necessary to uphold the interests of justice, and laws should not absolutely bar self-representation in criminal proceedings.<sup>780</sup>

## 20.3 RIGHT TO BE ASSISTED BY COUNSEL

The assistance of counsel is a primary means of protecting the human rights of people accused of criminal offences, and in particular their right to fair trial. Whether or not individuals are assisted by a lawyer often determines whether or not they can participate in legal proceedings in a meaningful way.<sup>a 781</sup>

<sup>a</sup> See Section N(2)(a) of the Principles on Fair Trial in Africa

<sup>775</sup> HRC General Comment 32, §37.

<sup>776</sup> See *Moiseyev v Russia* (62936/00), European Court (2008) §222.

<sup>777</sup> *Malawi African Association and Others v Mauritania* (54/91, 61/91, 98/93, 164/97 to 196/97, 210/98), African Commission, 13th Annual Report (2000) §96.

<sup>778</sup> HRC: *Guerra de la Espriella v Colombia*, UN Doc. CCPR/C/98/D/1623/2007 (2010) §9.3, *Becerra Barney v Colombia*, UN Doc. CCPR/C/87/D/1298/2004 (2006) §7.2, *Rodríguez Orejuela v Colombia*, UN Doc. CCPR/C/75/D/848/1999 (2002) §7.3; See HRC General Comment 32, §23.

<sup>779</sup> HRC: General Comment 32, §37, *Correia de Matos v Portugal*, UN Doc. CCPR/C/86/D/1123/2002 (2006) §7.4-7.5; *Prosecutor v Vojislav Šešelj* (IT-03-67-AR73.3), ICTY Appeals Chamber Decision on Appeal against the Trial Chamber’s Decision on Assignment of Counsel (20 October 2006).

<sup>780</sup> HRC: General Comment 32, §37, *Correia de Matos v Portugal*, UN Doc. CCPR/C/86/D/1123/2002 (2006) §7.4-7.5, *Hill v Spain*, UN Doc. CCPR/C/59/D/526/1993 (1997) §14.2; *Milošević v Prosecutor* (IT-02-54-AR73.7), ICTY Appeals Chamber (1 November 2004) §§11-21.

<sup>781</sup> HRC General Comment 32, §10.



All those accused of criminal offences have the right to legal assistance to protect their rights and defend them.<sup>a</sup>

The right to counsel applies at all stages of criminal proceedings, including the preliminary investigation, before and during trial and appeals. (See **Chapter 2.2.1**, Notification of the right to legal counsel, and **Chapter 3**, Right to legal counsel before trial.) It may also be required to enable effective access to constitutional remedies.

The Human Rights Committee concluded that the right to legal assistance was violated where a magistrate allowed two prosecution witnesses to testify at a preliminary hearing while defence counsel was not present.<sup>782</sup> The Committee also raised concern over a rule forbidding legal representation in customary courts in Botswana.<sup>783</sup>

The African Commission concluded that the right to counsel was violated when a court failed to grant an adjournment or to appoint replacement counsel to represent an accused when the defence lawyer, who had submitted a written defence statement, was not present on the day that the prosecution gave its closing argument in a death penalty case.<sup>784</sup> (See **Chapter 28**, Death penalty cases.)

The right to be represented by counsel applies even if the accused chooses not to appear at the proceedings or is absent for other reasons.<sup>785</sup> (See **Chapter 21** on right to be present and trials *in absentia*, and **Chapter 26.5**, Fair trial guarantees during appeals.)

The right to be defended by counsel also includes the right of access to and confidential communication with counsel, the right to adequate time and facilities to prepare, and the right to assistance by counsel of choice or by competent appointed counsel.

### 20.3.1 RIGHT TO CHOOSE DEFENCE COUNSEL

Because of the importance of trust and confidence between those accused and their lawyers, the accused has the right to choose who will represent him or her.<sup>b</sup>

The Principles on Fair Trial in Africa expressly state that a judicial body may not assign a lawyer to represent an individual if a qualified lawyer of the accused's choosing is available.<sup>c</sup>

The right to be represented by counsel of choice has been violated in cases involving political and terrorism-related offences.<sup>786</sup>

The African Commission concluded that the rights of a civilian and five military officers were violated when they were denied the right to be defended by their chosen counsel and, despite their objections, they were assigned junior military lawyers to represent them before a special military tribunal.<sup>787</sup>

The right to be represented by counsel of choice is not, however, absolute.

#### Basic Principles on the Role of Lawyers, Principle 1

"All persons are entitled to call upon the assistance of a lawyer of their choice to protect and establish their rights and to defend them in all stages of criminal proceedings."

<sup>a</sup> Article 14(3)(d) of the ICCPR, Article 40(2)(b)(ii) of the Convention on the Rights of the Child, Article 18(3)(d) of the Migrant Workers Convention, Article 7(1)(c) of the African Charter, Article 8(2)(d) and (e) of the American Convention, Article 16(3) and (4) of the Arab Charter, Article 6(3)(c) of the European Convention, Principle 1 of the Basic Principles on the Role of Lawyers, Rules 7.1 and 15.1 of the Beijing Rules, Section N(2)(a) and (c) of the Principles on Fair Trial in Africa, Article 67(1)(d) of the ICC Statute, Article 20(4)(d) of the Rwanda Statute, Article 21(4)(d) of the Yugoslavia Statute

<sup>b</sup> See Article 14(3)(d) of the ICCPR, Article 18(3)(d) of the Migrant Workers Convention, Article 7(1)(c) of the African Charter, Article 8(2)(d) of the American Convention, Article 16(3) of the Arab Charter, Article 6(3)(c) of the European Convention, Principle 1 of the Basic Principles on the Role of Lawyers, Section N(2)(a) and (d) of the Principles on Fair Trial in Africa, Article 67(1)(d) of the ICC Statute, Article 20(4)(d) of the Rwanda Statute, Article 21(4)(d) of the Yugoslavia Statute

<sup>c</sup> Section N(2)(d) of the Principles on Fair Trial in Africa

<sup>782</sup> HRC: *Brown v Jamaica*, UN Doc. CCPR/C/65/D/775/1997 (1999) §6.6; See *Hendricks v Guyana*, UN Doc. CCPR/C/75/D/838/1998 (2002) §6.4.

<sup>783</sup> HRC *Concluding Observations: Botswana*, UN Doc. CCPR/C/BWA/CO/1 (2008) §21.

<sup>784</sup> *Avocats Sans Frontières (on behalf of Bwampanye) v Burundi* (231/99), African Commission, 14th Annual Report (2001) §§29-31; See *Robinson v Jamaica*, HRC, UN Doc. CCPR/C/35/D/223/1987 (1989) §10.3.

<sup>785</sup> European Court: *Poitrimol v France* (14032/88), (1993) §§34-39.

<sup>786</sup> See e.g., HRC: *Estrella v Uruguay* (74/1980), UN Doc. CCPR/C/OP/2

(1983) §§8.6, 10, *Burgos v Uruguay* (52/1979), UN Doc. A/36/40 (1981) §§11.5, 13; *Acosta v Uruguay* (110/1981), UN Doc. Supp No. 40 A/39/40 (1984) §§13.2, 15; UN Mechanisms Joint Report on detainees at Guantánamo Bay, UN Doc. E/CN.4/2006/120 (2006) §35.

<sup>787</sup> *Civil Liberties Organisation, Legal Defence Centre, Legal Defence and Assistance Project v Nigeria* (218/98), African Commission (2001) §§28-31; CHR resolution 1998/64, §2(b); See, *Law Office of Ghazi Suleiman v Sudan* (222/98 and 229/99), African Commission (2003) §§58-60; *Amnesty International and Others v Sudan* (48/90, 50/91, 52/91 and 89/93), African Commission, 13th Annual Report (1999) §§64-66.

<sup>a</sup> See Regulation 70 of the ICC Regulations

<sup>b</sup> Principle 18 of the Basic Principles on the Role of Lawyers, Section I(g) of the Principles on Fair Trial in Africa

<sup>c</sup> Article 14(3)(d) of the ICCPR, Article 18(3)(d) of the Migrant Workers Convention, Principle 6 of the Basic Principles on the Role of Lawyers, Article 8(2)(e) of the American Convention, Article 16(4) of the Arab Charter, Section H(a) of the Principles on Fair Trial in Africa; See Article 6(3)(c) of the European Convention, Article 67(1)(d) of the ICC Statute, Article 20(4)(d) of the Rwanda Statute, Article 21(4)(d) of the Yugoslavia Statute

<sup>d</sup> Principle 3 of the Principles on Legal Aid; Section H(b)(i) of the Principles on Fair Trial in Africa

<sup>e</sup> See Principle 10 of the Principles on Legal Aid

<sup>f</sup> Principle 3 §20 of the Principles on Legal Aid, Section H(c) of the Principles on Fair Trial in Africa

There must be a reasonable and objective basis for restrictions, which should be open to challenge before a court.<sup>788</sup> Restrictions may be imposed, for example, if the lawyer is not acting within the bounds of professional ethics, is the subject of criminal proceedings<sup>789</sup> or refuses to follow court procedure.<sup>a</sup>

Any restrictions must, however, be consistent with the prohibition of identifying a lawyer with the client or the client's cause as a result of the lawyer's professional duties.<sup>b</sup>

An accused may not have an unrestricted right to choose assigned counsel, particularly if the state is paying the costs. The European Court has stated that when appointing defence counsel the courts must consider the accused's wishes, but that they may be overridden in the interests of justice.<sup>790</sup>

The Human Rights Committee has indicated that courts should give preference to appointing counsel chosen by the accused in death penalty cases, including at appeal. The reasons include ensuring adequate and effective legal assistance.<sup>791</sup>

Similarly, the African Commission stated that even in cases in which counsel is appointed free of charge, and particularly where the accused may face a death sentence, "the individual should be able to choose out of a list the preferred independent counsel 'not acting under the instructions of government but responsible only to the accused'". The Commission highlighted the risk that an accused may not feel able to give full instructions to their counsel in the absence of a relationship of trust and confidence.<sup>792</sup> (See **Chapter 28**, Death penalty cases.)

### 20.3.2 RIGHT TO HAVE DEFENCE COUNSEL ASSIGNED; RIGHT TO FREE LEGAL ASSISTANCE

Individuals who do not have lawyers of their choice to represent them may have counsel assigned.<sup>c</sup>

Under Article 8(2)(e) of the American Convention, the right to assigned counsel is inalienable if the accused chooses not to defend him or herself personally or does not engage counsel within the period established by law.

However, the other international standards guarantee the right to have counsel assigned when the interests of justice so require.

The determination of whether the interests of justice require counsel to be assigned is based primarily on the seriousness of the offence, the issues at stake, the penalty that could be imposed, and the complexity of the issues or the procedure.<sup>d</sup> <sup>793</sup> It may also depend on an accused's particular vulnerabilities due to factors such as age, health, disability or economic or social disadvantage.<sup>e</sup> Respect for the principle of equality of arms should also be considered. (See **Chapter 13.2**.)

The interests of justice require that counsel be assigned at all stages of proceedings in death penalty cases if the accused does not have counsel of choice.<sup>f</sup> <sup>794</sup>

<sup>788</sup> Special Rapporteur on human rights and counter-terrorism, UN Doc. A/63/223 (2008) §§38-41.

<sup>789</sup> *Ensslin, Baader, and Raspe v Federal Republic of Germany* (7572/76, 7586/76 and 7587/76), European Commission (Decision) 8 July 1978, En Droit §20.

<sup>790</sup> European Court: *Croissant v Germany* (13611/88), (1992) §29, *Lagerblom v Sweden* (26891/95), (2003) §54, *Mayzit v Russia* (63378/00), (2005) §66; See *Prosecutor v Blagojević and Jokić* (IT-02-60-A), ICTY Appeals Chamber (9 May 2007) §17.

<sup>791</sup> See *Pinto v Trinidad and Tobago*, HRC, UN Doc. CCPR/C/39/D/232/1987 (1990) §12.5.

<sup>792</sup> *Civil Liberties Organisation, Legal Defence Centre, Legal Defence and Assistance Project v Nigeria* (218/98), African Commission, 14th Annual Report (2001) §§28-31.

<sup>793</sup> HRC General Comment 32, §38; European Court: *Twalib v Greece* (24294/94), (1998) §§52-53, *Quaranta v Switzerland* (12744/87), (1991) §§32-38.

<sup>794</sup> HRC: General Comment 32, §38, *Aliboeva v Tajikistan*, UN Doc. CCPR/C/85/D/985/2001 (2005) §6.4, *Robinson v Jamaica*, UN Doc. CCPR/C/35/D/223/1987 (1989) §10.2-10.4, *Aliev v Ukraine*, UN Doc. CCPR/C/78/D/781/1997 (2003) §7.2-7.3, *LaVende v Trinidad and Tobago*, UN Doc. CCPR/C/61/9/544/1993 (1997) §5.8.

According to the Principles on Legal Aid the state should ensure that anyone arrested, detained, suspected or charged with a criminal offence punishable by imprisonment is entitled to legal aid at all stages of the criminal justice process. In addition, if the interests of justice require, for example given the urgency or complexity of the case, legal aid should be provided regardless of the individual's means.<sup>a</sup>

The European Court has also concluded that where a person may be deprived of their liberty, the interests of justice, in principle, require legal representation.<sup>795</sup>

Concern has been expressed over systems that provide free legal aid only in death penalty cases as well as systems that only provide it if the potential punishment exceeds five years' imprisonment.<sup>796</sup>

The Human Rights Committee has concluded that legal assistance to pursue constitutional motions, including following a conviction, must be available where the interests of justice so require. Such proceedings do not determine criminal charges but rule on constitutional issues, including issues related to the fairness of the trial.<sup>797</sup>

Under some international standards, the state is required to provide counsel free of charge if two conditions are met. The first is that the interests of justice require that counsel be appointed. The second is that the accused lacks sufficient means to pay for a lawyer.<sup>b</sup>

Other standards differ.

The Arab Charter guarantees the right to free assistance of counsel if the accused cannot defend him or herself or if the interests of justice so require.<sup>c</sup>

While the American Convention requires appointed counsel to be paid by the state only if required by domestic law,<sup>d</sup> the Inter-American Court has clarified that states must provide counsel free of charge if this is necessary to ensure a fair hearing.<sup>798</sup>

The Principles on Legal Aid state that legal aid should be granted to those whose means exceed the limits of a financial means test, but who cannot afford or do not have access to a lawyer, where the interests of justice so require and legal aid otherwise would have been granted.<sup>e</sup>

(See **Chapter 27.6.3** on legal aid for children.)

States must provide sufficient resources to ensure the availability, throughout the country, of adequate and effective appointed legal counsel for those charged with criminal offences.<sup>f 799</sup> This is essential to ensure the right to a fair trial without discrimination, the right to equality before the courts, the right of those accused to defend themselves and the principle of equality of arms.

### Basic Principles on the Role of Lawyers, Principle 3

"Governments shall ensure the provision of sufficient funding and other resources for legal services to the poor and, as necessary, to other disadvantaged persons. Professional associations of lawyers shall cooperate in the organization and provision of services, facilities and other resources."

<sup>a</sup> Principle 3 §§20-21 of the Principles on Legal Aid

<sup>b</sup> Article 14(3)(d) of the ICCPR, Article 13(d) of the Migrant Workers Convention, Article 6(3)(c) of the European Convention, Principle 6 of the Basic Principles on the Role of Lawyers, Section H(a) of the Principles on Fair Trial in Africa, Article 67(1)(d) of the ICC Statute, Article 20(4)(d) of the Rwanda Statute, Article 21(4)(d) of the Yugoslavia Statute, Rule 45 of the Yugoslavia Rules

<sup>c</sup> Article 16(4) of the Arab Charter

<sup>d</sup> Article 8(2)(e) of the American Convention

<sup>e</sup> Guideline 1 §41(a) of the Principles on Legal Aid

<sup>f</sup> Principle 3 of the Basic Principles on the Role of Lawyers; Principles 2 §15 and 10 and Guidelines 11-13 and 15-16 of the Principles on Legal Aid

<sup>795</sup> European Court: *Prezec v Croatia* (48185/07), (2009) §29, *Quaranta v Switzerland* (12744/87), (1991) §§32-38; See *R.D. v Poland* (29692/96 and 34612/97), European Court (2001) §§49-52; See also regarding appeal proceedings: *Maxwell v United Kingdom* (18949/91), European Court (1994) §§40-41.

<sup>796</sup> HRC Concluding Observations: *Botswana*, UN Doc. CCPR/C/BWA/CO/1 (2008) §20; CAT Concluding Observations: *Turkey*, UN Doc. CAT/C/TUR/CO/3 (2010) §11(b).

<sup>797</sup> HRC: *Kennedy v Trinidad and Tobago*, UN Doc.

CCPR/C/74/D/845/1998 (2002) §7.10, *Kelly v Jamaica*, UN Doc. CCPR/C/57/D/537/1993 (1996) §9.7.

<sup>798</sup> Inter-American Court, *Advisory Opinion, OC-11/90* (1990) §§25-28.

<sup>799</sup> HRC General Comment 32, §§7-10; CERD Concluding Observations: *USA*, UN Doc. CERD/C/USA/CO/6 (2008) §22; HRC Concluding Observations: *Argentina*, UN Doc. CCPR/C/ARG/CO/4 (2010) §20; *Tanzania*, UN Doc. CCPR/C/TZA/CO/4 (2009) §21; see *Special Rapporteur on the independence of judges and lawyers*, UN Doc. A/66/289 (2011) §§78, 99.

<sup>a</sup> Guideline 1 §41(f) and (d) of the Principles on Legal Aid

<sup>b</sup> Among others, Principle 7 and Guidelines 4 §44(g), 5 §45(b) and 12 §62 of the Principles on Legal Aid

<sup>c</sup> Article 4(2) of the Arab Charter

<sup>d</sup> Article 14(3)(b) of the ICCPR, Article 18(3)(b) of the Migrant Workers Convention, Article 8(2)(d) of the American Convention, Article 16(3) of the Arab Charter, Section N(3)(e) of the Principles on Fair Trial in Africa, Article 67(1)(b) of the ICC Statute, Article 20(4)(b) of the Rwanda Statute, Article 21(4)(b) of the Yugoslavia Statute

<sup>e</sup> Article 8(2)(d) of the American Convention, Article 16(3) of the Arab Charter, Principles 8 and 22 of the Basic Principles on the Role of Lawyers, Principles 7 and 12 and Guidelines 3 §43(d), 4 §44(g), 5 §45(b) and 10 §53(d) of the Principles on Legal Aid, Rule 93 of the Standard Minimum Rules, Principle 18 of the Body of Principles, Section N(3)(e)(i-ii) of the Principles on Fair Trial in Africa, Rule 23.4 of the European Prison Rules, Article 67(1)(b) of the ICC Statute; See Article 14(3)(b) of the ICCPR, Article 6(3)(c) of the European Convention

<sup>f</sup> Principle 8 of the Basic Principles on the Role of Lawyers, Rule 93 of the Standard Minimum Rules, Principle 18(4) of the Body of Principles, Section N(3)(e) of the Principles on Fair Trial in Africa; See Principle 7 and Guidelines 4 §44(g), 5 §45(b) and 12 §62 of the Principles on Legal Aid

If a financial means test is applied:<sup>a</sup>

- Preliminary legal aid should be granted to individuals urgently requiring legal aid, pending the outcome of the means test;
- The individual's rather than the household's income should be the basis of the calculation if family members are in conflict or do not have equal access to family income;
- A person denied legal aid on the basis of a means test should have the right to appeal against the decision.

Laws that require an accused to pay back the costs of legal aid if the case is lost are inconsistent with the right to counsel.<sup>800</sup>

Courts must ensure that the accused and their appointed counsel have adequate time and facilities to prepare a defence.<sup>b 801</sup> (See **Chapter 8**.)

The right to legal aid for those without adequate financial resources guaranteed under Article 13 of the Arab Charter, expressly applies at all times, including during emergencies.<sup>c</sup> This right is also guaranteed under international humanitarian law, applicable during armed conflict. (See **Chapter 31** on states of emergency and **Chapter 32** on armed conflict.)

## 20.4 RIGHT TO CONFIDENTIAL COMMUNICATIONS WITH COUNSEL

The right to communicate with counsel is part and parcel of the right to counsel. It is expressly included in some of the international standards that guarantee either the right to adequate time and facilities to prepare a defence or the right of accused individuals to defend themselves.<sup>d</sup> In other standards, this right is implicit.

Communications between the accused and counsel within the professional relationship are confidential.<sup>e</sup> The authorities must ensure that such communications remain confidential. (See **Chapter 27.6.3** on confidentiality of communications between lawyers and accused children.)

The right to communicate with counsel under the ICCPR<sup>802</sup> and European Convention includes the right to confidential communication, although this is not explicitly stated in either treaty. The European Court considers that an accused's right to communicate with his or her lawyer confidentially is part of the basic requirements of a fair trial.<sup>803</sup>

The authorities must provide adequate time and facilities for an accused who is in custody to meet and have confidential communication with their lawyer,<sup>804</sup> including face-to-face, on the telephone, and in writing. Such meetings or telephone calls may take place within the sight, but not within the hearing, of others.<sup>f 805</sup> (See **Chapter 3.6.1**, Right to confidential communication with counsel.)

### Basic Principles on the Role of Lawyers, Principle 22

“Governments shall recognize and respect that all communications and consultations between lawyers and their clients within their professional relationship are confidential.”

<sup>800</sup> See CAT Concluding Observations: *Latvia*, UN Doc. CAT/C/CR/31/3 (2004) §6(h).

<sup>801</sup> *Chan v Guyana*, HRC, UN Doc. CCPR/C/85/D/913/2000 (2006) §6.2-6.3; *Sakhnovskiy v Russia* (21272/03), European Court Grand Chamber (2010) §§97-107.

<sup>802</sup> HRC: General Comment 32, §34, *Gridin v Russian Federation*, UN Doc. CCPR/C/69/D/770/1997 (2000) §8.5.

<sup>803</sup> *S v Switzerland* (12629/87 and 13965/88), European Court (1991) §48.

<sup>804</sup> See, CPT 2nd General Report, *CPT/Inf(92)3* §38, CPT 21st General Report, *CPT/Inf(2011) §23*; *Modarca v Moldova* (14437/05), European Court (2007) §§84-99.

<sup>805</sup> *Öcalan v Turkey* (46221/99), European Court Grand Chamber (2005) §§131-148; See, *Arutyunyan v Uzbekistan*, HRC, UN Doc. CCPR/C/80/D/917/2000 (2004) §6.3.

Detainees should have the right to keep documents related to their case in their possession.<sup>a</sup> The Special Rapporteur on the independence of judges and lawyers has also emphasized that lawyers' files and documents should be protected from seizure or inspection and that no communications, including telephone calls and other electronic communications, should be intercepted.<sup>806</sup>

The European Court has held that the routine examination of correspondence between a detainee and his lawyer violated the principle of equality of arms and significantly eroded defence rights. It stated that correspondence with lawyers, whatever its purpose, is always privileged and that: "reading of a prisoner's mail to and from a lawyer is only permissible in exceptional circumstances, when the authorities have reasonable cause to believe that the privilege is being abused, in that the contents of the letter endanger prison security or the safety of others or are otherwise of a criminal nature".<sup>807</sup>

The UN Special Rapporteur on human rights and counter-terrorism has expressed concern about violations of the right to confidential communications between individuals charged with terrorism-related offences and their lawyers, both during pre-trial detention and during trial.<sup>808</sup> He noted that the decision to prosecute someone for a terrorism-related offence "should never on its own have the consequence of excluding or limiting [the accused's right to] confidential communication with counsel. If restrictions are justified in a specific case, communications between lawyer and client should be in sight but not in hearing of the authorities."<sup>809</sup>

The Inter-American Court concluded that the fact that an accused charged with terrorism was unable to communicate openly and privately with his lawyer violated Article 8(2)(d) of the American Convention.<sup>810</sup>

The European Court has held that in exceptional circumstances, the confidentiality of communications may lawfully be restricted. It said however that any such restrictions must be prescribed by law and ordered by a judge. They must be proportionate to a legitimate purpose – such as to prevent a serious crime involving death or injury – and must be accompanied by adequate safeguards against abuse. Council of Europe non-treaty standards, including the European Prison Rules, are based on this jurisprudence.<sup>b</sup>

The European Court analyzed restrictions on confidentiality of communications with counsel in light of the right to private life. Such restrictions must be exceptional, prescribed by law, necessary and proportionate to achieve a legitimate aim, and accompanied by adequate safeguards against abuse. It concluded that a review of the written correspondence between an accused and his lawyer was justified on grounds of protection of national security and crime prevention. It found the following safeguard to be adequate against abuse: the correspondence was reviewed by a judge, who was not connected with the criminal case and was duty bound to keep the information gained confidential.<sup>811</sup>

A few years later, in another case, the European Court concluded that the fact that Abdullah Öcalan was unable to consult with his lawyers in confidence was likely to have prevented him from asking them questions that might prove important to the

<sup>a</sup> See Principle 7 §28 of the Principles on Legal Aid

<sup>b</sup> Rule 23.5 of the European Prison Rules

<sup>806</sup> Special Rapporteur on the independence of judges and lawyers, UN Doc. A/64/181 (2009) §110; *Zagaria v Italy* (58295/00), European Court (2007) §§27-36.

<sup>807</sup> *Moiseyev v Russia* (62936/00), European Court (2008) §210.

<sup>808</sup> Special Rapporteur on human rights and counter-terrorism, Egypt, UN Doc. A/HRC/13/37/Add.2 (2009) §36.

<sup>809</sup> UN Special Rapporteur on human rights and counter-terrorism, UN Doc. A/63/223 (2008) §39.

<sup>810</sup> *Cantoral-Benavides v Peru*, Inter-American Court (2000) §§127-128.

<sup>811</sup> *Erdem v Germany* (38321/97), European Court (2001) §§65-69.

preparation of his defence. It held that, given the complexity of the case, limiting visits with his lawyers to two one-hour meetings per week and limiting his and his lawyers' access to the voluminous case file violated his right to a fair trial.<sup>812</sup>

<sup>a</sup> See Guideline 6 §47(a) of the Principles on Legal Aid

The right to confidential communications between an individual and their lawyer does not cease when a judgment becomes final.<sup>a</sup>

The Human Rights Committee expressed concern that in Japan, meetings between individuals sentenced to death and their lawyers about requests for retrials are monitored by prison officials until a court has decided to retry the case.<sup>813</sup>

<sup>b</sup> Principle 18(5) of the Body of Principles

Communications between a detained or imprisoned person and their lawyer are inadmissible as evidence unless they are connected with a continuing or contemplated crime.<sup>b</sup>

(See **Chapter 17.3** on exclusion of evidence obtained from confidential communications with counsel and **Chapter 3.6.1** on confidential communications with counsel before trial.)

## 20.5 RIGHT TO COMPETENT AND EFFECTIVE DEFENCE COUNSEL

Defence lawyers, including assigned counsel, must act freely and diligently in accordance with the law and recognized standards and ethics of the legal profession. They must advise their clients of their legal rights and obligations, and inform them about the legal system. They must aid their clients in every appropriate way, taking such action as is necessary to protect their clients' rights and interests, and assist their clients before the courts.<sup>c</sup> In protecting the rights of their clients and in promoting justice, lawyers must seek to uphold human rights recognized by national and international law.<sup>d</sup>

<sup>c</sup> Principles 13 and 6 of the Basic Principles on the Role of Lawyers, Principle 12 of the Principles on Legal Aid, Section I(i) of the Principles on Fair Trial in Africa

The Inter-American Commission considered that the right to legal counsel is violated when lawyers fail to fulfil their obligations in the defence of their clients.<sup>814</sup>

<sup>d</sup> Principle 14 of the Basic Principles on the Role of Lawyers, Section I(i) of the Principles on Fair Trial in Africa

When an accused is represented by assigned counsel, the authorities must ensure that the lawyer assigned has the requisite training, skills, experience and competence for the case.<sup>e 815</sup>

<sup>e</sup> Principle 6 of the Basic Principles on the Role of Lawyers, Principle 13 of the Principles on Legal Aid, Section H(e)(ii) of the Principles on Fair Trial in Africa; See Rule 22 of the ICC Rules of Procedure and Evidence

The authorities have a special duty to ensure that the accused is effectively represented by appointed counsel.<sup>816</sup> States are accountable if they fail to act when questions about ineffective counsel are brought to the attention of the authorities and the court or when the ineffectiveness is manifest.<sup>817</sup> If the appointed counsel is not effective, the court or other authorities must ensure that counsel performs their duties or is replaced.<sup>818</sup> (See **Chapter 28.6.1** on the right to effective counsel in death penalty cases.)

The European Court considered that it should have been manifest to a court in Portugal that an accused, a foreign national charged with drug and passport offences, was not being effectively represented by an appointed lawyer when it received pleadings from the accused himself (rather than his lawyer) in his native tongue (Spanish).<sup>819</sup>

<sup>812</sup> *Öcalan v Turkey* (46221/99), European Court Grand Chamber (2005) §§133-148.

<sup>813</sup> HRC Concluding Observations: *Japan*, UN Doc. CCPR/C/JPN/CO/5 (2008) §17.

<sup>814</sup> *Report on the Situation of Human Rights of a Segment of the Nicaraguan Population of Miskito Origin*, Inter-American Commission, OEA/Ser.L/V/II.62, doc.10, rev.3 (1983), at D(c) §§19-21.

<sup>815</sup> HRC General Comment 32, §38.

<sup>816</sup> *Kelly v Jamaica*, HRC, UN Doc. CCPR/C/41/D/253/1987 (1991) §5.10; *Chaparro Álvarez and Lapo Iñiguez v Ecuador*, Inter-American Court (2007) §159.

<sup>817</sup> *Daud v Portugal* (22600/93), European Court (1998) §38.

<sup>818</sup> *Artico v Italy* (6694/74), European Court (1980) §36; See HRC General Comment 32, §38.

<sup>819</sup> *Daud v Portugal* (22600/93), European Court (1998) §§34-43.

The Inter-American Court concluded that the state had violated the accused's right to counsel in a case where the appointed lawyer was absent during the accused's interrogation and during most of the accused's pre-trial statement.<sup>820</sup>

In the case of a lawyer representing an accused on appeal, effective assistance would include the lawyer consulting the accused if the lawyer intends to withdraw the appeal or argue that it has no merit.<sup>821</sup>

The importance of competent, experienced, skilled and effective counsel in death penalty cases has been repeatedly emphasized by human rights bodies and courts (see **Chapter 28.6.1** on the right to effective counsel in death penalty cases).

## 20.6 THE PROHIBITION ON HARASSMENT AND INTIMIDATION OF COUNSEL

Lawyers should be able to advise and represent people without restrictions, influence, pressure or improper interference from any quarter.<sup>a 822</sup>

Lawyers should be immune under criminal and civil law for oral and written statements made in good faith in pleadings or before tribunals. They should not suffer sanctions for any action taken in accordance with recognized professional duties, standards and ethics.<sup>b 823</sup>

States have a positive obligation to safeguard lawyers threatened as a result of discharging their duties.<sup>c 824</sup>

The Human Rights Committee has clarified that Article 14(3)(d) of the ICCPR is violated where the courts or authorities hinder appointed lawyers from carrying out their work effectively.<sup>825</sup>

Governments must ensure that lawyers are not identified with their clients or their clients' causes as a result of defending them.<sup>d</sup>

The UN Special Rapporteur on the independence of judges and lawyers has raised concern that lawyers are often identified with their clients' causes, particularly when lawyers defend individuals in politically sensitive cases or cases related to large-scale corruption, organized crime, terrorism and drug trafficking. Lawyers have been investigated or charged with supporting their client's alleged criminal activities, or for defamation. Lawyers have also been prosecuted for raising claims of ill-treatment of their clients or identifying malfunctions in the justice system.<sup>826</sup>

<sup>a</sup> Principle 16 of the Basic Principles on the Role of Lawyers, Principles 2 §16 and 12 of the Principles on Legal Aid, Sections H(e)(iii) and I(b) of the Principles on Fair Trial in Africa

<sup>b</sup> Principles 20 and 16(c) of the Basic Principles on the Role of Lawyers, Section I(b)(iii) and (e) of the Principles on Fair Trial in Africa

<sup>c</sup> Principle 17 of the Basic Principles on the Role of Lawyers, Section I(f) of the Principles on Fair Trial in Africa

<sup>d</sup> Principle 18 of the Basic Principles on the Role of Lawyers, Section I(g) of the Principles on Fair Trial in Africa

<sup>820</sup> *Chaparro Álvarez and Lapo Íñiguez v Ecuador*, Inter-American Court (2007) §159.

<sup>821</sup> HRC: *Kelly v Jamaica*, UN Doc. CCPR/C/41/D/253/1987 (1991) §5.10, *Kelly v Jamaica*, UN Doc. CCPR/C/57/D/537/1993 (1996) §9.4-9.5, *Sooklal v Trinidad and Tobago*, UN Doc. CCPR/C/73/D/928/2000 (2001) §4.10.

<sup>822</sup> HRC General Comment 32, §38.

<sup>823</sup> *Bagosora et al v The Prosecutor* (ICTR-98-41-A), ICTR Appeals Chamber, Decision on Aloys Ntabakuze's Motion for Injunctions Against the Government of Rwanda Regarding the Arrest and Investigation of Lead Counsel Peter Erlinder (6 October 2010) §§29-30.

<sup>824</sup> Special Rapporteur on the independence of judges and lawyers, UN Doc. A/64/181 (2009) §§68-69; *International Pen, Constitutional Rights Project, Interights on behalf of Ken Saro-Wiwa Jr. and Civil Liberties Organisation v Nigeria* (137/94, 139/94, 154/96 and 161/97), African Commission, 12th Annual Report (1998) §§97-101.

<sup>825</sup> HRC General Comment 32, §38.

<sup>826</sup> Special Rapporteur on the independence of judges and lawyers, UN Doc. A/64/181 (2009) §§64-67.

# CHAPTER 21

## RIGHT TO BE PRESENT AT TRIAL AND APPEAL

Everyone charged with a criminal offence has the right to be tried in his or her presence and to an oral hearing, in order to hear and challenge the prosecution case and present a defence. People convicted following trials *in absentia*, if apprehended, should receive a new trial before a different court.

### 21.1 Right to be present at trial and an oral hearing

#### 21.2 Trials in absentia

#### 21.3 Right to be present at appeals

## 21.1 RIGHT TO BE PRESENT AT TRIAL AND AN ORAL HEARING

All those charged with criminal offences have the right to be tried in their presence and to an oral hearing so that they can hear and challenge the prosecution case and present a defence.<sup>a</sup> The rights to be present at trial and to an oral hearing are an integral part of the right to defend oneself. (See **Chapter 20**, Right to defend oneself in person or through counsel, and **Chapter 5.2** on the right to be present during proceedings related to release or detention pending trial.)

The Human Rights Committee has clarified that in order to guarantee the rights of the defence, “all criminal proceedings must provide the accused with the right to an oral hearing, at which he or she may appear in person or be represented by counsel and may bring evidence and examine witnesses”.<sup>827</sup>

Although the right to be present at trial is not expressly mentioned in the European Convention, the European Court has stated that it is “of capital importance”. It reasoned that “it is difficult to see” how a person could exercise the rights to defend him or herself in person, to examine and cross-examine witnesses and to have the free assistance of an interpreter when necessary “without being present”.<sup>828</sup>

Article 8(2)(d) of the American Convention guarantees the right of the accused to defend him or herself. The right to be present at trial is inherent in this right, as well as the right to a hearing (Article 8(1)) and to examine witnesses (Article 8(2)(f)).<sup>b</sup>

While the right to be present at trial is not expressly set out in the African Charter, the Principles on Fair Trial in Africa do set out this right.<sup>c</sup>

### ICCPR, Article 14(3)(d)

“In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality:  
(d) To be tried in his presence,”

<sup>a</sup> Article 14(3)(d) of the ICCPR, Article 18(3)(d) of the Migrant Workers Convention, Article 16(3) of the Arab Charter, Section N(6)(c) of the Principles on Fair Trial in Africa, Articles 63(1) and 67(1)(d) of the ICC Statute, Article 20(4)(d) of the Rwanda Statute, Article 21(4)(d) of the Yugoslavia Statute

<sup>b</sup> Article 8(2)(d) of the American Convention; See Principle V of the Principles on Persons Deprived of Liberty in the Americas

<sup>c</sup> Section N(6)(c) of the Principles on Fair Trial in Africa

<sup>827</sup> *Guerra de la Esperiella v Colombia*, HRC, UN Doc. CCPR/C/98/D/1623/2007 (2010) §9.3; See *HRC General Comment 32*, §§23, 28, *Domukovsky, Tsiklauri, Gelbakhiani and Dokvadze v Georgia*, HRC, UN Docs. CCPR/C/62/D/623/1995, CCPR/C/62/D/624/1995, CCPR/C/62/D/626/1995,

CCPR/C/62/D/627/1995 (1998) §18.9.

<sup>828</sup> European Court: *Hermi v Italy* (18114/02), Grand Chamber (2006) §§58-59, *Sejdovic v Italy* (56581/00), Grand Chamber (2006) §81, *Colozza v Italy* (9024/80), (1985) §27.



The right to be present at trial requires the authorities to notify the accused (and defence counsel) in sufficient time of the date and location of the hearing(s), to invite the accused to attend and not to improperly exclude the accused from the trial.<sup>829</sup> If the proceedings are re-scheduled, the accused must be informed of the new date and place of trial.<sup>830</sup>

There may be limits on the efforts the authorities can be expected to make in contacting the accused. However, the Human Rights Committee found a violation in a case where the authorities of the former Zaire issued summonses only three days before trial and did not send them to the accused, who was living abroad, although his address was known.<sup>831</sup>

The right of an accused to be present at trial may be temporarily restricted, in exceptional circumstances, if the accused repeatedly disrupts the proceedings to such an extent that the court deems it impractical for the trial to continue with the accused present. In such circumstances, the court may remove the accused from the courtroom but must make provisions to preserve the rights of the defence, such as ensuring the accused can observe the trial and instruct counsel confidentially from outside the courtroom, for example through a video link. Such measures may be taken only after other reasonable alternatives have proved inadequate, and only for as long as is strictly required.<sup>a</sup> Such restrictions must be necessary and proportionate.

The accused may waive the right to be present at hearings, but such a waiver must be established in an unequivocal manner, preferably in writing, must be attended by safeguards commensurate with its importance and must not run counter to any important public interest.<sup>b</sup><sup>832</sup>

In 1983 the Human Rights Committee concluded that the right may be deemed waived if the accused fails to appear in court for trial after having been duly notified, sufficiently in advance.<sup>833</sup> Whether that conclusion, which involved an accused in exile in another country, would be considered today to be consistent with extradition law, prohibitions on *non-refoulement* and human rights is an open question.

The right to be represented by counsel still applies if the accused waives their right to be present or is tried *in absentia* (see **Chapter 20**).

## 21.2 TRIALS IN ABSENTIA

Trials *in absentia* are trials that take place in the absence of the accused.

None of the international criminal tribunals are authorized to conduct trials *in absentia* (see **21.1** above). Trials *in absentia* are expressly prohibited by the Principles on Fair Trial in Africa.<sup>c</sup>

A “plain meaning” reading of Article 14(3)(d) of the ICCPR would not seem to permit trials to proceed *in absentia*.

However, the Human Rights Committee has clarified that proceedings *in absentia* may be permissible, in the interests of justice, in some circumstances. For example, they may be permissible when the accused has been informed of the charges, date and place of proceedings sufficiently in advance, but has declined to be present.<sup>834</sup>

<sup>a</sup> Article 63(2) of the ICC Statute

<sup>b</sup> Section N(6)(c)(iii) of the Principles on Fair Trial in Africa

<sup>c</sup> Section N(6)(c)(ii) of the Principles on Fair Trial in Africa

<sup>829</sup> *Mbenge v Zaire* (16/1977), HRC, (1983) 2 Sel. Dec.76, p78, §14.1-14.2; See HRC General Comment 32, §§31, 36.

<sup>830</sup> *Osiyuk v Belarus*, HRC, UN Doc. CCPR/C/96/D/1311/2004 (2009) §8.2-8.3.

<sup>831</sup> *Mbenge v Zaire* (16/1977), HRC, (1983) 2 Sel. Dec.76, p78, §14.2.

<sup>832</sup> European Court: *Colozza v Italy* (9024/80), (1985) §28,

*Poitrimol v France* (14032/88), (1993) §31, *Hermi v Italy* (18114/02), Grand Chamber (2006) §73.

<sup>833</sup> See *Mbenge v Zaire* (16/1977), HRC, (1983) 2 Sel. Dec.76, p78, §14.1.

<sup>834</sup> HRC: General Comment 32, §§36, 31, *Mbenge v Zaire* (16/1977), (1983) 2 Sel. Dec.76, p78, §14.1, *Salikh v Uzbekistan*, UN Doc. CCPR/C/95/D/1382/2005 (2009) §9.4.

Before starting a trial in the absence of the accused, a court should verify whether the accused has been duly informed of the case and the time and place of the proceedings.<sup>835</sup>

Those human rights monitoring mechanisms that consider trials *in absentia* permissible in exceptional circumstances have emphasized that extra vigilance is required by the court to ensure respect for defence rights.<sup>836</sup> These rights include the right to counsel, even if the accused has chosen not to attend the trial and to have counsel defend them.<sup>a 837</sup>

<sup>a</sup> Section N(6)(f)(iv) of the Principles on Fair Trial in Africa

<sup>b</sup> See Section N(6)(c)(ii) of the Principles on Fair Trial in Africa

Individuals who have been convicted *in absentia* have the right to remedy, including a retrial in their presence, particularly if they were not duly notified of the trial or if the failure to appear was for reasons beyond their control.<sup>b 838</sup>

When assessing the right of an accused to a retrial following a trial *in absentia*, the burden of proof does not lie with the accused to show that they were not seeking to evade justice or that their absence was for reasons beyond their control. However, the court may consider whether there was good cause for the absence of the accused.<sup>839</sup>

The Special Rapporteur on human rights and counter-terrorism expressed concern about allegations that individuals rendered to Egypt outside the framework of formal extradition proceedings, who had previously been sentenced to death following trials *in absentia*, were executed shortly after their arrival, without a new trial.<sup>840</sup>

If a person is apprehended following a trial in which they were convicted *in absentia*, Amnesty International calls for the verdict rendered *in absentia* to be quashed and for a completely new and fair trial to be held before an independent and impartial court.<sup>841</sup>

It should be noted that the prohibition of double jeopardy does not prohibit the retrial of a person convicted *in absentia*, if the individual requests a retrial.<sup>842</sup> (See **Chapter 18.2.**)

## 21.3 RIGHT TO BE PRESENT AT APPEALS

The right to be present during appeals proceedings (following conviction) depends on the nature of those proceedings. In particular, it depends on whether there was a public hearing during the trial, whether the appeal court has jurisdiction to decide on questions of law and fact, whether issues of law and fact are raised in the appeal and examined by the appeal court, and on the manner in which the accused's interests are presented and protected.<sup>843</sup>

(See **Chapter 5.3** on the right to be present at reviews relating to release or detention pending trial.)

If the court hearing an appeal considers issues of both law and fact, the right to a fair trial generally requires the presence of the accused, as well as defence counsel, if any.<sup>844</sup>

The European Court held that an accused (who was represented by counsel) did not have his rights violated when he was not allowed to be present during the part of his

<sup>835</sup> *Maleki v Italy*, HRC, UN Doc. CCPR/C/66/D/699/1996 (1999) §9.4.

<sup>836</sup> HRC Concluding Observations: Tajikistan, UN Doc. CCPR/CO/84/TJK (2004) §19.

<sup>837</sup> European Court: *Pelladoah v the Netherlands* (16737/90), (1994) §41, *Poitrimol v France* (14032/88), (1993) §34.

<sup>838</sup> *Colozza v Italy* (9024/80), European Court (1985) §29; HRC: *Maleki v Italy*, UN Doc. CCPR/C/66/D/699/1996 (1999) §9.5, Concluding Observations: Croatia, UN Doc. CCPR/C/HRV/CO/2 (2009) §11.

<sup>839</sup> European Court: *Hermi v Italy* (18114/02), Grand Chamber

(2006) §75, *Sejdovic v Italy* (56581/00), Grand Chamber (2006) §§87-88; See *Medenica v Switzerland* (20491/92), European Court (2001) §57.

<sup>840</sup> Special Rapporteur on human rights and counter-terrorism, Egypt, UN Doc. A/HRC/13/37/Add.2 (2009) §42.

<sup>841</sup> See e.g., Amnesty International, *Italian Pardon of US Military Officer Sets Stage for Impunity*, Index: EUR 30/005/2013.

<sup>842</sup> HRC General Comment 32, §54.

<sup>843</sup> *Belziuk v Poland* (23103/93), European Court (1998) §37(ii).

<sup>844</sup> *Sibgatullin v Russia* (32165/02), European Court (2009) §§38-50.

appeal that addressed legal issues only. However, it held that his absence when the court considered whether to amend his sentence in light of factors including his character, motives and dangerousness violated the state's obligation to ensure his right to defend himself in person.<sup>845</sup>

Where the prosecutor, the defence lawyer and the accused were not present during an appeal in which the appeals court increased the sentence, the European Court considered that the accused's rights to a fair hearing and to defend himself were violated.<sup>846</sup>

The European Court found a violation of the accused's rights in a case where the Supreme Court in Norway convicted and sentenced an accused, overturning an acquittal by a lower court and considering issues of both law and fact, without summoning the accused to appear.<sup>847</sup>

The European Court considered that the participation of a convicted individual through video-link in an appeal which examined law and facts did not unduly restrict his right to a defence. The accused could see and hear what was going on in the courtroom (including the testimony of witnesses) and could participate and be heard in the courtroom. The accused was represented by counsel in the courtroom, and could confer with counsel confidentially (through a secured telephone line).<sup>848</sup>

If the appeal court is only addressing issues of law, including whether or not to grant a request to appeal, the European Court considers that the accused does not necessarily have the right to be present.<sup>849</sup> However, if the prosecution is present and has an opportunity to argue points of law, respect for the principle of fairness, including equality of arms, will usually require at least the presence of counsel for the accused.<sup>850</sup> Additional factors taken into account have been: whether there were public hearings during the trial;<sup>851</sup> whether the accused was notified of the hearing, and if so, asked to be present at the appeal (and if detained, how far ahead of the hearing);<sup>852</sup> and whether the accused's liberty was at stake.<sup>853</sup>

In a case where the accused was no longer represented by counsel, the prosecution argued before a panel of three judges on issues related to whether to grant the accused leave to appeal his sentence on points of law. The fact that the accused was not present at the hearing and could not respond orally to the prosecutor's submission was inconsistent with the principle of equality of arms and violated the right to a fair trial.<sup>854</sup>

**845** European Court: *Cooke v Austria* (25878/94), (2000) §§36-44, *Kremzow v Austria* (12350/86), (1993) §§65-69, Cf., *Kucera v Austria* (40072/98), (2002) §§28-29.

**846** *Csikós v Hungary* (37251/04), European Court (2006) §21.

**847** See *Botten v Norway* (16206/90), European Court (1996) §§48-53.

**848** *Viola v Italy* (45106/04), European Court (2006) §§70-76; See *Golubev v Russia* (26260/02), European Court (inadmissibility) Decision (2006).

**849** See, European Court: *Zhuk v Ukraine* (45783/05), (2010) §32; *Maksimov v Azerbaijan* (38228/05), (2009) §§39-43.

**850** *Pakelli v Germany* (8398/78), European Court (1983) §§35-41.

**851** *Hermi v Italy* (18114/02), European Court Grand Chamber (2006) §61.

**852** European Court: *Zhuk v Ukraine* (45783/05), (2010) §34, *Hermi v Italy* (18114/02), Grand Chamber (2006) §§98-101, *Maksimov v Azerbaijan* (38228/05), (2009) §§39-43, *Sobolewski v Poland (No.2)* (19847/07), (2009) §§38, 42-43.

**853** *Zhuk v Ukraine* (45783/05), European Court (2010) §29.

**854** European Court: *Zhuk v Ukraine* (45783/05), (2010) §§23-35; See *Maksimov v Azerbaijan* (38228/05), (2009) §§39-43.

# CHAPTER 22

## RIGHT TO CALL AND EXAMINE WITNESSES

People charged with a criminal offence have the right to call witnesses on their behalf, and to examine, or have examined, witnesses against them. In exceptional circumstances, restrictions may be placed on the right of the defence to question prosecution witnesses. Such restrictions, and measures to protect the rights and safety of witnesses, must respect the requirement of fairness and the principle of equality of arms. Victims and witnesses have rights to information and to appropriate protection.

### 22.1 Right to call and question witnesses

#### 22.2 Right of the defence to question prosecution witnesses

##### 22.2.1 Restrictions on the examination of prosecution witnesses

##### 22.2.2 Anonymous witnesses

##### 22.2.3 Absent witnesses

#### 22.3 Right to call and examine defence witnesses

#### 22.4 Rights of victims and witnesses

##### 22.4.1 Child witnesses and victims of gender-based violence

## 22.1 RIGHT TO CALL AND QUESTION WITNESSES

The right of the accused to call and to question witnesses is a fundamental element of the right to a defence and the principle of equality of arms (see **Chapter 13.2**).<sup>a</sup> This right guarantees the accused “the same legal powers of compelling the attendance of witnesses and of examining or cross-examining any witnesses as are available to the prosecution”.<sup>855</sup>

The right to examine (or have examined) prosecution witnesses ensures that the defence has an opportunity to challenge the evidence against the accused. Equally, the right to call and question witnesses on behalf of the accused is part of the right to a defence. The questioning of witnesses by both the prosecution and the defence, which should – as a rule – take place in a public hearing at which the accused is present, allows the court to hear evidence and challenges to that evidence and to examine the demeanour of witnesses. It reinforces the right to the presumption of innocence and enhances the likelihood that the verdict will be based on all relevant evidence.

Some international standards provide for the possibility of witnesses to testify by electronic means, usually via video-links allowing them to be seen, heard and questioned in the courtroom.<sup>b</sup> However, live testimony is generally preferred. While all witnesses need not be examined in the same manner, consideration should be given to any prejudice arising, for example if most prosecution witnesses testify in the courtroom while most defence witnesses testify by video link.<sup>856</sup> (See **Chapter 21**, Right to be present at trial and appeal.)

<sup>a</sup> Article 14(3)(e) of the ICCPR, Article 40(2)(b)(iv) of the Convention on the Rights of the Child, Article 18(3)(e) of the Migrant Workers Convention, Article 8(2)(f) of the American Convention, Article 16(5) of the Arab Charter, Article 6(3)(d) of the European Convention, Section N(6)(f) of the Principles on Fair Trial in Africa, Article 67(1)(e) of the ICC Statute, Article 20(4)(e) of the Rwanda Statute, Article 21(4)(e) of the Yugoslavia Statute

<sup>b</sup> See Article 36(2)(b) of the CoE Convention on Sexual Abuse of Children, Article 56(1)(i) of the CoE Convention on violence against women, Article 68(2) of the ICC Statute, Rule 67 of the ICC Rules of Procedure and Evidence, Rule 75 of the Rwanda Rules, Rule 75 of the Yugoslavia Rules

<sup>855</sup> HRC General Comment 32, §39.

<sup>856</sup> See, *The Prosecutor v Hategkimana* (ICTR-00-55B-R11bis), ICTR Appeals Chamber, Decision on the Prosecution’s Appeal

against Decision on Referral under Rule 11bis, (4 December 2008) section IV.B.26.

The wording of international standards, which use the phrase “to examine or have examined”, takes into account different legal systems – adversarial (where generally the parties question witnesses) and inquisitorial (where generally the judicial authorities examine witnesses).<sup>857</sup> It also covers questions being asked by the trial judge or an independent person rather than the accused or their lawyer, for example, if a judge or a psychologist puts questions from the defence to a child victim.

The rights of accused individuals to question witnesses in public and in their presence, and to call and examine defence witnesses, are not without limitation. (See **22.2.1** below.)

## 22.2 RIGHT OF THE DEFENCE TO QUESTION PROSECUTION WITNESSES

Individuals accused of criminal offences have the right to examine, or have examined, witnesses against them at some stage of the proceedings.<sup>a 858</sup>

The right of the accused to adequate time and facilities to prepare a defence includes the right to prepare the examination of prosecution witnesses. There is therefore an obligation on the prosecution (explicit in recent standards and otherwise implied) to give the defence adequate advance notification of the witnesses that the prosecution intends to call at trial.<sup>b</sup> The right to such information may be subject to court orders to keep the identity of a witness confidential or other restrictions.<sup>c 859</sup> (See also **Chapter 8.4** on disclosure.)

If a previously undisclosed witness is called to testify or an undisclosed witness statement is submitted as evidence by the prosecution, the defence should request an adjournment to preserve the right to adequate time and facilities to prepare.<sup>860</sup>

A refusal to disclose a prior statement by a key prosecution witness was found to violate the right to question witnesses.<sup>861</sup>

All of the evidence must normally be produced in the presence of the accused at a public hearing, so that the reliability of the evidence itself as well as the credibility and probity of witnesses can be challenged.

Questioning by both the prosecution and the defence should therefore normally take place during trial proceedings at which the accused is present. However, the requirement may be satisfied if the questioning takes place when the witness gives their statement, including during pre-trial proceedings, or at some later stage.<sup>862</sup> Although there are exceptions to this principle, the exceptions must not infringe on the rights of the defence.<sup>d 863</sup>

### ICCPR, Article 14(3)(e)

“In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality:

(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;”

<sup>857</sup> See M. Nowak, *U.N. Covenant on Civil and Political Rights: CCPR Commentary, 2nd revised edition*, Engel, 2005, p342, §68.

<sup>858</sup> HRC General Comment 32, §39.

<sup>859</sup> See *Prosecutor v Katanga and Ngudjolo* (ICC-01/04-01/07 (OA5)), ICC Appeals Chamber, Judgment on the appeal of Mr Mathieu Ngudjolo against the decision of Pre-Trial Chamber I entitled “Decision on the Prosecution Request for Authorisation to Redact Statements of Witnesses 4 and 9” (27 May 2008) §§30-38 (allowing non-disclosure of identity of victims of sexual offences prior to

hearing on confirmation of the charges).

<sup>860</sup> See *Adams v Jamaica*, HRC, UN Doc. CCPR/C/58/D/607/1994 (1996) §8.3.

<sup>861</sup> *Pearl v Jamaica*, HRC, UN Doc. CCPR/C/54/D/464/1991 and 482/1991 (1995) §11.4-11.5.

<sup>862</sup> *Al-Khawaja and Tahery v United Kingdom* (26766/05 and 22228/06), European Court Grand Chamber (2011) §§118, 127.

<sup>863</sup> *Van Mechelen and others v The Netherlands* (21363/93, 21364/93, 21427/93 and 22056/93), European Court (1997) §51.

<sup>a</sup> Article 14(3)(e) of the ICCPR, Article 40(2)(b)(iv) of the Convention on the Rights of the Child, Article 18(3)(e) of the Migrant Workers Convention, Article 8(2)(f) of the American Convention, Article 16(5) of the Arab Charter, Article 6(3)(d) of the European Convention, Section N(6)(f) of the Principles on Fair Trial in Africa, Article 67(1)(e) of the ICC Statute, Article 20(4)(e) of the Rwanda Statute, Article 21(4)(e) of the Yugoslavia Statute

<sup>b</sup> Section N(6)(f)(i) of the Principles on Fair Trial in Africa, Rule 76 of the ICC Rules of Procedure and Evidence

<sup>c</sup> Rules 76 and 81(4) of the ICC Rules of Procedure and Evidence

<sup>d</sup> Section N(6)(f)(iii) of the Principles on Fair Trial in Africa

In a case where a conviction was based decisively on statements made pre-trial by witnesses whom the accused had not had an opportunity to question and whom the court never questioned, the European Court concluded that the accused's rights to examine witnesses and to a fair trial were violated.<sup>864</sup>

### 22.2.1 RESTRICTIONS ON THE EXAMINATION OF PROSECUTION WITNESSES

The right of defendants to examine (or have examined) prosecution witnesses in their presence may be limited to ensure the fair and expeditious conduct of the trial.<sup>865</sup>

In addition, restrictions on the accused's right to question prosecution witnesses may be permissible if the witness becomes unavailable (having died or gone missing), if the witness reasonably fears reprisals, or if the witness is particularly vulnerable. Examples of vulnerable witnesses include children and victims of gender-based violence.<sup>a</sup> (See **22.4** below.)

<sup>a</sup> Section N(6)(f)(iii) of the Principles on Fair Trial in Africa

Before allowing any restrictions, a court must determine that they are objectively necessary. Restrictions are only permitted to the extent necessary. They must be proportionate and consistent with the rights of the accused and the requirements of a fair trial. The court must ensure that difficulties caused to the defence are sufficiently counter-balanced by procedures which permit the fair and proper assessment of the reliability of the evidence.<sup>866</sup>

<sup>b</sup> Section N(6)(f) (iv) of the Principles on Fair Trial in Africa

Where an accused is excluded or absent from proceedings, their lawyer has the right to be present and to question witnesses. If the accused is unrepresented, the court should ensure that a lawyer (of the accused's choice or appointed) is present to represent them and question witnesses.<sup>b</sup> (See **Chapter 20.3** on the right to counsel and **Chapter 21** on the right to be present at trial.)

The Human Rights Committee considered that ordering an accused to leave the courtroom during the questioning of an undercover agent, who wore a mask and was one of two main prosecution witnesses, and refusing to allow the accused to question the witness, violated the individual's right to question witnesses.<sup>867</sup>

### 22.2.2 ANONYMOUS WITNESSES

The use as evidence of testimony from an anonymous witness (where the defence is unaware of the witness' identity) is inconsistent with the accused's right to examine witnesses. Because the witness' identity has been withheld, the accused is deprived of information needed to challenge the credibility and reliability of the witness and the evidence they present. The greater the significance of the evidence from the anonymous witness, the greater the risk of unfairness.

<sup>c</sup> Section N(6)(f)(vi) of the Principles on Fair Trial in Africa, Guideline IX(3)(iii)-(4) of the CoE Guidelines on human rights and counter-terrorism, Rule 75(B)(i)(d) of the Yugoslavia Rules, Rule 75(B)(i)(d) of the Rwanda Rules

Amnesty International has challenged the use of testimony from anonymous witnesses on grounds that it is inconsistent with the presumption of innocence, the right of the accused to challenge evidence and the ability of a court to reach a verdict based on all relevant evidence, which the parties have had the opportunity to challenge.<sup>868</sup>

Some international standards and jurisprudence permit witnesses to testify anonymously, but only in exceptional, narrowly defined circumstances and subject to particular conditions.<sup>c</sup>

<sup>864</sup> *Taal v Estonia* (13249/02), European Court (2005) §§31-36; See, European Court: *Balsán v Czech Republic* (1993/02), (2006) §§31-35, *Lucà v Italy* (33354/96), (2001) §§41-45.

<sup>865</sup> *Prosecutor v Prlić et al* (IT-04-74-AR73.2), ICTY Appeals Chamber, Decision on Joint Defence Interlocutory Appeal Against the Trial Chamber Oral Decision of 8 May 2006 Relating to Cross-Examination by Defence and on Association of Defence Counsel's Request for Leave to File an Amicus Curiae Brief, (4 July 2006).

<sup>866</sup> See e.g., European Court: *A.S. v Finland* (40156/07), (2010) §55, *Al-Khawaja and Tahery v United Kingdom* (26766/05 and

22228/06), Grand Chamber (2011) §147.

<sup>867</sup> *Koreba v Belarus*, HRC, UN Doc. CCPR/C/100/D/1390/2005 (2010) §7.5.

<sup>868</sup> See, for example, Amnesty International: *The international criminal court: Making the right choices – Part II – Organizing the court and ensuring a fair trial*, Index: IOR 40/011/1997, (1997) pp59-61, *Singapore: The death penalty – A hidden toll of executions*, Index: ASA 36/001/2004, (2004) p14; *USA: Justice delayed and justice denied? Trials under the Military Commissions Act*, Index: AMR 51/044/2007, (2007) pp42-43.

These limitations are imposed due to the prejudice to defence rights and the risks that the use of evidence from anonymous witnesses may render the trial unfair.

For example, the Principles on Fair Trial in Africa permit testimony of anonymous witnesses at trial only in exceptional circumstances, in the interests of justice, considering the nature and circumstances of the offence and the need to protect the witness' security.<sup>a</sup>

The European Court and international criminal tribunals have exceptionally allowed the use of anonymous witnesses including in cases of terrorism-related offences, drug trafficking, organized crime and crimes under international law. However, these courts have advised that their use must be exceptional and strictly limited, in view of the prejudice to defence rights.

The European Court has held that the trial court must reject a request for anonymity unless there is objective evidence of good reason.<sup>869</sup> It requires a court to examine the request and review alternatives to anonymity. The Court has repeatedly emphasized that a conviction should not be based solely or decisively on anonymous statements.<sup>870</sup> Therefore, the trial court should keep under continuous review – and the appeal court should determine – whether the evidence of the anonymous witness is the sole or decisive evidence against the accused. If it is the sole or decisive evidence, extreme caution must be exercised before admitting it. If there is other evidence against the accused, then the strength of the corroborating evidence must be evaluated. Finally, if a court grants a request for a witness to testify anonymously, it must take sufficient compensatory measures to protect the rights of the accused and the fairness of the proceedings.<sup>b 871</sup>

Among the factors that the European Court has considered are:

- whether the witness testified in a manner allowing the judge, jury and lawyers to observe their demeanour while testifying;<sup>872</sup>
- the extent of disclosure to the defence of information relevant to the credibility and reliability of the witness and their testimony, while preserving anonymity;
- the extent to which the defence was able to question the witness and to test their credibility and reliability;
- the extent to which the court kept the need for anonymity and the fairness of accepting such evidence under review.

In addition the European Court has considered the measures used to ensure that the evidence of the anonymous witness was treated with particular caution, including instructions to the jury, if any.<sup>873</sup>

The International Criminal Court's procedure when addressing requests for witnesses (including victims) to testify anonymously is similar to that of the European Court. The International Criminal Court has underscored that "extreme care must be exercised before permitting the participation of anonymous victims, particularly in relation to

<sup>a</sup> Section N(6)(f)(vi) of the Principles on Fair Trial in Africa

<sup>b</sup> See Guideline IX(4) of the CoE Guidelines on human rights and counter-terrorism

<sup>869</sup> European Court: *Ellis and Simms and Martin v United Kingdom* (46099/06; 46699/06) (Inadmissibility) Decision (2012) §§75-76, *Krasniki v Czech Republic* (51277/99), (2006) §§76-86, *Van Mechelen and others v The Netherlands* (21363/93, 21364/93, 21427/93 and 22056/93), (1997) §§60-61, *Doorson v The Netherlands* (20524/92), (1996) §71.

<sup>870</sup> European Court: *Van Mechelen and others v The Netherlands* (21363/93, 21364/93, 21427/93 and 22056/93), (1997) §§55, 60-61, *Doorson v The Netherlands* (20524/92), (1996) §76, cited with approval by the Grand Chamber in *A and Others v United Kingdom* (3455/05), (2009) §208, *Visser v The Netherlands* (26668/95),

(2002) §§47-49; But see *Ellis and Simms and Martin v United Kingdom* (46099/06 and 46699/06), (inadmissibility) Decision (2012) §§75-76.

<sup>871</sup> European Court: *Ellis and Simms and Martin v United Kingdom* (46099/06 and 46699/06), (Inadmissibility) Decision (2012) §§76-78, *Krasniki v Czech Republic* (51277/99), (2006) §§75-86.

<sup>872</sup> *Windisch v Austria* (12489/86), European Court (1990) §29; See *Kostovski v The Netherlands* (11454/85), European Court (1989) §43.

<sup>873</sup> *Ellis and Simms and Martin v United Kingdom* (46099/06 and 46699/06), (inadmissibility) Decision of European Court (2012) §§82-89.

the rights of the accused”. The court stated: “the greater the extent and the significance of the proposed participation, the more likely it would be that the Chamber will require the victim to identify himself or herself.”<sup>874</sup>

The Human Rights Committee raised concern about a law in the Netherlands that allowed the identity of certain witnesses to be kept from the defence on grounds of national security. While the defence could put questions to such witnesses through the examining judge, the defence was not always allowed to attend the examination.<sup>875</sup>

In view of the challenges to the defence posed by the use of anonymous witnesses, alternative measures to protect witnesses have been adopted, including witnesses testifying by video-link (see **22.4** below).

### 22.2.3 ABSENT WITNESSES

The use as evidence of statements from witnesses who do not appear in court (absent witnesses) poses particular challenges to the defence. In contrast to anonymous witnesses, the identities of absent witnesses are known. Their credibility may therefore be investigated by the defence. However, because the witnesses are not present, their evidence cannot be tested through questioning in court before the judge (and jury, if any). The use of such evidence should be exceptional and measures to allow a fair assessment of the reliability of the evidence and to protect the rights of the defence must be taken.

The ICC Rules of Procedure and Evidence permit a previously recorded statement of an absent witness to be admitted as evidence, provided that both the prosecutor and the defence could question the witness when the statement was made.<sup>a</sup>

<sup>a</sup> Rule 68 of the ICC Rules of Procedure and Evidence

The European Court has stated that the admission of evidence from an absent witness, whom the defence has not had an opportunity to question, should be a measure of last resort.<sup>876</sup>

In ruling on the fairness of trials in which statements of absent witnesses have been accepted as evidence, the European Court has examined three issues:

- Are there good reasons for the witness being absent and for admitting their statement?
- Is this evidence the sole or decisive evidence against the accused?
- Were there sufficient balancing measures taken by the courts to allow a fair assessment of the reliability of the evidence and to secure defence rights (such as for example, sufficient warnings to the jury)?

Fear of threats or reprisals by the accused or people acting on their behalf (or with their knowledge and approval) is considered “good reason” for a witness’ absence, according to the European Court. If there are sufficient counter-balancing factors, admitting evidence from such a witness, even if it is the sole or decisive evidence, would not violate the right to fair trial. It considered that excluding such evidence would be incompatible with the rights of the witness and would allow the accused to subvert the integrity of the proceedings.<sup>877</sup>

Before admitting a statement from a witness absent on grounds of fear, however, a court must enquire whether their fear is objectively justified and supported by evidence.

<sup>874</sup> *Prosecutor v Lubanga* (ICC-01/04-01/06-1119), ICC Trial Chamber, Decision on victims’ participation (18 January 2008) §§130-131.

<sup>875</sup> HRC Concluding Observations: Netherlands, UN Doc. CCPR/C/NLD/CO/4 (2009) §13.

<sup>876</sup> *Al-Khawaja and Tahery v United Kingdom* (26766/05 and 22228/06), European Court Grand Chamber (2011) §125.

<sup>877</sup> *Al-Khawaja and Tahery v United Kingdom* (26766/05 and 22228/06), European Court Grand Chamber (2011) §123.



Even in such cases, the court should determine whether alternatives, including other protection measures, are appropriate or practicable.<sup>878</sup> (See **22.4** below.)

Applying these tests the European Court ruled that:

- The admission as evidence of a recorded statement made to the police by a deceased woman who was one of several alleged victims of indecent assault by a doctor did not violate fair trial rights. Corroborating evidence (from friends to whom the deceased had spoken and from other victims who testified during the trial) and the judge's caution to the jury were sufficient counter-balancing safeguards.<sup>879</sup>

- The admission of a statement from the alleged sole eyewitness to a stabbing who refused to testify in court, even from behind a screen, violated the accused's right to a fair trial. The European Court concluded that prejudice resulting from the admission of this decisive evidence, which had not been tested through cross-examination, was not sufficiently counter-balanced by the trial court's warning to the jury about the dangers of relying on untested evidence.<sup>880</sup>

The European Court found a violation of the accused's rights when a court based its judgment on the reports of an undercover police officer, transcripts of intercepted telephone calls, and statements made by the accused when shown the transcripts. The accused had no opportunity to check or challenge the transcripts or to examine the undercover police officer.<sup>881</sup>

The European Court concluded that reliance on the statement made by a co-accused during the investigation as the sole evidence against the accused violated his right to a fair trial. The co-accused exercised his right to remain silent during trial. The European Court noted that the authorities had not sought corroborating evidence and the court of appeal had denied the accused's request to question his co-defendant.<sup>882</sup>

## 22.3 RIGHT TO CALL AND EXAMINE DEFENCE WITNESSES

Everyone accused of a criminal offence has the right to obtain the attendance of witnesses and to examine witnesses on their behalf "under the same conditions as witnesses against them".<sup>a</sup>

The right to call defence witnesses "under the same conditions" as prosecution witnesses means that the right is not unlimited; it gives courts discretion in deciding which witnesses to summons. However, in exercising such discretion, judges must ensure fairness and respect for the principle of equality of arms.<sup>883</sup> Before rejecting a request for a defence witness to be called, a court should assess the relevance of the witness to the defence.<sup>b</sup><sup>884</sup> If a court refuses such a request, reasons should be given.<sup>885</sup>

The Human Rights Committee concluded that the refusal of a court to order expert forensic testimony in a rape case violated Article 14(3)(e) of the ICCPR, as it was of

<sup>a</sup> Article 14(3)(e) of the ICCPR, Article 18(3)(e) of the Migrant Workers Convention, Article 16(5) of the Arab Charter, Article 6(3)(d) of the European Convention, Section N(6)(f) of the Principles on Fair Trial in Africa, Article 67(1)(e) of the ICC Statute, Article 20(4)(e) of the Rwanda Statute, Article 21(4)(e) of the Yugoslavia Statute; See Article 40(2)(b)(iv) of the Convention on the Rights of the Child

<sup>b</sup> Section N(6)(f)(ii) of the Principles on Fair Trial in Africa

<sup>878</sup> *Al-Khawaja and Tahery v United Kingdom* (26766/05 and 22228/06), European Court Grand Chamber (2011) §125.

<sup>879</sup> *Al-Khawaja and Tahery v United Kingdom* (26766/05 and 22228/06), European Court Grand Chamber (2011) §§153-158; See, European Court: *Gossa v Poland* (47986/99), (2007) §§57-65, *Artner v Austria* (13161/87), (1992) §§20-24.

<sup>880</sup> *Al-Khawaja and Tahery v United Kingdom* (26766/05 and 22228/06), European Court Grand Chamber (2011) §§159-165; See *Mirlashvili v Russia* (6293/04), European Court (2008) §§217-229.

<sup>881</sup> European Court: *Lüdi v Switzerland*, (12433/86), (1992) §§42-50, See *Saïdi v France* (14647/89), (1993) §44.

<sup>882</sup> *Balšán v Czech Republic* (1993/02), European Court (2006) §§22-35; See *Lucà v Italy* (33354/96), European Court (2001) §§39-43; See also *Lutsenko v Ukraine* (30663/04), European Court (2009) §§42-53.

<sup>883</sup> European Court: *Vidal v Belgium* (12351/86), (1992) §33, *Popov v Russia* (26853/04), (2006) §177.

<sup>884</sup> HRC General Comment 32, §39; *Popov v Russia* (26853/04), European Court (2006) §§187-189.

<sup>885</sup> *Vidal v Belgium* (12351/86), European Court (1992) §34.

<sup>a</sup> Article 8(2)(f) of the American Convention

<sup>b</sup> Among others, Article 13 of the Convention against Torture, Articles 12(1) and 12(4) of the Convention on Enforced Disappearance, Articles 24-25 of the Convention against Transnational Organized Crime, Articles 6-7 of the Palermo Protocol on Trafficking in Persons, Sections VI-X of the Basic Principles on Reparation, Declaration on Justice for Victims of Crime, Principles 15-16 of the Principles for the Investigation of Arbitrary Executions, Articles 56-57 of the CoE Convention on violence against women, Articles 54(1)(b) and 68 of the ICC Statute

<sup>c</sup> Among others, Article 24(2) of the Convention against Transnational Organized Crime, Article 27 of the Basic Principles on Reparation, Principle 6(b) of the Declaration on Justice for Victims of Crime, Principles 4 and 5 and Guideline 7 of the Principles on Legal Aid, Article 30(4) of the CoE Convention on Sexual Abuse of Children, Section P(f)(ii) of the Principles on Fair Trial in Africa; See Article 7(3) of the Convention against Torture, Article 11(3) of the Convention on Enforced Disappearance

<sup>d</sup> Among others, Article 24(2) of the Convention on Enforced Disappearance, Guidelines 7 and 8 of the Principles on Legal Aid, Principles 4 and 6 of the Declaration on Justice for Victims of Crime, Principle 11(c) of the Basic Principles on Reparation, Guideline VII of the Guidelines on Child Victims and Witnesses, Section P(d), (f)(i) and (m)(ii) of the Principles on Fair Trial in Africa, Article 56(1)(c) of the CoE Convention on violence against women

<sup>e</sup> See Articles 56(1)(h) and 57 of the CoE Convention on violence against women, Principles 4 and 5 and Guideline 8 §49(d) of the Principles on Legal Aid

crucial importance to the defence.<sup>886</sup> It also found a violation where the court refused a defence request to call officials who could have provided information relevant to the accused's claim that he had been tortured to "confess".<sup>887</sup>

The Human Rights Committee has laid particular emphasis on the importance of respect for this right in death penalty cases. In a murder trial where a witness for the defence was willing to testify about the accused's alibi but was unable to appear in court on the particular day because she had no means of transport, the Human Rights Committee found a violation; the witness's failure to appear was attributable to the authorities, who could have adjourned the proceedings or provided her with transport.<sup>888</sup>

The American Convention is broader in this regard. It guarantees the right of the defence to examine witnesses present in court and to obtain the appearance of expert witnesses or others who may throw light on the facts.<sup>a</sup>

## 22.4 RIGHTS OF VICTIMS AND WITNESSES

International standards, human rights bodies and jurisprudence have increasingly underscored the duty of states and courts to respect and protect the rights of victims of crime and other witnesses. This includes, when appropriate, family members, dependants and individuals who have suffered harm when intervening to assist victims. The standards require the authorities to ensure that all, including victims, have equal access to courts without discrimination.<sup>889</sup> (See **Chapter 11.3** and **Chapter 26.3.**)

International standards require the authorities to take measures and organize criminal proceedings so as to ensure the safety and well-being of victims and witnesses and respect for their rights, including their right to privacy.<sup>b</sup><sup>890</sup>

The measures taken to protect the rights of victims and witnesses must be consistent with the rights of the accused and the requirements of a fair trial.<sup>c</sup><sup>891</sup>

Measures to be taken by the authorities and courts include providing victims and witnesses with information about their rights and how they may access and exercise them, as well as timely information on the conduct and progress of the investigation and proceedings.<sup>d</sup><sup>892</sup>

The authorities should also provide assistance, including an interpreter, if necessary,<sup>893</sup> advice to ensure effective access to the court and, where appropriate, legal assistance.<sup>e</sup><sup>894</sup>

<sup>886</sup> *Fuenzalida v Ecuador*, HRC, UN Doc. CCPR/C/57/D/480/1991 (1996) §9.5.

<sup>887</sup> *Idiev v Tajikistan*, HRC, UN Doc. CCPR/C/95/D/1276/2004 (2009) §9.6.

<sup>888</sup> *Grant v Jamaica*, HRC, UN Doc. CCPR/C/50/D/353/1988 (1994) §8.5.

<sup>889</sup> See HRC General Comment 32, §9; CEDAW Committee Concluding Observations: *Rwanda*, UN Doc. CEDAW/C/RWA/CO/6 (2009) §§23-24.

<sup>890</sup> CEDAW Committee General Recommendation 19, §24(b), (k), (r); CERD General Recommendation XXXI, §17, 19; Special Rapporteur on independence of judges and lawyers, UN Doc. A/66/289 (2011) §§44-46, 60-73, 77, 100-101; Special Rapporteur on human rights and counter-terrorism: UN Doc. A/HRC/20/14 (2012) §§35-45, 67(c), (e-i); UN Mechanisms joint study on secret detention, UN Doc. A/HRC/13/42 (2010) §292(k); *Myrna Mack Chang v Guatemala*, Inter-American Court (2003) §199; HRC Concluding Observations: *UNMIK: Kosovo*, UN Doc. CCPR/C/UNK/CO/1 (2006) §12; CAT Concluding Observations: *Bosnia*, UN Doc. CAT/C/BIH/CO/2-5 (2010) §17 and *Indonesia*, UN Doc. CAT/C/IDN/CO/2 (2008) §31; CoE Committee of Ministers Recommendation Rec(2006)8, §§4-6; *Prosecutor v Haradinaj et al* (IT-04-84-A), ICTY Appeals Chamber (19 July 2010) §§35-36, 48-49.

<sup>891</sup> European Court: *A.S. v Finland* (40156/07), (2010) §55, *Perez v France* (47287/99), Grand Chamber (2004) §70-72; CoE Committee of Ministers Recommendation No. R (97)13 §2, 6; Special Rapporteur on human rights and counter-terrorism, UN Doc. A/HRC/20/14 (2012) §42, 67(g); See *Prosecutor v Milošević* (IT-02-54), ICTY Trial Chamber, Decision on Prosecution Motion for Provisional Protective Measure Pursuant to Rule 69 (19 February 2002) §23.

<sup>892</sup> CRC General Comment 12, §64; CoE Committee of Ministers Recommendation Rec(2006)8 §§4-6; See, European Court: *Finucane v United Kingdom* (29178/95), (2003) §71, 82-83, *Zontul v Greece* (12294/07), (2012) §§110-112, *Gül v Turkey* (22676/93), (2000) §93, *Oğur v Turkey* (21594/93), (1999) §92; *González et al ("Cotton Field") v Mexico*, Inter-American Court (2009) §424.

<sup>893</sup> *Rosendo Cantú et al v Mexico*, Inter-American Court (2010) §§184-185; See, CoE Committee of Ministers Recommendation Rec(2006)8 §6.2.

<sup>894</sup> HRC General Comment 32, §§9-10; UN General Assembly resolution 65/228, §12; CEDAW Committee Concluding Observations: *India*, UN Doc. CEDAW/C/IND/CO/SP.1 (2010) §22, 24(c); CoE Committee of Ministers Recommendation No. R (97)13 §22; see also *Yula v Belgium* (45413/07), European Court (2009) §§28-40.

The Principles on Legal Aid state that legal aid should be provided to victims and witnesses where appropriate, without prejudice to the rights of the accused. Examples include when the witness risks incriminating him or herself, when there are risks to the individual's safety and well-being, or when the individual is particularly vulnerable. Child victims and witnesses should receive appropriate legal assistance as required.<sup>a</sup>

Witness protection is not optional<sup>b</sup> but a duty of states under international law.<sup>895</sup>

Forms of protection for victims and witnesses include witness protection programmes providing physical protection and psychological support before, during and after proceedings.<sup>b</sup><sup>896</sup> For witnesses and victims participating in hearings, they include, where necessary and proportionate, allowing the presentation of evidence by electronic or other special means, or closing part or all of the proceedings to the public. (See **Chapter 14**, Right to a public hearing.)

The European Court has stated that where the life, liberty or security of witnesses may be at stake, states must organize criminal proceedings so as to ensure that these rights are not unjustifiably imperilled.<sup>897</sup>

In ruling on the case of a woman extrajudicially executed during a military intelligence operation in Guatemala, the Inter-American Court stated that ensuring due process requires states to protect victims, witnesses and their next of kin, as well as others involved in the criminal justice process. The Court found that the investigation and subsequent criminal proceedings were impeded by reprisals, in particular the murder of an investigating police officer, and threats against witnesses and the victim's family.<sup>898</sup>

Criminal proceedings should permit the views and concerns of victims to be presented and considered at appropriate stages where their personal interests are affected, without prejudice to the rights of the accused.<sup>c</sup><sup>899</sup>

International standards and jurisprudence have increasingly recognized that special measures may be needed when investigating, prosecuting and judging crimes where the characteristics of the victim or the crime leave the victim or witnesses at particular risk. These include crimes against children and crimes involving gender-based violence. Victims of identity-based violence and those who fear reprisals may be reluctant to testify. Those in charge of such investigations, as well as judges, prosecutors and lawyers, should be specialists in the field or trained for the purpose.<sup>d</sup><sup>900</sup>

### 22.4.1 CHILD WITNESSES AND VICTIMS OF GENDER-BASED VIOLENCE

International standards and the jurisprudence of human rights courts have set out a range of measures (complementary to or more specific than those set out in **22.4** above) to protect the rights of child victims and victims of gender-based violence and human trafficking during investigations and criminal proceedings.

For example, numerous international standards aim to protect the privacy of child victims of crime, child witnesses and victims of gender-based violence and human trafficking.<sup>e</sup>

<sup>a</sup> Principles 4 and 5, Guideline 8 §§50-51 and 49(c), Guideline 9 §52(c) and Guideline 7 §48(b) of the Principles on Legal Aid

<sup>b</sup> Among others, Principles 10-12 of the Basic Principles on Reparation, Article 36(2) of the CoE Convention on Sexual Abuse of Children, Articles 52-57 of the CoE Convention on violence against women, Section P of the Principles on Fair Trial in Africa, Guidelines VI and VII(6) of the CoE Guidelines on eradicating impunity

<sup>c</sup> Among others, Article 6(b) of the Declaration on Justice for Victims of Crime, Guideline 7 §48(e) of the Principles on Legal Aid, Article 25(3) of the Convention against Transnational Organized Crime, Article 6(2)(b) of the Palermo Protocol on Trafficking in Persons, Section P(f)(ii) of the Principles on Fair Trial in Africa, Article 68(3) of the ICC Statute

<sup>d</sup> Among others, Article 4(i) of the Declaration on the Elimination of Violence against Women, Articles 34, 35(c) and 36(1) of the CoE Convention on Sexual Abuse of Children; See Article 8 of the Protocol to the African Charter on the Rights of Women in Africa, Section P(m)(iii) of the Principles on Fair Trial in Africa

<sup>e</sup> Among others, Article 8(1)(e) of the Optional Protocol to the Convention on the Rights of the Child on the sale of children, Article 36(2) of the CoE Convention on Sexual Abuse of Children, Articles 11 and 30 of the CoE Convention on Trafficking in Human Beings, Article 56 of the CoE Convention on violence against women, Guidelines X-XII of the Guidelines on Child Victims and Witnesses, Section A(3)(f)(i) of the Principles on Fair Trial in Africa, Article 68(2) of the ICC Statute

<sup>895</sup> Special Rapporteur on the independence of judges and lawyers, UN Doc. *A/66/289* (2011) §62.

<sup>896</sup> CEDAW Committee: *Concluding Observations: India*, UN Doc. CEDAW/C/IND/CO/SP.1 (2010) §§23, 24(e); *CoE Recommendation Rec(2006)8* §§4-6, 10-12; *CoE Recommendation No. R (97)13* §2; Special Rapporteur on the independence of judges and lawyers, UN Doc. *A/66/289* (2011) §§60-73, 77; See *A.T. v Hungary* (2/2003) CEDAW Committee (2005) §§8.4, 9.3.

<sup>897</sup> *Doornson v The Netherlands* (20524/92), European Court (1996) §70.

<sup>898</sup> *Myrna Mack Chang v Guatemala*, Inter-American Court (2003) §199.

<sup>899</sup> *Prosecutor v Lubanga* (ICC-01/04-01/06-1432), ICC Appeals Chamber, Judgment on the Appeals of the Prosecutor and the Defence against Trial Chamber I's Decision on Victims' Participation of 18 January 2008, (11 July 2008) §§98-100, 104; See also Principle 19 of the *Updated Impunity Principles*.

<sup>900</sup> *HRC Concluding Observations: Japan*, UN Doc. CCPR/C/JPN/CO/5 (2008) §14, *Madagascar*, UN Doc. CCPR/C/MDG/CO/3 (2007) §11; CEDAW Committee *Concluding Observations: India*, UN Doc. CEDAW/C/IND/CO/SP.1 (2010) §24(c) and (f); Principle 10(c) of the *Yogyakarta Principles*; *CoE Recommendation CM/Rec(2010)5*, §A(3).

<sup>a</sup> Guidelines on Child Victims and Witnesses

<sup>b</sup> Among others, Guidelines XII(34)(a), XI(31) and V(13-14) of the Guidelines on Child Victims and Witnesses, Section O(p) of the Principles on Fair Trial in Africa

<sup>c</sup> Among others, Articles 35-36(2)(b) of the CoE Convention on Sexual Abuse of Children, Article 56 of the CoE Convention on violence against women, Guideline XI(31) of the Guidelines on Child Victims and Witnesses, Section O(p) of the Principles on Fair Trial in Africa, Article 68(2) of the ICC Statute

<sup>d</sup> Among others, Article 35(1)(f) of the CoE Convention on Sexual Abuse of Children, Section O(p)(i) and (v) of the Principles on Fair Trial in Africa

<sup>e</sup> Sections N(6)(f)(iii-v) and O(p) of the Principles on Fair Trial in Africa; See Articles 26, 54 and 56 of the CoE Convention on violence against women

<sup>f</sup> Guideline 31(b) of the Guidelines on Child Victims and Witnesses, Article 30(4) of the CoE Convention against Sexual Abuse of Children, Sections N(6)(f)(iii-v) and O(p) of the Principles on Fair Trial in Africa, Article 68(1) of the ICC Statute

<sup>g</sup> Article 54 of the CoE Convention on violence against women, Section O(p)(xii) of the Principles on Fair Trial in Africa

<sup>h</sup> Among others, Article 14(1) of the ICCPR, Guideline X of the Guidelines on Child Victims and Witnesses, Guideline 10 §54 of the Principles on Legal Aid, Section O(p)(iv) of the Principles on Fair Trial in Africa

Cases involving child victims and witnesses must respect the right of the child to be heard, the best interests of the child and the child's right to a private life.<sup>a 901</sup> (See **Chapter 27**, Children.)

Contact between the accused and victims of gender-based violence and child victims should be avoided in police stations and courts, where possible. Interviews should be video-recorded, and should be conducted by people who have been specifically trained.<sup>b</sup> Without prejudice to the rights of the accused, rules of evidence should allow for such recordings to be admissible as evidence, and victims should be able to be heard in the courtroom without necessarily being physically present, or at least without having to see the accused.<sup>c 902</sup>

Parents or relatives, if appropriate, legal representatives or social workers should be present when child victims or witnesses are questioned by the police, and consideration should be given to questioning children through an intermediary.<sup>d</sup>

Trials involving children may be closed to the public (see **Chapter 14.3** and **Chapter 27.6.9**).

When victims of gender-based violence or child victims are being questioned, limitations on the scope and manner of the questioning may be permissible.<sup>e</sup> Such limitations must be sufficiently counter-balanced by procedures to protect defence rights.<sup>f</sup>

For example, evidence relating to the sexual history and conduct of the victim should be permitted only when it is relevant and necessary.<sup>g</sup>

Examining cases involving child victims of sexual abuse, the European Court has stated that fairness requires an accused to be given an opportunity to observe the interviewing of a child witness, for example via video-link or from behind a one-way mirror, or subsequently from a video-recording. The accused has the right to have questions put to the child, directly or indirectly, either during the first interview or later.<sup>903</sup> The Court reiterated, however, that evidence obtained from a witness when the rights of the defence cannot be secured should be treated with particular care by the courts.<sup>904</sup> Applying these principles, it held that the rights of the accused were violated when the previously recorded statement of the victim was decisive but the defence did not have the opportunity to put questions to the victim either directly or indirectly.<sup>905</sup>

The complaints of unfairness by the accused were considered to be manifestly ill-founded when the decisive evidence against the accused was a video-tape of the questioning of the child victims of sexual abuse. The accused, defence counsel and the investigating judge were present behind one-way mirrors, and the accused could ask the investigating judge to put specific questions to the witnesses.<sup>906</sup>

Measures must be taken to prevent the publication of any information or personal data that may lead to the identification of a child victim or witness, including in court judgments or by the media.<sup>h</sup> (See **Chapter 24.1** on judgments.)

<sup>901</sup> CRC General Comment 12, §§63-65, 68.

<sup>902</sup> UN Security Council, Rule of Law and Transitional Justice in Conflict and Post Conflict Societies: Report of the Secretary General, UN Doc. S/2004/616, §25.

<sup>903</sup> European Court: *A.S. v Finland* (40156/07), (2010) §56, *Accardi and Others v Italy* (30598/02), Inadmissibility Decision (2005), *W.S. v Poland* (21508/02), (2007) §61-64.

<sup>904</sup> *S.N. v Sweden* (34209/96), European Court (2002) §§47-53.

<sup>905</sup> European Court: *A.S. v Finland* (40156/07), (2010) §§53-68, *Demski v Poland* (22695/03), (2008) §§38-47, *Bocos-Cuesta v The Netherlands* (54789/00), (2005) §§64-74.

<sup>906</sup> *Accardi and Others v Italy* (30598/02), European Court Inadmissibility Decision (2005).

# CHAPTER 23

## RIGHT TO AN INTERPRETER AND TO TRANSLATION

Everyone charged with a criminal offence has the right to the assistance of a competent interpreter, free of charge, if he or she does not understand or speak the language used in court. Everyone charged with a criminal offence also has the right to have documents translated.

### 23.1 Interpretation and translation

#### 23.2 Right to a competent interpreter

#### 23.3 Right to have documents translated

## 23.1 INTERPRETATION AND TRANSLATION

If an accused does not understand, speak or read the language used by the courts, or has difficulty doing so, accurate and clear oral interpretation and translation of documents are crucial to the fairness of the proceedings. Such assistance is vital for the effective exercise of the rights to assistance of counsel, adequate facilities to prepare and present a defence, equality before the law and courts and the principle of equality of arms (see **Chapters 8** and **13.2**). Without such assistance an accused may not be able to participate fully and effectively in the preparation of their defence and during the proceedings. Because documents may contain information essential to the preparation of the defence and an accused may be questioned about the contents of documents, the right to translation of important documents is vital to a fair trial. (See **Chapter 22.4** regarding interpreters and translation for victims and witnesses.)

The right to assistance of this sort extends to facilities for people with disabilities which impede their ability to communicate orally or in writing or to read relevant documents in the language or format in which they are presented.<sup>a 907</sup>

Fulfilling these rights requires the authorities to ensure that sufficient numbers of qualified interpreters and translators are available.<sup>908</sup>

## 23.2 RIGHT TO A COMPETENT INTERPRETER

Everyone charged with a criminal offence has the right to the assistance of an interpreter, free of charge, if he or she does not understand or speak the language used in court.<sup>b</sup>

The failure to provide an interpreter for an accused who does not speak or understand the language used in court violates the accused's right to a fair trial.<sup>909</sup>

The right to an interpreter applies at all stages of criminal proceedings, including during police questioning, preliminary examinations or inquiries, and challenges to the legality of detention,

<sup>a</sup> See Guidelines 2 §42(d) and 3 §43(f) of the Principles on Legal Aid, Articles 9 and 13 of the Convention on Persons with Disabilities

<sup>b</sup> Article 14(3)(f) of the ICCPR, Article 40(2)(b)(vi) of the Convention on the Rights of the Child, Articles 18(3)(f) and 16(8) of the Migrant Workers Convention, Article 8(2)(a) of the American Convention, Article 16(4) of the Arab Charter, Article 6(3)(e) of the European Convention, Guideline 3 §43(f) of the Principles on Legal Aid, Section N(4) of the Principles on Fair Trial in Africa, Principle V of the Principles on Persons Deprived of Liberty in the Americas, Article 67(1)(f) of the ICC Statute, Article 20(4)(f) of the Rwanda Statute, Article 21(4)(f) of the Yugoslavia Statute

<sup>907</sup> Article 2(3) of EU Directive 2010/64 (2010) on the right to interpretation and translation in criminal proceedings.

<sup>908</sup> HRC Concluding Observations: Former Yugoslav Republic of Macedonia, UN Doc. CCPR/C/MKD/CO/2 (2008) §17; See, CERD Concluding Observations: Romania, UN Doc. CERD/C/ROU/CO/16-19 (2010) §19, Cameroon, UN Doc. CERD/C/CMR/CO/15-18 (2010) §17.

<sup>909</sup> *Bozbej v Turkmenistan*, HRC, UN Doc. CCPR/C/100/D/1530/2006 (2010) §7.2; *Kevin Mgwanga Gunme et al v Cameroon* (266/03), African Commission (2009) §§129-130; Report on terrorism and human rights, Inter-American Commission (2002) III(D)(1) §235, III(H)(3) §400, IV(H) §16(f).

<sup>a</sup> Article 16(8) of the Migrant Workers Convention, Principle 14 of the Body of Principles, Guideline 3 §43(f) of the Principles on Legal Aid, Section N(4)(c) of the Principles on Fair Trial in Africa, Principle V of the Principles on Persons Deprived of Liberty in the Americas

<sup>b</sup> Section N(4)(b) of the Principles on Fair Trial in Africa

<sup>c</sup> Article 9(1)(a) of the European Charter for Regional or Minority Languages

<sup>d</sup> Section N(4)(e) of the Principles on Fair Trial in Africa; See Article 67(1)(f) of the ICC Statute

as well as during any period of detention or imprisonment.<sup>a 910</sup> (See **Chapters 2.4, 3.3, 5.2, 8.3.2, 9.5, 11.2.1, 11.3, 23** and **32.2.1.**) It also applies, where necessary, to contact between the accused and their counsel in all phases of the investigation, pretrial and throughout the proceedings.<sup>911</sup>

The right to free assistance of an interpreter must be available to all people who do not speak or understand the language of the court, nationals and non-nationals alike.<sup>912</sup>

As guardians of the fairness of criminal proceedings, the courts are responsible for ensuring the assistance of a competent interpreter to those who need it.<sup>913</sup> An accused should have the right to appeal against a decision not to provide an interpreter.<sup>914</sup>

When making decisions about whether to appoint an interpreter, a court must not only consider the extent of the accused's knowledge of the language but also the complexity of the issues in the case and of any communications from the authorities. If the accused speaks and understands the language used to some degree, the complexity of the legal or factual issues should have a bearing on whether an interpreter is appointed.<sup>915</sup> The International Criminal Court has stated that in cases of doubt, an interpreter should be provided.<sup>916</sup>

If an accused does speak and understand the language used in the court adequately, but prefers to speak another language, the Human Rights Committee has concluded that there is no obligation on the authorities to provide the accused with the free assistance of an interpreter.<sup>b 917</sup>

States, however, have been encouraged to allow criminal proceedings to take place in regional or minority languages, or to allow individuals to use these languages in court when requested by one of the parties. This may be facilitated through the use of interpreters.<sup>c 918</sup>

For the right to an interpreter to be meaningful, the interpretation must be competent and accurate. The accused must be able to understand the proceedings and the court must be able to understand testimony presented in another language.<sup>d</sup> Issues of competency should be brought to the attention of the authorities and ultimately the court, which must ensure that the quality of the interpretation is adequate.<sup>919</sup>

#### ICCPR, Article 14(3)(f)

"In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality:

(f) To have the free assistance of an interpreter if he cannot understand or speak the language used in court;"

<sup>910</sup> European Court: *Hermi v Italy* (18114/02), Grand Chamber (2006) §69, *Diallo v Sweden* (13205/07), (in)Admissibility Decision, (2010) §§23-25; See, HRC: *General Comment 32*, §32, *Singarasa v Sri Lanka*, UN Doc. CCPR/C/81/D/1033/2001 (2004) §7.2; Special Rapporteur on human rights and counter-terrorism, *Spain*, UN Doc. A/HRC/10/3/Add.2 (2008) §§26-27; Article 2 of the *EU Directive 2010/64* (2010) on the right to interpretation and translation in criminal proceedings.

<sup>911</sup> HRC *General Comment 32*, §32.

<sup>912</sup> HRC *General Comment 32*, §40; CERD *General Recommendation XXXI*, §30; *Hermi v Italy* (18114/02), European Court Grand Chamber (2006) §72; *Kevin Mgwanga Gunme et al v Cameroon* (266/03), African Commission, 26th Annual Report (2009) §130.

<sup>913</sup> *Cusani v United Kingdom* (32771/96), European Court (2002) §39.

<sup>914</sup> See, Article 2(5) of the *EU Directive 2010/64* (2010) on the right to interpretation and translation in criminal proceedings.

<sup>915</sup> *Hermi v Italy* (18114/02), European Court Grand Chamber (2006) §71.

<sup>916</sup> *Prosecutor v Katanga* (ICC-01/04-01/07), ICC Appeals Chamber (27 May 2008) §61.

<sup>917</sup> HRC: *Juma v Australia*, UN Doc. CCPR/C/78/D/984/2001 (2003) §7.3, *Guesdon v France*, UN Doc. CCPR/C/39/D/219/1986 (1990) §10.2-10.3.

<sup>918</sup> CERD *Concluding Observations: Romania*, UN Doc. CERD/C/ROU/CO/16-19 (2010) §19, *Guatemala*, UN Doc. CERD/C/GTM/CO/12-13 (2010) §8, *Australia*, UN Doc. CERD/C/AUS/CO/15-17 (2010) §19.

<sup>919</sup> European Court: *Kamasinski v Austria* (9783/82), (1989) §74, 83; *Hacioglu v Romania* (2573/03), (2011) §§88-89; *Griffin v Spain*, HRC, UN Doc. CCPR/C/53/D/493/1992 (1995) §9.5.

Interpreters for those who do not understand or speak the language used in court are to be provided free of charge, regardless of the outcome of the trial.<sup>a 920</sup>

### 23.3 RIGHT TO HAVE DOCUMENTS TRANSLATED

Some standards expressly provide for an accused to be assisted by a translator or for the translation of documents free of charge.<sup>b 921</sup> In addition, the right to an interpreter under other treaties has been understood to include the right of an accused to have relevant documents translated free of charge and within a reasonable time in order to prepare and present the defence.<sup>922</sup>

The right to have documents translated free of charge is not unlimited. It extends to documents that are necessary for the accused to understand or to have rendered into the language used by the court in order to have a fair trial.<sup>c 923</sup> Documents that should be translated without cost include, but are not limited to, the charge sheet and/or indictment, decisions on detention, and judgments.<sup>d</sup>

Noting that the ICCPR and the European Convention expressly guarantee the right to an interpreter (not a translator), both the Human Rights Committee and the European Court have considered that oral “translations” of some documents (including by defence counsel or through an interpreter) may be sufficient to guarantee the right, provided this does not prejudice defence rights.<sup>924</sup> (See **Chapter 8.**)

If an accused needs to have relevant documents translated, he or she should request the translation. The accused’s ability to understand the language in which the document is written is an issue of fact (not of the accused’s preference);<sup>925</sup> both the accused’s ability and the need for translation should be decided by the court. Refusal of requests for translation should be subject to appeal.<sup>926</sup>

<sup>a</sup> Section N(4)(f) of the Principles on Fair Trial in Africa

<sup>b</sup> Article 8(2)(a) of the American Convention, Guideline 3 §43(f) of the Principles on Legal Aid, Principle V of the Principles on Persons Deprived of Liberty in the Americas, Section N(4)(d-f) of the Principles on Fair Trial in Africa, Article 9(1)(a)(iv) of the CoE Charter for Regional or Minority Languages, Article 67(1)(f) of the ICC Statute, Rule 3 of the Rwanda Rules, Rule 3 of the Yugoslavia Rules

<sup>c</sup> Section N(4)(d) of the Principles on Fair Trial in Africa, Article 67(1)(f) of the ICC Statute

<sup>d</sup> Rule 47 of the Rwanda Rules, Rule 47 of the Yugoslavia Rules

<sup>920</sup> *Luedicke, Belkacem and Koç v Germany* (6210/73, 6877/75 and 7132/75), European Court (1978) §42.

<sup>921</sup> Article 3 of the *EU Directive 2010/64* (2010) on the right to interpretation and translation in criminal proceedings.

<sup>922</sup> European Court: *Hermi v Italy* (18114/02), Grand Chamber (2006) §69-70, *Diallo v Sweden* (13205/07) (in)Admissibility Decision, (2010) §§23-25, *Luedicke, Belkacem and Koç v Germany* (6210/73; 6877/75; 7132/75), (1978) §48.

<sup>923</sup> European Court: *Luedicke, Belkacem and Koç v Germany* (6210/73, 6877/75 and 7132/75), (1978) §48, *Kamasinski v Austria* (9783/82), (1989) §74, *Diallo v Sweden* (13205/07),

(in)Admissibility Decision (2010) §23.

<sup>924</sup> HRC: *Harward v Norway*, UN Doc. CCPR/C/51/D/451/1991 (1994) §9.2-9.5, *Hacioglu v Romania* (2573/03), European Court (2011) §§88-92; see *HRC General Comment 32*, §33.

<sup>925</sup> *Prosecutor v Tolimir* (IT-05-88/2-AR73.1), ICTY Appeals Chamber, Decision on the Interlocutory Appeal Against Oral Decision of the Pre-Trial Judge of 11 December 2007, (28 March 2008) §§14-15.

<sup>926</sup> Article 3(5) of the *EU Directive 2010/64* (2010) on the right to interpretation and translation in criminal proceedings.

# CHAPTER 24

## JUDGMENTS

**Judgments must be made public, with limited exceptions. Everyone tried by a court of law has the right to a reasoned judgment.**

### 24.1 Right to a public judgment

### 24.2 Right to know the reasons for the judgment

## 24.1 RIGHT TO A PUBLIC JUDGMENT

Judgments in criminal proceedings (in civilian and military courts, both at trial and appeal) must be made public.<sup>a</sup>

The ICCPR allows an exception to this requirement in criminal cases in order to protect the interests of children under 18. This is consistent with the Convention on the Rights of the Child which guarantees accused children full respect for their privacy at all stages of proceedings.<sup>b</sup> (See **Chapter 27** on children.)

Article 8(5) of the American Convention requires criminal proceedings to be public except insofar as necessary to protect the interests of justice, which include the best interests of children. This requirement is considered to extend to judgments.<sup>927</sup>

The right to a public judgment aims to ensure that the administration of justice is public and open to public scrutiny.

A judgment is considered to be public if it is pronounced orally in a session of the court open to the public or, if the judgment is written, it is provided to the parties and available to others, including through a court's registry.<sup>928</sup>

The requirement that reasoned judgments be made public (in all but exceptional circumstances) applies even if the public has been excluded from the trial.<sup>929</sup>

Some judgments are published in a redacted form, when this is necessary to maintain the confidentiality of protected information about victims or witnesses, including children.<sup>930</sup>

If the accused does not speak or understand the language used by the court, the judgment should be communicated to the individual orally and, ideally, be translated into a language that he or she understands.<sup>931</sup> (See **Chapter 23.3**.)

### ICCPR, Article 14(1)

"... 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."

<sup>a</sup> Article 14(1) of the ICCPR, Article 6(1) of the European Convention, Section A(3)(j) of the Principles on Fair Trial in Africa, Articles 74(5) and 76(4) of the ICC Statute, Article 22(2) of the Rwanda Statute, Article 23(2) of the Yugoslavia Statute; See Article 8(5) of the American Convention

<sup>b</sup> Article 40(2)(b)(vii) of the Convention on the Rights of the Child

<sup>927</sup> See *Palamara-Iribarne v Chile*, Inter-American Court (2005) §§165-168; *Inter-American Court Advisory Opinion OC-17/2002* §134.

<sup>928</sup> *Sutter v Switzerland* (8209/78), European Court (1984) §§31-34.

<sup>929</sup> HRC General Comment 32, §29.

<sup>930</sup> *In the Case against Vojislav Šešelj* (IT-03-67-R77.2-A), ICTY

Appeals Chamber Judgment (Public Redacted Version), Appeals Chamber, (19 May 2010) §32.

<sup>931</sup> See CERD *Concluding Observations: Italy*, UN Doc. CERD/C/ITA/CO/15 (2008) §8; *Kamasinski v Austria* (9783/82), European Court (1989) §§74, 84-85.



The right to trial within a reasonable time includes the right to receive a reasoned judgment at trial and appeal within a reasonable time.<sup>932</sup> (See **Chapter 19**.)

## 24.2 RIGHT TO KNOW THE REASONS FOR THE JUDGMENT

The rights to a fair trial and to a public judgment require courts to give reasons for their judgments.<sup>a 933</sup> The right to a reasoned judgment is essential to the rule of law, in particular to protect against arbitrariness.<sup>934</sup> In criminal cases, reasoned judgments allow the accused and the public to know why the accused has been convicted or acquitted. Furthermore, they are necessary for the right to appeal.<sup>b 935</sup>

A reasoned judgment generally includes the essential findings, evidence, legal reasoning and conclusions.<sup>c 936</sup>

Examining a case in which a military court sentenced individuals to death for participation in sabotage without giving reasons for the judgment and without any right of appeal, the African Commission stated that it had “always deplored lack or inadequacy of motives for legal decisions as a violation of the right to a fair trial”.<sup>937</sup>

The manner and extent of the reasons provided in a judgment vary, depending on the nature of the decision and whether a case is heard before a judge or a lay jury.<sup>938</sup> The test of whether the judgment is sufficiently reasoned is whether it provides enough information to rule out the risk of arbitrariness and to ensure that the accused can understand the reason for the ruling.

For example, a judgment dismissing an appeal on the basis of the reasoning of the trial court may suffice if the trial court judgment sets out the essential facts and legal grounds for the ruling.<sup>939</sup>

In cases which are heard and decided by (professional) judges rather than lay juries, the ruling must address facts and issues essential to the determination of each aspect of the case, although it need not give a detailed answer to every argument raised.<sup>940</sup> Particular attention must be given to the evaluation of witness testimony identifying an alleged perpetrator.<sup>941</sup>

In cases decided by juries which are not required or permitted to give reasons for their verdicts, safeguards to rule out the risk of arbitrariness and to allow the accused to understand the basis of the decision are required. These may include impartial directions or guidance from the judge on the legal issues or the evidence, and precise, unequivocal questions to the jury which form a framework for the verdict.<sup>942</sup>

The Human Rights Committee has emphasized the need for such directions or guidance to the jury to be impartial, presenting both the prosecution and defence cases fairly.<sup>943</sup>

<sup>a</sup> Section A(2)(i) of the Principles on Fair Trial in Africa, Article 74(5) of the ICC Statute; See Article 22(2) of the Rwanda Statute, Article 23(2) of the Yugoslavia Statute

<sup>b</sup> Section N(3)(e)(vii) of the Principles on Fair Trial in Africa

<sup>c</sup> Sections A(2)(i) and N(3)(e)(vii) of the Principles on Fair Trial in Africa, Article 74(5) of the ICC Statute

<sup>932</sup> WGAD Opinion No. 21/2004 (concerning *Morales Hernández v Colombia*), UN Doc. E/CN.4/2006/7/Add.1 (2004) p8, §§6, 11, 14; *Lenford Hamilton v Jamaica*, HRC, UN Doc. CCPR/C/50/D/333/1988 (1994) §§8.3, 9.1.

<sup>933</sup> HRC General Comment 32, §29.

<sup>934</sup> *Apitz Barbera et al v Venezuela*, Inter-American Court (2008) §78.

<sup>935</sup> *Hadjianastassiou v Greece* (12945/87), European Court (1992) §33; See, Special Rapporteur on human rights and counter-terrorism, UN Doc. A/63/223 (2008) §15; *García-Asto and Ramírez-Rojas v Peru*, Inter-American Court (2005) §155.

<sup>936</sup> HRC General Comment 32, §29; See *Apitz Barbera et al v Venezuela*, Inter-American Court (2008) §90.

<sup>937</sup> *Wetsh'okonda Koso and Others v Democratic Republic of the Congo* (281/2003), African Commission (2008) §89.

<sup>938</sup> *Taxquet v Belgium* (926/05), European Court Grand Chamber (2010) §§91-92.

<sup>939</sup> *García Ruiz v Spain* (30544/96), European Court (1999) §§26, 29-30.

<sup>940</sup> *Taxquet v Belgium* (926/05), European Court Grand Chamber (2010) §91; ICTY Appeals Chamber: *Prosecutor v Kvočka et al* (IT-98-30/1-A), (28 February 2005) §23, *Prosecutor v Hadžihasanović and Kubura* (IT-01-47-A), (22 April 2008) §13.

<sup>941</sup> *Prosecutor v Kvočka et al* (IT-98-30/1-A), ICTY Appeals Chamber (28 February 2005) §24.

<sup>942</sup> *Taxquet v Belgium* (926/05), European Court Grand Chamber (2010) §92.

<sup>943</sup> *Pinto v Trinidad and Tobago*, HRC, UN Doc. CCPR/C/39/D/232/1987 (1990) §12.3-12.4; See *Clifton Wright v Jamaica*, HRC, UN Doc. CCPR/C/45/D/349/1989 (1992) §8.2-8.3.

The European Court has emphasized that the directions or questions put to the jury need to be sufficiently precise and directed to the individual case. Furthermore it should be clear from the indictment, together with the questions to the jury and its answers, which pieces of evidence and factual circumstances the jury based its verdict on. In a case where an accused was convicted by a jury of murder and attempted murder, the European Court ruled that the verdict did not provide sufficient reasons for his conviction nor why he was considered more culpable than some of his seven co-accused. Even when viewed in conjunction with the indictment, the questions put to the jury did not enable the accused to ascertain what evidence and circumstances the verdict was based on.<sup>944</sup>

In contrast, an accused was convicted of crimes against humanity in the context of World War II, following a trial in which the court asked the jury to answer 768 questions in its verdict. The European Court considered that the questions, which both the defence and prosecution had a part in formulating, were sufficiently precise, formed a framework for the jury's verdict and offset the fact that no reasons were given for their answers.<sup>945</sup>

Challenges to the content or extent of the reasoning in a judgment should identify the specific aspects or factual findings at issue and explain their significance.<sup>946</sup>

<sup>944</sup> *Taxquet v Belgium* (926/05), European Court Grand Chamber (2010) §§85-100; See *Goktepe v Belgium* (50372/99), European Court (2005) §§23-31.

<sup>945</sup> *Papon v France* (54210/00), Decision European Court (15 November 2001) The Law §6(f).

<sup>946</sup> See *Prosecutor v Kvočka et al* (IT-98-30/1-A), ICTY Appeals Chamber (28 February 2005) §25.

# CHAPTER 25

## PUNISHMENTS

**Punishments may lawfully be imposed only on people who have been convicted of a crime after a fair trial. Punishments must be proportionate and may not violate international standards. Conditions in prison must respect human dignity.**

- 25.1 Fair trial rights – punishments
- 25.2 What penalties can be imposed?
- 25.3 Retroactive application of lighter penalties
- 25.4 Punishments must not violate international standards
- 25.5 Corporal punishment
- 25.6 Life imprisonment without the possibility of parole
- 25.7 Indefinite prison sentences
- 25.8 Conditions of imprisonment

### 25.1 FAIR TRIAL RIGHTS – PUNISHMENTS

The right to a fair trial extends to how punishments (also called “penalties” in international law) are determined and what punishments may be imposed.<sup>947</sup>

A measure not considered a punishment under national law may nonetheless be considered a penalty under international law. Relevant factors include how the measure is characterized in domestic law, its nature and purpose, the procedures attached and its severity.<sup>948</sup>

Punishments may be lawfully imposed only on an individual convicted of a crime after proceedings which comply with international standards.

Imprisonment without legal basis, for example, following final acquittal on criminal charges or after completion of a prison sentence, amounts to arbitrary detention.<sup>949</sup>  
(See **Chapter 1**, Right to liberty.)

Punishments should be pronounced in public unless international standards allow otherwise, such as when the accused is a child.<sup>a</sup> (See **Chapter 24** on judgments and **Chapter 27.6.9** on proceedings against children.)

### 25.2 WHAT PENALTIES CAN BE IMPOSED?

Punishments imposed following a conviction must be prescribed by law.

The principle of legality – the requirement that offences must be defined precisely within the law and the law must be accessible – applies to penalties.<sup>950</sup> (See **Chapter 18.1.1.**)

<sup>a</sup> Article 40(2)(vii) of the Convention on the Rights of the Child, Article 76(4) of the ICC Statute; See Article 14(1) of the ICCPR, Article 8(5) of the American Convention, Article 6(1) of the European Convention, Sections A(3)(j) and O(h) and (n) of the Principles on Fair Trial in Africa, Article 22(2) of the Rwanda Statute, Article 23(2) of the Yugoslavia Statute

<sup>947</sup> *T v United Kingdom* (24724/94), European Court Grand Chamber (1999) §108.

<sup>948</sup> European Court: *Welch v United Kingdom* (17440/90), (1995) §§28, 32, *Kafkaris v Cyprus* (21906/04), Grand Chamber (2008) §142.

<sup>949</sup> WGAD, UN Doc. *A/HRC/16/47* (2012) p23 §8(a); See UN Security Council resolution 1949, Guinea Bissau, §10.

<sup>950</sup> *Kafkaris v Cyprus* (21906/04), European Court Grand Chamber (2008) §140.

<sup>a</sup> Article 7(2) of the African Charter, Article 5(3) of the American Convention

<sup>b</sup> See, among others, Rules 2.3, 3.2 and 8.1 of the Tokyo Rules, Article 40(4) of the Convention on the Rights of the Child, Article 4(2) of the Convention against Torture, Article 7 of the Convention on Enforced Disappearance, Articles 23-26 of the CoE Convention on Trafficking in human beings, Articles 45-48 of the CoE Convention on violence against women

<sup>c</sup> Rules 57, 58, 61 and 64 of the Bangkok Rules

<sup>d</sup> Article 19(2) of the Migrant Workers Convention

<sup>e</sup> See Article 42 of the CoE Convention on violence against women

<sup>f</sup> Rule 33 of the CoE Rules on remand in custody, Article 78(2) of the ICC Statute

Punishment for an offence may be imposed only on the individual convicted of an offence; international standards prohibit the imposition of collective punishments, including during times of emergency.<sup>a 951</sup> (See **Chapter 31** and **Chapter 32.5.1**, Prohibition of collective punishments.) This extends to prohibiting punishment of parents for offences committed by their children.<sup>952</sup>

Penalties imposed following a conviction must be commensurate with the gravity of the crime and the circumstances of the offender.<sup>b</sup> Neither the punishment itself nor the manner in which it is imposed may violate international standards.

Disproportionately severe punishments as well as punishments for acts that should not be criminalized violate international standards. Examples include prison sentences for defamation.<sup>953</sup> Human rights bodies and mechanisms<sup>954</sup> and Amnesty International<sup>955</sup> have called for the decriminalization of defamation.

At the other end of the spectrum, punishments such as lenient sentences for police officers convicted of torture or other ill-treatment also violate international standards, as they do not reflect the gravity of the crime and may lead to impunity for human rights violations.<sup>956</sup>

Decisions on sentencing should be gender-sensitive, taking into account for example the effects of post-traumatic stress on a woman survivor of gender-based violence, a woman's pregnancy or care responsibilities and the specific needs of transgender people.<sup>c 957</sup>

Humanitarian considerations related to the status of migrant workers, including their rights to residence and work, should be taken into account when imposing sentences for crimes committed by migrant workers or members of their families.<sup>d</sup>

Discrimination in sentencing laws or practices may be reflected in over-representation of certain ethnic or social groups in the prison population<sup>958</sup> and disproportionately lenient punishments for crimes involving violence against women, including rape, domestic violence,<sup>959</sup> "honour crimes"<sup>e 960</sup> and human trafficking. (See **Chapter 11**, Right to equality before the law and courts.)

Punishments involving deprivation of liberty should only be imposed to serve a pressing social need and should be proportionate to that need.<sup>961</sup> Time spent in pre-trial detention should be taken into account when imposing any sentence, whether or not it involves imprisonment, and should be deducted from any term of imprisonment imposed.<sup>f 962</sup>

<sup>951</sup> HRC General Comment 29, §11; HRC Concluding Observations: *Libya*, UN Doc. CCPR/C/LBY/CO/4 (2007) §20; UN General Assembly resolution 65/225, North Korea, §1(a)(i).

<sup>952</sup> CRC General Comment 10, §55.

<sup>953</sup> HRC: General Comment 34, §47, Concluding Observations: *Italy*, UN Doc. CCPR/C/ITA/CO/5 (2005) §19; See e.g., WGAD, *Nicaragua*, UN Doc. A/HRC/4/40/Add.3 (2006) §102(c) (penalties for drug offences).

<sup>954</sup> Special Rapporteur on freedom of expression: UN Doc. A/HRC/14/23 (2010) §83, UN Doc. A/HRC/4/27 (2007) §81; African Commission resolution 169 (2010); HRC Concluding Observations: Former Yugoslav Republic of Macedonia, UN Doc. CCPR/C/MKD/CO/2 (2008) §6; Office of the OAS Special Rapporteur for freedom of expression, *Press Release 32/11*.

<sup>955</sup> Among others, see Amnesty International, *Turkey: Decriminalize Dissent*, Index: EUR 44/001/2013, p14.

<sup>956</sup> HRC Concluding Observations: *Austria*, UN Doc. CCPR/C/AUT/CO/4 (2007) §11, *Grenada*, UN Doc. CCPR/C/GRD/CO/1 (2009) §15; CAT Concluding Observations: *USA*, UN Doc. CAT/C/USA/CO/2 (2006) §26; European Court: *Duran v Turkey* (42942/02), (2008) §§66-69, *Gätgen v Germany* (22978/05), Grand Chamber (2010) §§121-124, *Kopylov v Russia* (3933/04), (2010) §§140-142, *Enukidze and Girgviani v Georgia* (25091/07), (2011) §§268-278; See Arab Human Rights Committee Conclusions: *Jordan*, (2012) §§10, 33; *WGEID: Colombia*, UN Doc.

E/CN.4/2006/56.Add.1 (2006) §§63-69.

<sup>957</sup> Special Rapporteur on the independence of judges and lawyers, UN Doc. A/66/289 (2011) §102; Special Rapporteur on torture, UN Doc. A/HRC/7/3 (2008) §41.

<sup>958</sup> WGAD, *South Africa*, UN Doc. E/CN.4/2006/7/Add.3 (2005) §87; HRC Concluding Observations: *New Zealand*, UN Doc. CCPR/C/NZL/CO/5 (2010) §12; CAT Concluding Observations: *Hungary*, UN Doc. A/54/44 (1998) §81; CEDAW Committee Concluding Observations: *Canada*, UN Doc. CEDAW/C/CAN/CO/7 (2008) §§33-34; CERD Concluding Observations: *Australia*, UN Doc. CERD/C/304/Add.101 (2000) §16, *USA*, UN Doc. A/56/18 (2001) §395; *CERD General Recommendation XXXI*, §§34-37.

<sup>959</sup> HRC Concluding Observations: *Bosnia and Herzegovina*, UN Doc. CCPR/C/BIH/CO/1 (2006) §12, *Japan*, UN Doc. CCPR/C/JPN/CO/5 (2008) §15; *Opuz v Turkey* (33401/02), European Court (2009) §§169-170, 199-200; See *M.C. v Bulgaria* (39272/98), European Court (2003) §153.

<sup>960</sup> HRC Concluding Observations: *Yemen*, UN Doc. CCPR/C/84/YEM (2005) §12; See CEDAW Committee Concluding Observations: *Lebanon*, UN Doc. CEDAW/C/LBN/CO/3 (2008) §27, *Jordan*, UN Doc. CEDAW/C/JOR/CO/4 (2007) §§23-24.

<sup>961</sup> WGAD, UN Doc. E/CN.4/2006/7, (2005) §63.

<sup>962</sup> CAT Concluding Observations: *South Africa*, UN Doc. CAT/C/ZAF/CO/1 (2006) §22; WGAD: UN Doc. E/CN.4/2006/7/Add.3 (2005) §§72-74, 87, UN Doc. E/CN.4/2001/14 (2000) §96.

The Inter-American Court concluded that a criminal law which bases punishment on the “future dangerousness” of the offender is inconsistent with the principle of legality.<sup>963</sup>

Consensus is growing on the importance of alternatives to imprisonment.<sup>964</sup> The Tokyo Rules, adopted by the UN General Assembly in 1990, promote the use of non-custodial measures of punishment. Non-custodial sentences have been recommended when appropriate and proportionate for minor crimes,<sup>965</sup> for pregnant women, for Indigenous people, and to reduce overcrowding.<sup>966</sup> They also should be considered for people with dependent children.<sup>a 967</sup> (See **Chapter 27.7** on sentencing of children.)

## 25.3 RETROACTIVE APPLICATION OF LIGHTER PENALTIES

Courts may not impose a heavier penalty than was prescribed by law when the crime was committed.<sup>968</sup> However, if legal reform reduces the penalty for an offence after the crime was committed, states must apply the lighter penalty retroactively.<sup>b</sup> (See **Chapter 28.3** on death penalty cases.)

The right to retroactive application of a lighter penalty is considered inherent within Article 7 of the European Convention.<sup>969</sup>

The lighter penalty for an offence should be applied:

- if the law is changed before a final judgment or, under African Commission standards, before the punishment is fully served;<sup>c</sup> or
- if the individual has been sentenced to an irreversible punishment, such as the death penalty, corporal punishment or life imprisonment.<sup>970</sup>

The right to benefit from a lighter penalty also applies where criminal laws punishing an act or omission are repealed.<sup>971</sup>

## 25.4 PUNISHMENTS MUST NOT VIOLATE INTERNATIONAL STANDARDS

Neither the punishment itself nor the way that a punishment is imposed may violate international standards.

Torture and other cruel, inhuman or degrading treatment or punishment are absolutely prohibited.<sup>d</sup> (See **Chapter 10** on freedom from torture and other ill-treatment.) However, the definition of torture in Article 1 of the Convention against Torture expressly excludes pain and suffering arising from or inherent in or incidental to lawful sanctions – that is, sanctions which are both lawful under national law and consistent with international standards.<sup>972</sup>

### ICCPR, Article 15(1)

“...Nor shall a heavier penalty be imposed than the one that was applicable at the time when the criminal offence was committed. If, subsequent to the commission of the offence, provision is made by law for the imposition of the lighter penalty, the offender shall benefit thereby.”

<sup>a</sup> Tokyo Rules, Rules 64, 57-58 and 60-63 of the Bangkok Rules, Article 10(2) of ILO Convention 169, Guideline 37 of the Robben Island Guidelines, Section N(9)(e)(i-ii) of the Principles on Fair Trial in Africa

<sup>b</sup> Article 11 of the Universal Declaration, Article 15(1) of the ICCPR, Article 19(1) of the Migrant Workers Convention, Article 9 of the American Convention, Article 15 of the Arab Charter, Article 7(1) of the European Convention, Section N(7)(a)-(b) of the Principles on Fair Trial in Africa, Article 24(2) of the ICC Statute; See Article 7(2) of the African Charter

<sup>c</sup> Section N(7)(b) of the Principles on Fair Trial in Africa

<sup>d</sup> Article 5 of the Universal Declaration, Article 7 of the ICCPR, the Convention against Torture, Article 5 of the African Charter, Article 5(2) of the American Convention, Article 8 of the Arab Charter, Article 3 of the European Convention, Articles 2-3 of the Declaration against Torture, Principle 6 of the Body of Principles, Article XXVI of the American Declaration

<sup>963</sup> *Fermin Ramírez v Guatemala*, Inter-American Court (2005) §96.

<sup>964</sup> See UN General Assembly resolution 65/230, §51.

<sup>965</sup> HRC Concluding Observations: *Tajikistan*, UN Doc. CCPR/CO/84/TJK (2004) §14.

<sup>966</sup> HRC Concluding Observations: *Poland*, UN Doc. CCPR/CO/84/PL (2004) §17; *Croatia*, UN Doc. CCPR/CO/HRV/CO/2 (2009) §13; CERD General Recommendation XXXI, §36; *Orchowski v Poland* (17885/04), European Court (2009) §153.

<sup>967</sup> UN General Assembly: resolution 65/229, §9, resolution 65/213, §11; Human Rights Council resolution 10/2, §13; CPT 11th General Report: CPT/Inf (2001) 16 §28.

<sup>968</sup> *Ecer and Zeyrek v Turkey* (29295/95 and 29363/95), European Court (2001) §§31-37.

<sup>969</sup> *Scoppola v Italy (No.2)* (10249/03), European Court Grand Chamber (2009) §109.

<sup>970</sup> M. Nowak, *U.N. Covenant on Civil and Political Rights: CCPR Commentary, 2nd revised edition*, Engel, 2005, pp366-7 §§19-20.

<sup>971</sup> *Cochet v France*, HRC, UN Doc. CCPR/CO/100/D/1760/2008 (2010) §7.3-7.4.

<sup>972</sup> Special Rapporteur on torture, UN Doc. E/CN.4/1997/7 (1997) §8, UN Doc. A/60/316 (2005) §§26-28.

Although a penalty may be lawful under national law, if it violates international standards, including the absolute prohibition against torture and other ill-treatment or punishment, then the penalty is prohibited. Any other interpretation would defeat the purpose of the prohibition in international standards.<sup>973</sup>

Punishments which have been considered to violate international standards include all forms of corporal punishment,<sup>974</sup> banishment,<sup>975</sup> and imprisonment for failure to pay a debt.<sup>976</sup> (See also **Chapter 28** on the death penalty.)

The system of re-education through labour used in China has also been identified as violating international standards.<sup>977</sup>

Ancillary punishments – such as expulsion of foreign nationals following conviction and suspension of prisoners' voting rights – must meet international standards.<sup>978</sup>

The Special Rapporteur on human rights and counter-terrorism raised concern that the imposition of control orders on individuals after they had completed sentences, because of the conviction, could constitute double jeopardy.<sup>979</sup> (See **Chapter 18**.)

(See **Chapter 27.7.3** on prohibited sentences for children and **Chapter 28** on the death penalty.)

## 25.5 CORPORAL PUNISHMENT

Corporal punishment, which includes flogging, caning, whipping, amputation, branding and stoning,<sup>980</sup> is prohibited by international law as it violates the absolute prohibition of torture and other cruel, inhuman and degrading treatment or punishment.<sup>a 981</sup>

## 25.6 LIFE IMPRISONMENT WITHOUT THE POSSIBILITY OF PAROLE

Concern has been growing about sentences of life imprisonment without the possibility of parole.

The European Court has held that in order for a life sentence to be compatible with the European Convention, there must be both a possibility of review by the authorities and a prospect of release. The reviews, which should be periodic, should consider the appropriateness of commutation, remission, termination or conditional release in light of the individual's progress towards rehabilitation. This is because the continued imprisonment of an individual without possibility of release when it can no longer be justified on penal grounds is inconsistent with Article 3 of the European Convention.<sup>982</sup>

<sup>a</sup> Principle I of the Principles on Persons Deprived of Liberty in the Americas; See Rule 31 of the Standard Minimum Rules, Rule 60.3 of the European Prison Rules

<sup>973</sup> See, Special Rapporteur on torture, UN Doc. *E/CN.4/1988/17*, (1988) §§42-44, UN Doc. *E/CN.4/1993/26*, (1992) §593; Rodley and Pollard, *The Treatment of Prisoners under International Law*, 3rd edition, Oxford University Press, 2009.

<sup>974</sup> HRC: *General Comment 20*, §5, *Osborne v Jamaica*, UN Doc. CCPR/C/68/D/759/1997 (2000) §§9.1, 11; Special Rapporteur on torture: *Nigeria*, UN Doc. A/HRC/7/3/Add.4 (2007) §§56-60.

<sup>975</sup> HRC Concluding Observations: *Monaco*, UN Doc. CCPR/C/MCO/CO/2 (2008) §12.

<sup>976</sup> HRC Concluding Observations: *Greece*, UN Doc. CCPR/C/83/GRC (2005) §13.

<sup>977</sup> Special Rapporteur on torture, UN Doc. A/HRC/13.39/Add.5 (2010) §71.

<sup>978</sup> HRC Concluding Observations: *Italy*, UN Doc. CCPR/C/ITA/CO/5 (2005) §18; CERD Concluding Observations: *USA*, UN Doc. CERD/C/USA/CO/6 (2008) §27; HRC *General Comment 25*, §14; *Hirst v United Kingdom* (74025/01), European Court Grand Chamber (2005) §§72-85; See, HRC Concluding Observations: *USA*, UN Doc. CCPR/C/USA/CO/3/Rev.1 (2006) §35; *Scappola v Italy (No. 3)* (126/05), European Court Grand Chamber (2012) §§103-110.

<sup>979</sup> Special Rapporteur on human rights and counter-terrorism, Australia, UN Doc. A/HRC/4/26/Add.3 (2006) §40.

<sup>980</sup> HRC Concluding Observations: *Sudan*, UN Doc.

CCPR/C/79/Add.85 (1997) §9; Special Rapporteur on torture: *Nigeria*, UN Doc. A/HRC/7/3/Add.4 (2007) §56, *Iraq*, UN Doc. CCPR/C/79/Add.84 (1997) §12; CAT Concluding Observations: *Saudi Arabia*, UN Doc. CAT/C/CR/28/5 (2002) §4(b).

<sup>981</sup> HRC: *General Comment 20*, §5; Concluding Observations: *Sudan*, UN Doc. CCPR/C/79/Add.85 (1997) §9, *Iraq*, UN Doc. CCPR/C/79/Add.84 (1997) §12, *Libya*, UN Doc. CCPR/C/LBY/CO/4 (2007) §16, *Tanzania*, UN Doc. CCPR/C/TZA/CO/4 (2009) §16, *Botswana*, UN Doc. CCPR/C/BWA/CO/1 (2008) §19, *Osborne v Jamaica*, UN Doc. CCPR/C/68/D/759/1997 (2000) §§9.1, 11, *Sooklal v Trinidad*, UN Doc. CCPR/C/73/D/928/2000 (2001) §4.6; Special Rapporteur on torture: UN Doc. A/60/316 (2005) §§18-28, UN Doc. A/HRC/7/3/Add.4 (2007) §§56-60, UN Doc. *E/CN.4/1997/7* (1997) §6; African Commission: *Doebbler v Sudan* (236/2000), (2003) §42, *Concluding Observations: Botswana* (2010) §31; *Caesar v Trinidad and Tobago*, Inter-American Court (2005) §70; *Tyrer v United Kingdom* (5856/72), European Court (1978) §§37-39; See, UN General Assembly resolution 65/226: Iran (2010) §4(a), (d).

<sup>982</sup> *Vinter and Others v United Kingdom* (66069/09, 130/10, 3896/10) European Court Grand Chamber (2013) §§103-122; See, CoE Recommendation Rec (2003)22 §4(a); CPT: *Malta*, CPT/Inf (2011) 5, §121; CPT: *Actual/Real Life Sentences*, CPT (2007) 55 (2007).

While the ICC Statute provides for life imprisonment, such terms are to be reviewed by the court after 25 years to determine whether they should be reduced.<sup>a</sup>

The imposition of life sentences without parole on individuals for offences committed when under the age of 18 is prohibited. (See **Chapter 27.7.3.**)

Amnesty International opposes the imposition of sentences of life imprisonment without the possibility of parole, as inconsistent with the prohibition against cruel, inhuman or degrading punishments and the principle that incarceration should involve, among other goals, social rehabilitation. Mandatory sentences of life without parole mean that the sentenced person is deprived of consideration of their particular case and circumstances.

## 25.7 INDEFINITE PRISON SENTENCES

Indefinite sentences contain both a punitive element (a fixed term, sometimes called a “tariff”) and a preventive element aimed at ensuring the safety of the public. In some countries such sentences are referred to as preventive detention or preventive sentences.

While the imposition of an indefinite sentence has not been considered to violate the ICCPR or the European Convention *per se*, the Human Rights Committee and the European Court have stated that:

- the tariff must be set by an independent tribunal (a body independent of the parties and the executive);<sup>983</sup>
- the preventive element should be justified by compelling reasons and must be regularly reviewed by a judicial body with the power to order release following the expiry of the tariff.<sup>984</sup>

The imposition of continuing detention orders (including in psychiatric institutions following the completion of a sentence, for example for persons convicted of sexual violence), on grounds of dangerousness, have been found to violate the right to liberty.<sup>985</sup>

## 25.8 CONDITIONS OF IMPRISONMENT

Prisoners retain their human rights, except for proportionate restrictions prescribed by law which are necessitated by their deprivation of liberty.<sup>b</sup> The treatment of prisoners, prison conditions and the prison regime must respect and protect the rights of incarcerated individuals.

International standards set out guiding principles for the treatment of prisoners. They direct the prison system to respect the human rights of prisoners, imposing only such restrictions as are necessitated by incarceration, and not to aggravate the suffering inherent in the deprivation of liberty.<sup>c</sup> <sup>986</sup> They require the prison regime to minimize differences between prison life and life at liberty.<sup>d</sup>

The treatment of prisoners must aim at their rehabilitation and social reintegration.<sup>e</sup> <sup>987</sup>

A state’s duty remains intact even if it has contracted out the responsibility for running penal institutions to the private sector.<sup>988</sup>

<sup>a</sup> Articles 77(1)(b) and 110(3) of the ICC Statute

<sup>b</sup> Rule 5 of the Basic Principles for the Treatment of Prisoners, Principle VIII of the Principles on Persons Deprived of Liberty in the Americas, Rule 2 of the European Prison Rules

<sup>c</sup> Rule 57 of the Standard Minimum Rules, Rule 102(2) of the European Prison Rules

<sup>d</sup> Rule 60 of the Standard Minimum Rules; See Article 106(2) of the ICC Statute

<sup>e</sup> Article 10(3) of the ICCPR, Article 17(4) of the Migrant Workers Convention, Article 5(6) of the American Convention, Article 20(3) of the Arab Charter, Rules 58 and 65 of the Standard Minimum Rules, Section N(9)(a) and (e)(v) of the Principles on Fair Trial in Africa, Rule 6 of the European Prison Rules

<sup>983</sup> *T v United Kingdom* (24724/94), European Court Grand Chamber (1999) §§109-113.

<sup>984</sup> HRC: *Rameka et al v New Zealand*, UN Doc. CCPR/C/79/D/1090/2002 (2003) §7.3-7.4; *Dean v New Zealand*, UN Doc. CCPR/C/95/D/1512/2006 (2009) §7.3-7.4; European Court Grand Chamber: *T v United Kingdom* (24724/94), (1999) §118, *Stafford v United Kingdom* (46295/99), (2002) §§87-90.

<sup>985</sup> *Fardon v Australia*, HRC, UN Doc. CCPR/C/98/D/1629/2007 (2010) §7.3-7.4; *M v Germany* (19359/04), European Court (2009)

§§92-105; See HRC Concluding Observations: *France*, UN Doc. CCPR/C/FRA/CO/4 (2008) §16.

<sup>986</sup> HRC General Comment 21, §§2-3.

<sup>987</sup> WGAD, *Nicaragua*, UN Doc. A/HRC/4/40/Add.3 (2006) §102(c).

<sup>988</sup> HRC Concluding Observations: *New Zealand*, UN Doc. CCPR/C/NZL/CO/5 (2010) §11; *CAT General Comment 2*, §17; See *Cabal and Pasini Bertran v Australia*, HRC, UN Doc. CCPR/C/78/D/1020/2001 (2003) §7.2.

<sup>a</sup> **Guideline 33 of the Robben Island Guidelines**

<sup>b</sup> **Article 5 of the Universal Declaration, Articles 7 and 10 of the ICCPR, Article 17(1) of the Migrant Workers Convention, Articles 2 and 16 of the Convention against Torture, Article 5 of the African Charter, Article 5(2) of the American Convention, Articles 8 and 20(1) of the Arab Charter, Article 3 of the European Convention, Section M(7)(a) of the Principles on Fair Trial in Africa, Principle I of the Principles on Persons Deprived of Liberty in the Americas, Rules 1-5 and 102 of the European Prison Rules**

<sup>c</sup> **Among others, Article 10(2) of the ICCPR, Article 37(c) of the Convention on the Rights of the Child, Article 17(2) of the Migrant Workers Convention, Articles 5(4) and 5(5) of the American Convention, Articles 20(2) and 17 of the Arab Charter, Principle XIX of the Principles on Persons Deprived of Liberty in the Americas, Rule 18.8 of the European Prison Rules**

<sup>d</sup> **Among others, Section M(7)(c) of the Principles on Fair Trial in Africa, Principle XIX of the Principles on Persons Deprived of Liberty in the Americas, Rule 18.8 of the European Prison Rules**

<sup>e</sup> **See Principle XX of the Principles on Persons Deprived of Liberty in the Americas**

<sup>f</sup> **Rule 33 of the Standard Minimum Rules**

The conditions in which prisoners are held must, at a minimum, be consistent with international human rights standards.<sup>a</sup> States have a duty to treat imprisoned people with humanity and with respect for the inherent dignity of the human person and without discrimination, regardless of material resources available.<sup>989</sup> Torture and other cruel, inhuman or degrading treatment or punishment are prohibited.<sup>b</sup> (See **Chapter 10.**)

As imprisoned individuals are in the custody of the state, the state is responsible for their physical and psychological welfare. Adequate food, water, medical care and treatment (including necessary medication), hygiene, shelter and bedding must be provided.<sup>990</sup> (See **Chapter 10.3** and **10.4.**)

Prisoners should be allowed to spend sufficient hours out of their cell engaged in meaningful activities.<sup>991</sup>

The prison regime should take into account and respect cultural and religious practices.<sup>992</sup> The Human Rights Committee concluded that forbidding a Muslim prisoner to wear a beard and practise his religion amounted to a violation of his right to freedom of thought, conscience and religion.<sup>993</sup>

International standards require the authorities to hold convicted prisoners separately from detainees awaiting trial and to hold convicted children separately from adults, unless this is counter to the child's best interest.<sup>c</sup> Imprisoned men and women should be housed separately.<sup>d</sup> 994 Male guards should not be placed in front-line positions in women's prisons,<sup>e</sup> 995 and prisoners should never serve as guards to other prisoners.<sup>996</sup> States must also take appropriate measures to protect the rights of lesbian, gay, transgender and inter-sex individuals sentenced to imprisonment.<sup>997</sup> (See **Chapter 10.5-10.6.**)

International standards limit the use of force and of restraints such as handcuffs and leg irons. Instruments of restraint should never be used as punishment.<sup>f</sup> 998 (See **Chapter 10.10.2** on the use of force and **10.10.3** on methods of restraint.)

International standards also limit the use of solitary confinement, which can amount to torture or other cruel, inhuman or degrading treatment or punishment.<sup>999</sup> (See **Chapter 10.9** on solitary confinement.) The Special Rapporteur on torture has called for solitary confinement to be prohibited as a judicially imposed punishment following conviction.<sup>1000</sup>

Concern has been raised about high-security regimes within prisons and conditions in high-security prisons that involve isolation and deprivation of human contact, which may amount to cruel, inhuman or degrading treatment or punishment.<sup>1001</sup>

<sup>989</sup> HRC General Comment 21, §4; European Court: *Dybeku v Albania* (41153/06), (2007) §50, *Mamedova v Russia* (7064/05), (2006) §63.

<sup>990</sup> *Malawi African Association and Others v Mauritania* (54/91, 61/91, 98/93, 167/97-196/97 and 210/98), African Commission, 13th Annual Report (2000) §122; *Kurbanov v Tajikistan*, HRC, UN Doc. CCPR/C/79/D/1096/2002 (2003) §7.8; European Court: *Dybeku v Albania* (41153/06), (2007) §41, *Hummatov v Azerbaijan* (9852/03 and 13413/04), (2007) §§104-122.

<sup>991</sup> See also HRC Concluding Observations: *USA*, UN Doc. CCPR/C/USA/CO/3/Rev.1 (2006) §32; See, CPT 10th General Report, *CPT/Inf (2000)13* §25.

<sup>992</sup> CERD General Recommendation XXXI, §§5, 38(a).

<sup>993</sup> *Boodoo v Trinidad and Tobago*, HRC, UN Doc. CCPR/C/74/D/721/1996 (2002) §6.6.

<sup>994</sup> CAT Concluding Observations: *Cameroon*, UN Doc. CCPR/C/CMR/CO/4 (2010) §21.

<sup>995</sup> CEDAW Committee Concluding Observations: *Canada*, UN Doc.

CEDAW/C/CAN/CO/7 (2008) §§33-34.

<sup>996</sup> African Commission Concluding Observations: *Benin*, (2009) §30.

<sup>997</sup> Special Rapporteur on the independence of judges and lawyers, UN Doc. *A/66/289* (2011) §§81-82, 102; See Appendix to *CoE Recommendation CM/Rec*, (2010) 5 §(A)(4); Principle 9 of the Yogyakarta Principles.

<sup>998</sup> *CPT 2nd General Report*, CPT/Inf (92) 3, §53.

<sup>999</sup> HRC Concluding Observations: *Japan*, UN Doc. CCPR/C/JPN/CO/5 (2008) §21; See also *Polay Campos v Peru*, HRC, UN Doc. CCPR/C/61/D/577/1994 (1997) §8.6-8.7; *Castillo Petruzzi et al v Peru* (52/1999), Inter-American Court (1999) §§189-199.

<sup>1000</sup> Special Rapporteur on torture, UN Doc. *A/66/268* (2011) §84; See *CPT 21st General Report*, CPT/Inf (2011) 28, §56(a).

<sup>1001</sup> CAT Concluding Observations: *USA*, UN Doc. CAT/C/USA/CO/2 (2006) §36, *Hungary*, UN Doc. CAT/C/HUN/CO/4 (2006) §18.



Prisoners should be allowed visits from and to communicate with their families, in keeping with respect for the right to private and family life, and should have access to the outside world.<sup>1002</sup> Restrictions should be based only on security concerns and resources.<sup>1003</sup> Decisions on the location in which a person is imprisoned should take into account their rights to private and family life and to access to their lawyer.<sup>a 1004</sup> (See **Chapters 4** and **10.2.**)

Foreign nationals who are imprisoned also have the right to and must be provided with facilities to communicate with and receive visits from representatives of their government. If they are refugees or under the protection of an intergovernmental organization, they have the right to communicate with and receive visits from representatives of the organization or of the state where they reside. Foreign nationals must be informed of this right by the authorities. If the foreign national asks the authorities to contact such officials, then the authorities must do so without delay. However, they should not do so unless the individual makes the request.<sup>b 1005</sup> (See **Chapters 2.5** and **4.6.**)

Given the added protection of rights that such contact may give prisoners, Amnesty International considers that such contact should be guaranteed to individuals who are nationals of both the imprisoning state and a foreign country. If an individual is a national of two or more foreign states, they should enjoy the right and facilities to contact, communicate and receive visits from representatives of each such state, should he or she choose to do so.

Overcrowded prisons can create conditions that violate international standards and the rights of prisoners.<sup>1006</sup>

Prisoners should be informed of their rights under the law and the rules of the institution upon admission, as well as mechanisms for complaints, including about their conditions and treatment. They should have access to legal aid for: appeals; requests related to their treatment and conditions; when facing a serious disciplinary charge; and in relation to parole and pardon requests and hearings.<sup>c</sup>

(See **Chapter 10.3** on conditions of detention, **10.8** on disciplinary measures and **10.11** on the duty to investigate and the right to reparation for torture and other ill-treatment.)

<sup>a</sup> Article 17(5) of the Migrant Workers Convention, Rules 4 and 43 of the Bangkok Rules, Rules 37 and 79 of the Standard Minimum Rules, Rules 17 and 24 of the European Prison Rules

<sup>b</sup> Article 36 of the Vienna Convention on Consular Relations, Rule 38 of the Standard Minimum Rules, Rule 2(1) of the Bangkok Rules, Article 10 of the Declaration on non-Nationals, Principle V of the Principles on Persons Deprived of Liberty in the Americas, Rule 37 of the European Prison Rules; See Article 17(2)(d) of the Convention on Enforced Disappearance

<sup>c</sup> Guideline 6 §47(c) of the Principles on Legal Aid

<sup>1002</sup> CoE Recommendation [Rec\(2012\)12](#), Annex §22.

<sup>1003</sup> [CPT 2nd General Report](#), CPT/Inf (92) 3, §51; HRC Concluding Observations: [Israel](#), UN Doc. CCPR/C/ISR/CO/3 (2010) §21.

<sup>1004</sup> See Special Rapporteur on human rights and counter-terrorism: [Spain](#), UN Doc. A/HRC/10/3/Add.2 (2008) §20.

<sup>1005</sup> CoE Recommendation [Rec\(2012\)12](#), Annex §§24.1-25.4.

<sup>1006</sup> See, HRC Concluding Observations: [Argentina](#), UN Doc. CCPR/C/ARG/CO/4 (2010) §17; See [Kalashnikov v Russia](#) (47095/99), European Court (2002) §§92-103; CPT 7th General Report, [CPT/Inf \(97\)10](#) §§12-13.

# CHAPTER 26

## RIGHT TO APPEAL AND RETRIALS

Everyone convicted of a criminal offence has the right to have the conviction and sentence reviewed by a higher tribunal.

### 26.1 Right to appeal

### 26.2 Review by a higher tribunal

### 26.3 Can the right to appeal be exercised in practice?

### 26.4 Genuine review

### 26.5 Fair trial guarantees during appeals

### 26.6 Retrials on grounds of newly discovered facts

### 26.7 Reopening cases after findings of international human rights bodies

## 26.1 RIGHT TO APPEAL

Everyone convicted of a criminal offence has the right to have the conviction and sentence reviewed by a higher tribunal.<sup>a</sup>

<sup>a</sup> Article 14(5) of the ICCPR, Article 40(2)(b)(v) of the Convention on the Rights of the Child, Article 18(5) of the Migrant Workers Convention, Article 8(2)(h) of the American Convention, Article 16(7) of the Arab Charter, Article 2(1) of Protocol 7 to the European Convention, Section N(10)(a) of the Principles on Fair Trial in Africa, Article 81(1)(b) and 81(2) of the ICC Statute, Article 24 of the Rwanda Statute, Article 25 of the Yugoslavia Statute; See Article 7(1)(a) of the African Charter

Article 2(2) of Protocol 7 to the European Convention permits a more limited right to appeal.

The right to appeal is an essential element of a fair trial, aiming to ensure that a conviction resulting from prejudicial errors of law or fact, or breaches of the accused's rights, does not become final.<sup>1007</sup>

The UN Commission on Human Rights called upon states with military courts or special criminal tribunals to ensure that such courts respect fair trial guarantees, including the right to appeal.<sup>1008</sup> (See **Chapter 29** on special and military courts.)

The African Commission found violations of the African Charter in cases against Mauritania, Nigeria, Sierra Leone and Sudan where people, including civilians, were convicted before special or military courts, from which there was no appeal.<sup>1009</sup>

The Committee against Torture raised concerns about a Chinese law under which people charged with revealing state secrets had no right to appeal to an independent tribunal.<sup>1010</sup>

The right to have a conviction and sentence reviewed by a higher tribunal, under most standards, applies regardless of the seriousness of the offence or its characterization under domestic law.

The guarantee under the ICCPR is not confined to serious offences.<sup>1011</sup> The Human Rights Committee raised concern that in Iceland, people convicted of minor criminal

<sup>1007</sup> Inter-American Court: *Barreto Leiva v Venezuela*, (2009) §88; *Herrera-Ulloa v Costa Rica*, (2004) §§158, 163.

<sup>1008</sup> CHR resolution 2005/30, §8.

<sup>1009</sup> African Commission: *Malawi African Association and Others v Mauritania* (54/91, et al) 13th Annual Report (2000) §§93-94, *Centre for Free Speech v Nigeria* (206/97) 13th Annual Report (1999) §12, *International Pen, Constitutional Rights Project, Interrights on behalf of Ken Saro-Wiwa Jr. and Civil Liberties Organisation v Nigeria* (137/94, 139/94, 154/96 and 161/97) 12th Annual Report (1998)

§§91-93, *Forum of Conscience v Sierra Leone* (223/98) 14th Annual Report (2000) §§15-17, *Law Office of Ghazi Suleiman v Sudan* (222/98 and 229/99) 16th Annual Report (2003) §53.

<sup>1010</sup> CAT Concluding Observations: *China*, UN Doc. CAT/C/CHN/CO/4 (2008) §16.

<sup>1011</sup> HRC: *General Comment 32*, §45, *Terrón v Spain*, UN Doc. CCPR/C/82/D/1073/2002 (2004) §7.2, *Salgar de Montejo v Colombia* (64/1979), (1982) §10.4.

offences (misdemeanours) could not appeal to a higher tribunal other than when authorized by the Supreme Court in exceptional circumstances.<sup>1012</sup>

Under most standards, people convicted in any court, including customary courts, of acts which would be considered “criminal” offences under international human rights law must have the right to appeal.<sup>1013</sup> (See **Definitions of terms:** Criminal offence.)

However, under Article 2(2) of Protocol 7 to the European Convention, the right to appeal may be limited according to law if the offence is of “minor character”, if the person was tried in the first instance in the highest tribunal of a state, or if the person was convicted after an appeal against acquittal. Key to determining whether an offence is not of “minor character” is whether the maximum penalty includes deprivation of liberty.<sup>1014</sup>

## 26.2 REVIEW BY A HIGHER TRIBUNAL

The review of the conviction and sentence must take place before a higher tribunal. This ensures that there will be at least two levels of judicial scrutiny.

The Human Rights Committee has explained that the state has discretion to determine which higher court will conduct the review and how. The state does not, however, have discretion to decide whether national law will provide for such review.<sup>1015</sup>

In some countries members of parliament or government officials are tried in the highest court. The right to appeal is violated, except under Protocol 7 to the European Convention, when an individual is convicted by the highest court and there is no higher court to appeal to. The right to appeal to a higher tribunal applies even if a conviction is handed down by an appeal court.<sup>1016</sup>

Systems or laws which require a convicted person to request leave to appeal from a court may still be consistent with international standards. Factors include whether there is a clearly defined procedure for addressing such requests to a higher court, directly available to a convicted individual and not dependent on the consent of the authorities.<sup>1017</sup>

While the right to appeal under international law does not require states to provide for more than one instance of appeal, if domestic law provides for more, the convicted person must be given effective access to each instance.<sup>1018</sup>

## 26.3 CAN THE RIGHT TO APPEAL BE EXERCISED IN PRACTICE?

A state’s obligation to guarantee the right to appeal requires not only laws permitting review by a higher court but also measures to ensure that the right can be accessed and exercised effectively.<sup>1019</sup> This requires, among other things, reasonable time to lodge an appeal, access to the trial transcript, reasoned judgments (of the trial court and any appeals) and rulings on the appeal within a reasonable time.

**1012** HRC Concluding Observations: *Iceland*, UN Doc. CCPR/CO/83/ISL (2005) §14.

**1013** See HRC: *General Comment 32*, §24, Concluding Observations: *Rwanda*, UN Doc. CCPR/C/RWA/CO/3 (2009) §17.

**1014** European Court: *Zaicevs v Latvia* (65022/01), (2007) §§53-55, *Galstyan v Armenia* (26986/03), (2007) §124, *Gurepka v Ukraine* (61406/00), (2005) §§53-55.

**1015** HRC *General Comment 32*, §45.

**1016** HRC *General Comment 32*, §47; See, HRC: *Gelazauskas v Lithuania*, UN Doc. CCPR/C/77/D/836/1998 (2003) §7.1-7.6, *Terrón*

*v Spain*, UN Doc. CCPR/C/82/D/1073/2002 (2004) §7.4; *Barreto Leiva v Venezuela*, Inter-American Court (2009) §§88-91.

**1017** HRC: *Lumley v Jamaica*, HRC, UN Doc. CCPR/C/65/D/662/1995 (1999) §7.3, *Mennen v the Netherlands*, UN Doc. CCPR/C/99/D/1797/2008 (2010) §8.3; European Court: *Galstyan v Armenia* (26986/03), (2007) §§125-127, *Gurepka v Ukraine* (61406/00), (2005) §§57-62.

**1018** HRC: *General Comment 32*, §45, *Henry v Jamaica*, UN Doc. CCPR/C/43/D/230/1987 (1991) §8.4.

**1019** *Herrera-Ulloa v Costa Rica*, Inter-American Court (2004) §164.

Setting an unduly short time for lodging an appeal impedes the effective exercise of the right to appeal.<sup>1020</sup>

Access to a reasoned judgment and a trial transcript within a reasonable time are vital to prepare and present an appeal. In addition, if the law allows for appeals to more than one court, then the defence must have access within a reasonable time to reasoned judgments of each appeal.<sup>1021</sup> (See **Chapter 24.2**, Right to know the reasons for the judgment.)

The right to appeal is violated when a hearing or ruling on appeal is unduly delayed.<sup>1022</sup>

Delayed proceedings affect not only the rights of the accused, but also the rights of victims, including the right to an effective remedy. In a case of domestic violence in which a man was convicted of killing his wife's mother, the European Court criticized delays in the appeal, which meant that proceedings had not concluded after more than six years although he had confessed to the crime.<sup>1023</sup> (See **Chapter 22.4**, Rights of victims and witnesses.)

## 26.4 GENUINE REVIEW

The review of the conviction and sentence by a higher court must be a genuine review of the issues in the case.

The higher court must be competent to review both the sufficiency of the evidence and the law.<sup>a</sup> <sup>1024</sup> The higher court is required to review the allegations against the individual in detail, consider the evidence submitted at trial and referred to in the appeal, and render a judgment about the sufficiency of the incriminating evidence.<sup>1025</sup> Reviews limited to questions of law, which occur in some cassation courts, may not satisfy this guarantee.<sup>1026</sup>

The Human Rights Committee concluded that a judicial review limited to matters of law did not meet the requirements of the ICCPR for a full evaluation of the evidence and conduct of the trial.<sup>1027</sup>

Where the higher tribunal verified whether the evidence assessed by the trial judge was lawful, but did not review the sufficiency of the evidence (and stated that it was not empowered to reassess the evidence), the Human Rights Committee concluded that the review did not meet the requirements of the ICCPR.<sup>1028</sup>

Finding a violation in a case where the Court of Appeal confirmed sentences without considering the elements of fact and law, the African Commission stated that the court hearing the appeal must objectively and impartially consider the elements both of fact and of law presented to it.<sup>1029</sup>

<sup>a</sup> Section N(10)(a)(i) of the Principles on Fair Trial in Africa

**1020** See *HRC Concluding Observations: Barbados*, UN Doc. CCPR/C/BRB/CO/3 (2007) §7.

**1021** HRC: *General Comment 32*, §49, *Mennen v the Netherlands*, UN Doc. CCPR/C/99/D/1797/2008 (2010) §8.2, *Lumley v Jamaica*, UN Doc. CCPR/C/65/D/662/1995 (1999) §7.5, *Henry v Jamaica*, UN Doc. CCPR/C/43/D/230/1987 (1991) §8.4, *Little v Jamaica*, UN Doc. CCPR/C/43/D/283/1988 (1991) §8.5; *Hadjianastassiou v Greece* (12945/87), European Court (1992) §§29-37.

**1022** HRC: *General Comment 32*, §49, *Thomas v Jamaica*, UN Doc. CCPR/C/65/D/614/1995 (1999) §9.5, *Mwamba v Zambia*, UN Doc. CCPR/C/98/D/1520/2006 (2010) §6.6.

**1023** *Opuz v Turkey* (33401/02), European Court (2009) §§150-151.

**1024** HRC *General Comment 32*, §48.

**1025** HRC *General Comment 32*, §48.

**1026** *Herrera-Ulloa v Costa Rica*, Inter-American Court (2004) §§165-167.

**1027** HRC: *Domukovsky et al v Georgia*, UN Doc. CCPR/C/62/D/623/1995, CCPR/C/62/D/624/1995, CCPR/C/62/D/626/1995 and CCPR/C/62/D/627/1995 (1998) §18.11; See HRC: *Saidova v Tajikistan*, UN Doc. CCPR/C/81/D/964/2001 (2004) §6.5, *Gómez Vázquez v Spain*, UN Doc. CCPR/C/69/D/701/1996 (2000) §11.1; See also *Special Rapporteur on human rights and counter-terrorism, Spain*, UN Doc. A/HRC/10/3/Add.2 (2008) §§16-17, 30, 57; *Gelazauskas v Lithuania*, HRC, UN Doc. CCPR/C/77/D/836/1998 (2003) §7.1-7.6.

**1028** *Carpintero Uclés v Spain*, HRC, UN Doc. CCPR/C/96/D/1364/2005 (2009) §11.2-3.

**1029** *Malawi African Association and Others v Mauritania* (54/91, 61/91, 98/93, 167/97-196/97 and 210/98), African Commission, 13th Annual Report (2000) §94.

The Inter-American Commission has stated that appeal courts, which are guardians of justice, must examine not only the grounds for appeal but also whether due process was observed throughout the judicial proceedings.<sup>1030</sup>

The Human Rights Committee found a violation in a case in which the court of appeal dismissed an individual's appeal against conviction without giving reasons or issuing a written judgment.<sup>1031</sup> (See **Chapter 24.2**, Right to know the reasons for the judgment.)

## 26.5 FAIR TRIAL GUARANTEES DURING APPEALS

Fair trial rights must be respected during appeals; they are part of the criminal proceedings.<sup>1032</sup> Such rights include the right to adequate time and facilities to prepare the appeal, the right to counsel, the right to equality of arms (including the right to be notified of the opposing party's submissions), the right to a hearing before a competent, independent and impartial tribunal established by law without undue delay, and the right to a public and reasoned judgment within a reasonable time.<sup>1033</sup>

The higher court which hears the review must be a competent, independent and impartial court, established by law.<sup>1034</sup>

As the Principles on Fair Trial in Africa clarify, the impartiality of the appeals tribunal would be undermined if it included a judge who participated in or decided the case before a lower court.<sup>a</sup>

The right to appeal is violated if the higher reviewing body is an executive body rather than a court.<sup>1035</sup>

The general rule is that appeal proceedings should be held in public, with the parties present. This is an additional guarantee of fairness for the accused and is important to maintain public confidence in the justice system. However, holding an appeal hearing in private or in the absence of the accused does not always render the proceeding as a whole unfair.<sup>1036</sup>

According to the European Court, the lack of a public hearing for an appeal is not necessarily a violation, if, for example, the first trial was held in public.<sup>1037</sup> When examining appeals heard in the absence of the accused, the Court considered the role of the prosecution, the issues considered, the impact on the presentation and protection of the defence's interests, and the importance of the issues at stake.<sup>1038</sup> Where an appeal considers issues of both law and fact, a public hearing in the presence of the accused is usually required, especially if the appeal makes a determination of guilt or innocence.<sup>1039</sup>

(See **Chapter 14**, Right to a public hearing.)

<sup>a</sup> Section A(5)(d)(iv) of the Principles on Fair Trial in Africa

**1030** *Case 9850* (Argentina), Inter-American Commission (1990) at 74-76, Section III §18.

**1031** *George Winston Reid v Jamaica*, HRC, UN Doc. CCPR/C/51/D/355/1989 (1994) §14.3.

**1032** *Belziuk v Poland* (23103/93), European Court (1998) §37(i).

**1033** See *HRC General Comment 32*, §§49, 13; European Court: *Hadjianastassiou v Greece* (12945/87), (1992) §§31-37, *Belziuk v Poland* (23103/93), (1998) §37(iii), *Sakhnovskiy v Russia* (21272/03) Grand Chamber (2010) §§94-109.

**1034** Inter-American Court: *Castillo Petruzzi et al v Peru* (52/1999), (1999) §161, *Herrera-Ulloa v Costa Rica*, (2004) §§169-175; Inter-American Commission *Report on Terrorism*, (2002) Section III.D §239.

**1035** African Commission: *Media Rights Agenda v Nigeria* (224/98)

African Commission, 14th Annual Report, (2000) §46; *Civil Liberties Organisation v Nigeria* (151/96) African Commission, 13th Annual Report, (1999) §22.

**1036** *HRC General Comment 32*, §28; *Tierce and Others v San Marino* (24954/94, 24971/94 and 24972/94), European Court (2000) §§92-95.

**1037** *Botten v Norway* (16206/90), European Court (1996) §39.

**1038** European Court: *Golubev v Russia* (26260/02), (Inadmissibility) Decision (2006) pp6-8, *Belziuk v Poland* (23103/93), (1998) §37(ii).

**1039** European Court: *Ekbatani v Sweden* (10563/83), (1988) §32, *Tierce and Others v San Marino* (24954/94, 24971/94 and 24972/94), (2000) §§92-102, *Hummatov v Azerbaijan*, (9852/03 and 13413/04), (2007) §§140-152.

The right to have counsel appointed to represent the accused on appeal may be subject to similar conditions as the right to have counsel appointed at trial. (See **Chapter 20.3** on the right to appointed counsel.) Relevant factors in determining whether the interests of justice require the appointment of counsel for the appeal include the maximum sentence and the complexity of the case, procedure or issues of law.

The Principles on Legal Aid state that anyone charged with a criminal offence punishable by imprisonment or the death penalty is entitled to legal aid at all stages of the criminal justice process, including appeals. In addition, regardless of means, counsel should be appointed when required in the interest of justice.<sup>a</sup>

<sup>a</sup> Principle 3 and see Guidelines 5 and 6 of the Principles on Legal Aid

The European Court ruled that the failure to appoint counsel for the final appeal of an accused sentenced to five years' imprisonment violated his rights, since the accused was unable to address the court competently on the legal issues without assistance of counsel.<sup>1040</sup>

In a case in which the convicted person was not informed of the date of appeal or the counsel appointed to represent him on appeal, and was not present at the hearing seeking leave to appeal, the Human Rights Committee considered that his rights were violated.<sup>1041</sup>

If a lawyer intends to concede an appeal or does not intend to put arguments to the appeal court, the accused must be informed and allowed the opportunity to seek alternative representation.<sup>1042</sup>

The European Court held that an accused's right to appeal was violated where his application on points of law to the Court of Cassation was ruled inadmissible because the accused had absconded. In this case the European Court also found a violation of the right to legal assistance because the Court of Appeal refused to allow the accused's counsel of choice to represent him when the accused chose not to appear.<sup>1043</sup> (See **Chapter 20.3.**)

The right to appointed counsel applies, particularly in death penalty cases, at all appeal stages. It also applies to requests for review on constitutional grounds, although these proceedings are not considered part of the appeals process.<sup>1044</sup> (See **Chapter 20.3.2**, Right to have defence counsel assigned; right to free legal assistance. See also **Chapter 28**, Death penalty cases.)

## 26.6 RETRIALS ON GROUNDS OF NEWLY DISCOVERED FACTS

A procedure to reopen a criminal case following a final judgment, on grounds of newly discovered facts, is available in many countries and before international criminal tribunals. It is not considered to be a part of the appeal process.

Generally in such procedures, either the accused or the prosecution can request a reopening of the case because of the discovery of potentially decisive information not previously known despite due diligence by the party.<sup>b</sup>

<sup>b</sup> Article 84(1) of the ICC Statute, Article 25 of the Rwanda Statute, Article 26 of the Yugoslavia Statute

<sup>1040</sup> *Maxwell v United Kingdom* (18949/91), European Court (1994) §§40-41; See European Court: *Boner v United Kingdom* (18711/91), (1994) §§43-44, *Pakelli v Germany* (8398/78), (1983) §§30-41.

<sup>1041</sup> *Lumley v Jamaica*, HRC, UN Doc. CCPR/C/65/D/662/1995 (1999) §7.4.

<sup>1042</sup> *Sooklal v Trinidad and Tobago*, HRC, UN Doc. CCPR/C/73/D/928/2000 (2001) §4.10.

<sup>1043</sup> *Poitrimol v France* (14032/88), European Court (1993) §§34-39.

<sup>1044</sup> *La Vende v Trinidad and Tobago*, HRC, UN Doc. CCPR/C/61/D/554/1993 (1997) §5.8; See *Currie v Jamaica*, HRC, UN Doc. CCPR/C/50/D/377/1989 (1994) §13.4.

The Rwanda and Yugoslavia Appeals Chambers have distinguished between additional evidence about a fact that was considered at trial and new information that was not considered at trial (whether or not it existed previously). These courts have clarified that what is critical is whether the information is new, and whether it could have been a decisive factor in the outcome of the case.<sup>1045</sup>

The aim of such a procedure is to preserve the interests of justice and avoid the perpetuation of a miscarriage of justice. Such procedures do not violate the prohibition against double jeopardy.<sup>a</sup> (See **Chapter 18.2**, The prohibition of double jeopardy.)

Legal aid should be available to individuals seeking a retrial on such grounds.<sup>b</sup> (See also **Chapter 30** on miscarriages of justice.)

## 26.7 REOPENING CASES AFTER FINDINGS OF INTERNATIONAL HUMAN RIGHTS BODIES

In order to ensure an effective remedy and reparation for violations of fair trial rights, as required by international standards,<sup>c</sup> procedures should be put in place at the national level to ensure that criminal proceedings can be reopened in cases where an international human rights court or body has concluded that the rights of the accused have been violated.

A case should be reopened where the judgment of the national court itself has been found to violate international human rights, such as the right to freedom of expression or religion. A case should also be reopened where there is a risk that the fairness of the proceedings has been undermined by violations of the accused's rights. Such cases include violations of the rights to trial by an independent or impartial tribunal; to adequate time and facilities to prepare a defence; and to counsel. They also include cases in which statements elicited as a result of torture or other ill-treatment were admitted in evidence.<sup>1046</sup>

<sup>a</sup> Article 4(2) of Protocol 7 to the European Convention

<sup>b</sup> Guideline 11 §55(b) of the Principles on Legal Aid

<sup>c</sup> Article 2(3) of the ICCPR, Article 25 of the American Convention, Article 7 of the African Charter, Article 23 of the Arab Charter, Article 13 of the European Convention; See Basic Principles on Reparation, particularly Principle 19

<sup>1045</sup> *Barayagwiza v The Prosecutor* (ICTR-97-19-AR72), ICTR Appeals Chamber, Decision Prosecutor's Request for Review or Reconsideration (31 March 2000) §§41-42; *Prosecutor v Duško Tadić*, (IT-94-1-R), ICTY Appeals Chamber, Decision on Motion for Review (30 July 2002) §§19-20.

<sup>1046</sup> HRC: *Polay Campos v Peru*, UN Doc. C/PR/C/61/D/577/1994 (1998) §10, *Semey v Spain*, C/PR/C/78/D/986/2001 (2003) §9.3; *Castillo Petruzzi et al v Peru*, Inter-American Court (1999) §§217-221,

226(13); *Joseph Thomas v Jamaica* (12.183) Inter-American Commission, Report 127/01 (2001) §153(1); European Court: *Üküncü and Günes v Turkey* (42775/98), (2003) §32, *Gençel v Turkey* (53431/99), (2003) §27, *Somogyi v Italy* (67972/01), (2004) §86, *Stoichkov v Bulgaria* (9808/02), (2005) §81; CoE Recommendation No R(2000)2; ICJ: *LaGrand Case (Germany v the USA)*, (2001) §125, *Avena and other Mexican Nationals (Mexico v the USA)*, (2004) §§131, 138, 140, 143.





# SECTION C

## SPECIAL CASES

<b>Chapter 27</b>	<b>Children</b>
<b>Chapter 28</b>	<b>Death penalty cases</b>
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# CHAPTER 27

## CHILDREN

Children accused of infringing the law are entitled to all fair trial rights that apply to adults, as well as to additional juvenile justice protections. In particular, their treatment must reflect the fact that children differ from adults in their physical and psychological development and must take into account the best interests of the child. In the administration of juvenile justice, states must systematically ensure respect for the best interests of the child; the child's rights to life, survival and development; the child's right to be heard; and the right to be free from discrimination. Deprivation of liberty must be a measure of last resort and alternatives must be explored. Corporal punishment, the death penalty and life sentences without parole are expressly prohibited as punishments for crimes committed by individuals under the age of 18.

- 27.1 Children's right to special care and protection
  - 27.1.1 The definition of "child"
  - 27.1.2 Minimum age of criminal responsibility
  - 27.1.3 Trial of children as adults
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<sup>a</sup> Section 0(b) of the Principles on Fair Trial in Africa; See, among others, Articles 9 and 14 of the ICCPR, Article 40 of the Convention on the Rights of the Child

<sup>b</sup> Article 24(1) of the ICCPR, Preamble and Article 3(2) of the Convention on the Rights of the Child, Article 17 of the African Charter on the Rights of the Child, Article 19 of the American Convention, Article 17 of the Arab Charter, Section 0(b) of the Principles on Fair Trial in Africa, Article VII of the American Declaration

<sup>c</sup> Article 40(3)(b) of the Convention on the Rights of the Child, Guideline 10 §53(f) of the Principles on Legal Aid, Section 0(i) of the Principles on Fair Trial in Africa

<sup>d</sup> Article 1 of the Convention on the Rights of the Child

<sup>e</sup> Article 2 of the African Charter on the Rights of the Child, Section 0(a) of the Principles on Fair Trial in Africa

## 27.1 CHILDREN'S RIGHT TO SPECIAL CARE AND PROTECTION

Children accused of infringing the law whose cases are dealt with in the criminal justice system are entitled to all of the fair trial guarantees that apply to adults.<sup>1047</sup> In addition, international standards recognize that children accused of infringing the criminal law require further special care and protection.<sup>b</sup>

In the administration of juvenile justice, states must systematically ensure respect for the best interests of the child, the child's rights to life, survival and development, to dignity, to be heard and to be free from discrimination.<sup>1048</sup>

Where appropriate, in particular where rehabilitation would be fostered, measures that divert cases from the formal justice system should be used.<sup>1049</sup> Such measures must be consistent with due process, be in the best interests of the child, respect the child's rights and have the child's free and informed consent.<sup>c</sup>

### 27.1.1 THE DEFINITION OF "CHILD"

The Convention on the Rights of the Child defines a child as "every human being below the age of eighteen years unless under the law applicable to the child, majority is attained earlier".<sup>d</sup> The African Charter on the Rights of the Child defines a child as any person under the age of 18, without exception.<sup>e</sup> While the American Convention, like the ICCPR, uses the term "child", but does not define it, the Inter-American Court has clarified that for the purposes of the American Convention, a child is a person who is under 18 years of age.<sup>1050</sup>

Some international instruments use other terms, such as "minor", "juvenile" and "young person". Many of these instruments were drafted before the adoption of the Convention on the Rights of the Child in 1990; most human rights instruments developed after that date follow the terms used in the Convention. However, the African Youth Charter, adopted in 2006, uses the terms "youth" and "young people" (people aged from 15 to 35) to indicate that many of the protections of the charter extend to younger adults as well as children.<sup>1051</sup>

In cases where a youth's age is not known and cannot be established, international standards call for the youth to be given the benefit of the doubt and granted the protection of the juvenile justice system.<sup>1052</sup>

Moreover, even if the age of majority is lower than 18 in a state, the Committee on the Rights of the Child calls for international standards on juvenile justice to be applied to everybody under the age of 18.<sup>1053</sup>

### 27.1.2 MINIMUM AGE OF CRIMINAL RESPONSIBILITY

Children who have not reached the minimum age of criminal responsibility should not be formally charged with an offence or held responsible within a criminal justice procedure. Instead, their behaviour should be addressed through special protective measures, if appropriate and in the child's best interests.<sup>1054</sup>

Neither the Convention on the Rights of the Child nor the ICCPR expressly sets a minimum age of criminal responsibility. However, the Committee on the Rights of the Child and the Human Rights Committee have concluded that these treaties require states to set a minimum

<sup>1047</sup> HRC: [General Comment 32](#), §16, [General Comment 17](#), §2.

<sup>1048</sup> CRC [General Comment 10](#), §§5-14.

<sup>1049</sup> HRC [General Comment 32](#), §44.

<sup>1050</sup> Inter-American Court, [Advisory Opinion OC-17/2002](#), §42.

<sup>1051</sup> The African Youth Charter uses the term "minor" to refer to

youths who are between ages 15-17.

<sup>1052</sup> CRC [General Comment 10](#), §§35, 39, see also §72.

<sup>1053</sup> CRC [General Comment 10](#), §§36-37; See [HRC General Comment 17](#), §4.

<sup>1054</sup> CRC [General Comment 10](#), §31.

age below which children are presumed not to have the capacity to infringe the penal law.<sup>a 1055</sup> The African Charter on the Rights of the Child explicitly requires states to set a minimum age of responsibility.<sup>b</sup>

The Committee on the Rights of the Child has concluded that 12 is the lowest internationally acceptable minimum age of criminal responsibility. It urges states with a lower minimum age to increase it to at least 12, and to continue to increase it to a higher age. Those states that have a higher minimum age are encouraged not to lower it.<sup>1056</sup> The Principles on Fair Trial in Africa establish a minimum age of criminal responsibility of 15.<sup>c</sup>

Other international human rights bodies, including the Human Rights Committee, have stated that the age of criminal responsibility should not be set unreasonably low,<sup>1057</sup> and have called on states that currently set the minimum age at eight to 10 years to raise it.<sup>1058</sup>

The Committee on the Rights of the Child has expressed concern about practices that allow exceptions to the minimum age of criminal responsibility, for example when a child is accused of a serious offence or is deemed to be mature enough to be held criminally responsible.<sup>1059</sup>

### 27.1.3 TRIAL OF CHILDREN AS ADULTS

Every person under the age of 18 years at the time of the alleged commission of an offence must be treated in accordance with the rules of juvenile justice.<sup>1060</sup> These guarantees apply in times of armed conflict and in situations of occupation.<sup>1061</sup> (See **Chapter 32.**)

The Committee on the Rights of the Child calls on states that limit juvenile justice protections to younger children, or treat some children as adults, to change their laws so that their juvenile justice rules apply fully to all those who were under 18 at the time of the alleged crime.<sup>1062</sup> Human rights bodies have called on states not to try children as adults and to reform legislation that permits the trial of children as adults.<sup>1063</sup>

The Inter-American Commission takes the view that “the State’s punitive response must be [different] when the offenders are under the age of 18, precisely because they are children when they commit the offense and therefore the blame that attaches to them and, by extension, the penalty, should be less in the case of children than it would be for adults.”<sup>1064</sup>

## 27.2 THE BEST INTERESTS OF THE CHILD

The best interests of the child must be a primary consideration in all actions concerning children.<sup>d 1065</sup>

The Inter-American Court has recognized that the best interests of the child require that “children’s development and full enjoyment of their rights must be considered the

<sup>a</sup> Article 40(3)(a) of the Convention on the Rights of the Child

<sup>b</sup> Article 17(4) of the African Charter on the Rights of the Child

<sup>c</sup> Section 0(d) of the Principles on Fair Trial in Africa

<sup>d</sup> Article 3(1) of the Convention on the Rights of the Child, Article 4(1) of the African Charter on the Rights of the Child, Article 33(3) of the Arab Charter, Principle 2 of the Declaration on the Rights of the Child

<sup>1055</sup> CRC General Comment 10, §31; HRC General Comment 17, §4; See HRC General Comment 32, §43.

<sup>1056</sup> CRC General Comment 10, §31, 79; See Special Rapporteur on torture, UN Doc. A/64/215 (2009) §67.

<sup>1057</sup> HRC General Comment 17, §4.

<sup>1058</sup> HRC Concluding Observations: Zambia, UN Doc. CCPR/C/ZMB/CO/3 (2007) §26, Kenya, UN Doc. CCPR/CO/83/KEN (2005) §24; CAT Concluding Observations: Guyana, UN Doc. CAT/C/GUY/CO/1 (2006) §18, Ethiopia, UN Doc. CAT/C/ETH/CO/1 (2010) §27, Yemen, UN Doc. CAT/C/YEM/CO/2/Rev.1 (2010) §25, Indonesia, UN Doc. CAT/C/IDN/CO/2 (2008) §17; WGAD, Malta, UN Doc. A/HRC/13/30/Add.2 (2010), §31.

<sup>1059</sup> See CRC General Comment 10, §34.

<sup>1060</sup> CRC General Comment 10, §37; *Mendoza y otros v Argentina*, (12.651) Inter-American Court (2013), §§145-46.

<sup>1061</sup> See *Legal Consequences of the Construction of a Wall in the*

*Occupied Palestinian Territories*, ICJ Advisory Opinion (2004) §113; CAT: Concluding Observations: Israel, UN Doc. A/57/44 (supp) (2002) §52(d), UN Doc. CAT/C/ISR/CO/4 (2009) §27.

<sup>1062</sup> CRC General Comment 10, §37.

<sup>1063</sup> HRC: Concluding Observations: Israel, UN Doc. CCPR/C/ISR/CO/3 (2010) §22(a), Belgium, UN Doc. CCPR/C/BEL/CO/5 (2010) §23; CAT Concluding Observations: Ethiopia, UN Doc. CAT/C/ETH/CO/1 (2010) §27, Jordan, UN Doc. CAT/C/JOR/CO/2 (2010) §26, Luxembourg, UN Doc. CAT/C/LUX/CO/5 (2007) §10; WGAD, Malta, UN Doc. A/HRC/13/30/Add.2 (2010) §31.

<sup>1064</sup> Inter-American Commission Rapporteurship on the Rights of the Child, *Juvenile Justice and Human Rights in the Americas* (2011) §34 (citing *Michael Domingues v United States* (12.285), Inter-American Commission (2002) §80.

<sup>1065</sup> UN General Assembly resolution 65/213, preamble.

guiding principles to establish and apply provisions pertaining to all aspects of children's lives".<sup>1066</sup>

The European Court has held that when a case involves a child, the courts are required to protect the child's best interests and that the child's best interests must be assessed in each individual case.<sup>1067</sup>

## 27.3 FUNDAMENTAL PRINCIPLES OF JUVENILE JUSTICE

Children in conflict with the law must be treated in a manner consistent with their dignity and needs.<sup>1068</sup> This requires states to develop and implement a comprehensive juvenile justice policy that reflects international standards.<sup>1069</sup> In particular, states must establish a separate, "child-oriented" juvenile justice system.<sup>a 1070</sup>

<sup>a</sup> Article 17 of the Arab Charter, Section O(m) of the Principles on Fair Trial in Africa

<sup>b</sup> Article 17(1) of the African Charter on the Rights of the Child, Article 17 of the Arab Charter, Section O(l)(i) of the Principles on Fair Trial in Africa

<sup>c</sup> Article 40(1) of the Convention on the Rights of the Child, Article 17 of the African Charter, Article 17(3) of the African Charter on the Rights of the Child, Article 18(2)(d) of the African Youth Charter, Article 17 of the Arab Charter, Section O(m) of the Principles on Fair Trial in Africa; See also Article 14(4) of the ICCPR

<sup>d</sup> Articles 19, 37(a) of the Convention on the Rights of the Child

<sup>e</sup> Article 40(1) of the Convention on the Rights of the Child

The Inter-American Court has held that "children under 18 to whom criminal conduct is imputed must be subject to different courts than those for adults".<sup>1071</sup>

The Committee against Torture has expressed concern at the absence of a juvenile justice system in countries such as Burundi and the Russian Federation<sup>1072</sup> and called for the establishment in Cambodia of a separate juvenile justice system.<sup>1073</sup>

Juvenile justice systems must be put in place even in conflict and post-conflict settings.<sup>1074</sup>

The Commission on Human Rights called for the establishment or strengthening of the juvenile justice system in, for instance, Afghanistan, Cambodia, Sierra Leone and Somalia.<sup>1075</sup> (See also **Chapter 32** on armed conflict.)

International standards, the Committee on the Rights of the Child,<sup>1076</sup> other treaty bodies, the UN Human Rights Council and regional authorities have identified the following core principles of juvenile justice:

- Treatment consistent with the child's sense of dignity and worth;<sup>b 1077</sup>
- Treatment that takes into account the child's age and promotes the child's reintegration and the child's adoption of a constructive role in society;<sup>c 1078</sup>
- Prohibition and prevention of all forms of violence.<sup>d 1079</sup>

The child's treatment by the juvenile justice system must also reinforce the child's respect for human rights and the fundamental freedoms of others.<sup>e 1080</sup>

<sup>1066</sup> Inter-American Court, *Advisory Opinion OC-17/2002* §137(2); See Inter-American Commission Rapporteurship on the Rights of the Child: *Report on Corporal Punishment and Human Rights of Children and Adolescents* (2009) §25, *Juvenile Justice and Human Rights in the Americas* (2011) §§23-24.

<sup>1067</sup> European Court: *Neulinger and Shuruk v Switzerland* (41615/07), Grand Chamber (2010) §138, *Adamkiewicz v Poland* (54729/00), (2010) §70.

<sup>1068</sup> CHR: Human Rights in the Administration of Justice, in Particular of Children and Juveniles in Detention, UN Doc. E/CN.4/RES/1998/39, §13, and see §12, UN Doc. E/CN.4/RES/2000/39, §11, Rights of the Child, UN Doc. E/CN.4/RES/1998/76, §2(f); See HRC General Comment 32, §43.

<sup>1069</sup> CRC General Comment 10, §§4 *et seq*; UN General Assembly resolution 65/213, §14, and see §13.

<sup>1070</sup> HRC General Comment 32, §43; *Guidelines for Action on Children in the Criminal Justice System*, (1997) §11(a); See, CRC General Comment 10, §28; CoE Recommendation No. R (87) 20, preamble.

<sup>1071</sup> Inter-American Court, *Advisory Opinion OC-17/2002*, §137(11), and see §§96, 109.

<sup>1072</sup> CAT Concluding Observations: *Burundi*, UN Doc.

CAT/CO/BDI/CO/1 (2006) §13, *Russian Federation*, UN Doc. CAT/C/RUS/CO/4 (2006) §14.

<sup>1073</sup> CAT Concluding Observations: *Cambodia*, UN Doc. CAT/C/KHM/CO/2 (2010) §23.

<sup>1074</sup> See e.g., *Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies*, UN Doc. S/2004/1616, §35; *Thirteenth Progress Report of the Secretary-General on the United Nations Mission in Liberia*, UN Doc. S/2006/958, §29.

<sup>1075</sup> CHR: Afghanistan, UN Doc. E/CN.4/2005/135, p358 §15, Cambodia, UN Doc. E/CN.4/RES/2001/82, §20, Sierra Leone, UN Doc. E/CN.4/RES/2001/20, §11(b), Somalia, UN Doc. E/CN.4/RES/2005/83, §6(b), Sudan, UN Doc. E/CN.4/RES/2001/18, §4(i).

<sup>1076</sup> CRC General Comment 10, §13.

<sup>1077</sup> Human Rights Council resolution 10/2, §7.

<sup>1078</sup> HRC General Comment 32, §42; See UN General Assembly: resolution 65/230, annex, §26, resolution 65/213, §15; CoE Recommendation No. R (87) 20, preamble.

<sup>1079</sup> See UN Study on Violence against Children, UN Doc. A/61/299 (2006).

<sup>1080</sup> CRC General Comment 10, §13.

An effective juvenile justice system requires specialized training for police, prosecutors, legal representatives, judges and others who work with children in conflict with the law.<sup>a 1081</sup> Such training should include a special focus on the particular needs of girls, including the impact of prior abuse and awareness of health needs.<sup>b 1082</sup> The administration of the juvenile justice system should also collect statistics disaggregated by age, gender, and other relevant factors that can lead to disparities.<sup>1083</sup>

The Inter-American Court has noted that an effective, just and humanitarian juvenile justice system requires broad discretion “so that those who adopt decisions can take the steps they deem most appropriate in each individual case” as well as “checks and balances so as to restrict any abuse of discretionary powers and safeguard the rights of juvenile offenders”.<sup>1084</sup>

States should also establish child-friendly and child-sensitive legal aid systems.<sup>c</sup>

As discussed below, when the state chooses to resolve cases informally, it must take care to safeguard the child’s rights fully. Formal juvenile justice processes, for their part, must guarantee all fair trial rights, including those particularly pertaining to children.

## 27.4 THE PRINCIPLE OF LEGALITY

The principle of legality – the requirement that offences must be defined precisely within the law and the law must be accessible – applies to juvenile offences.<sup>1085</sup> (See **Chapter 18.1.1.**)

Applying the principle of legality together with the best interests principle and the core principles of juvenile justice, children should not be held accountable in the justice system for acts that would not be crimes if committed by adults. The justice system should also not hold them accountable for other acts that are not cognizable criminal offences.

### 27.4.1 STATUS OFFENCES

States should abolish legal provisions that criminalize acts that would not be crimes if carried out by adults, such as truancy, roaming the streets and running away from home.<sup>d</sup> Instead, if appropriate, states should address such behaviour through child protection measures, including assistance to parents, to address the root causes.<sup>e 1086</sup>

The Commission on Human Rights expressed concern at the practice of *asiwalid* in Somalia, where parents send disobedient children to be kept in prison until they order them to be released.<sup>1087</sup>

The Inter-American Commission found that children in Honduras who were detained for non-criminal acts, merely because they were abandoned, orphaned or vagrants, had suffered a violation of the right to personal liberty.<sup>1088</sup>

Applying the principle that children should not be punished for an act that would not be criminal if carried out by an adult, Amnesty International calls on states not to prosecute children for consensual sexual conduct.

<sup>a</sup> Section O(c) of the Principles on Fair Trial in Africa

<sup>b</sup> Rule 6.3 of the Beijing Rules

<sup>c</sup> Guideline 11 §58 of the Principles on Legal Aid

<sup>d</sup> Rule 3.1 of the Beijing Rules, Article 56 of the Riyadh Guidelines

<sup>e</sup> See Article 18 of the Convention on the Rights of the Child

**1081** Inter-American Court, *Advisory Opinion OC-17/2002*, §120 (6.3); UN General Assembly resolution **63/241**, §45; CHR: Human rights in the administration of justice, in particular juvenile justice, UN Doc. *E/CN.4/RES/2000/39* §§5, 14, Rights of the Child, UN Doc. *E/CN.4/RES/2000/85* §11, UN Doc. *E/CN.4/RES/2005/44*, §5.

**1082** CRC General Comment 10, §40.

**1083** CHR, Rights of the Child, UN Doc. *E/CN.4/RES/2005/44*, §6.

**1084** Inter-American Court, *Advisory Opinion OC-17/2002*, §120 n.113.

**1085** Inter-American Court, *Advisory Opinion OC-17/2002*, §108.

**1086** CRC General Comment 10, §§8-9.

**1087** CHR, Somalia, UN Doc. *E/CN.4/RES/2005/83* §5(c).

**1088** *Minors in Detention in Honduras* (11.491), Inter-American Commission (1999) §109.

<sup>a</sup> Article 2 of the Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict

<sup>b</sup> Article 8(2)(b)(xxvi) and (e)(vii) of the ICC Statute, Article 4(c) of the Statute of the Special Court for Sierra Leone

<sup>c</sup> Article 7(2) of the African Charter, Article 5(3) of the American Convention

<sup>d</sup> Article 40(3) of the Convention on the Rights of the Child, Rule 11.1 of the Beijing Rules, Guideline 10 §53(f) of the Principles on Legal Aid, Section 0(i) of the Principles on Fair Trial in Africa

<sup>e</sup> Guideline 10 §53(f) of the Principles on Legal Aid

<sup>f</sup> See Rule 11.3 of the Beijing Rules

<sup>g</sup> Section 0(b) of the Principles on Fair Trial in Africa; See, among others, Articles 9 and 14 of the ICCPR, Article 40 of the Convention on the Rights of the Child

<sup>h</sup> Article 24(1) of the ICCPR, Preamble and Article 3(2) of the Convention on the Rights of the Child, Article 17 of the African Charter on the Rights of the Child, Article 19 of the American Convention, Section 0(b) of the Principles on Fair Trial in Africa, Article VII of the American Declaration

## 27.4.2 DESERTION OR FAILURE TO ENLIST IN THE ARMED FORCES

Service in the armed forces by children under the age of 18 is a form of hazardous labour, prohibited under the Worst Forms of Child Labour Convention (ILO Convention No. 182). The compulsory recruitment of children under the age of 18 into the armed forces is prohibited.<sup>a</sup> The conscription, enlistment, or use of children under the age of 15 in armed conflict is a war crime.<sup>b 1089</sup>

The UN Secretary-General has called on states not to arrest children (including those aged 15 and above) for desertion or on similar charges, noting, “As children cannot legally serve in the military, deeming them deserters is not a legitimate claim.”<sup>1090</sup> Children who are accused of participation in or association with armed forces or armed groups should be treated primarily as victims, not perpetrators.<sup>1091</sup>

## 27.4.3 CRIMINAL RESPONSIBILITY OF PARENTS

Punishment for an offence may be imposed only on the individual convicted of an offence.<sup>c 1092</sup> This principle extends to prohibiting punishment of parents for criminal offences committed by their children.

The Committee on the Rights of the Child observed that “criminalizing parents of children in conflict with the law will most likely not contribute to their becoming active partners in the social reintegration of their child.”<sup>1093</sup>

## 27.5 ALTERNATIVES TO FORMAL JUDICIAL PROCEEDINGS

States should develop and adopt a wide range of measures to deal with children in conflict with the law in ways that do not resort to judicial proceedings.<sup>d</sup>

Such measures, often called diversion programmes, must fully ensure children’s human rights and legal safeguards, including the right to legal aid at every stage of the process.<sup>e</sup>

The Human Rights Committee recommends measures such as mediation between the perpetrator and the victim, conferences with the family of the perpetrator, counselling, community service or educational programmes.<sup>1094</sup>

Diversion programmes should be used only when in the best interests of the child, including the child’s rehabilitation. Such measures require the child’s free, voluntary and informed consent, based on information on the nature, content and duration of the measure, and on the consequences of failing to co-operate or complete the measure.<sup>f 1095</sup>

Once completed, diversion should result in a definite and final closure of the case. Diversion should not result in a criminal record, and a child who completes diversion should not be treated as having a criminal conviction.<sup>1096</sup>

## 27.6 THE CONDUCT OF JUVENILE PROCEEDINGS

Children are entitled to all of the fair trial guarantees and protections that apply to adults,<sup>g</sup> as well as further special care and protection.<sup>h 1097</sup>

<sup>1089</sup> *Prosecutor v Thomas Lubanga Dyilo* (ICC-01/04-01/06), ICC (14 March 2012) §§568-630; *Prosecutor v Charles Ghankay Taylor* (Case No. SCSL-03-01-T), *Special Court for Sierra Leone* (18 May 2012), Judgment, §§438-444.

<sup>1090</sup> *Report of the Secretary-General on Children and Armed Conflict in Myanmar*, UN Doc. S/2007/666, §11, see §62. See also *Paris Principles*, Principle 7.6.3; CRC Concluding Observations: *DRC*, UN Doc. CRC/C/OPAC/COD/CO/1, (2012) §47.

<sup>1091</sup> See *Paris Principles*, Principle 3.6.

<sup>1092</sup> HRC General Comment 29, §11.

<sup>1093</sup> CRC General Comment 10, §55.

<sup>1094</sup> HRC General Comment 32, §44.

<sup>1095</sup> CRC General Comment 10, §27; See CRC General Comment 12, §59.

<sup>1096</sup> CRC General Comment 10, §27; See CRC General Comment 12, §59.

<sup>1097</sup> HRC: General Comment 32, §42, General Comment 17, §2.



The rights to participate in proceedings and to be heard, the confidentiality of communications between the child and those providing legal assistance, and other fair trial rights are more readily overlooked in cases involving children than in adult trials. Courts, prosecutors, police, and others in the juvenile justice system must take particular care to safeguard children's fair trial rights.

Children in conflict with the law must be guaranteed trial by a competent, independent and impartial tribunal. (See **Chapter 12**, Right to trial by a competent, independent and impartial tribunal established by law.)

The European Court held that when the same judge conducted the preliminary investigation, leading the process of gathering evidence, and then presided over the trial in the juvenile court, the guarantee of independence and impartiality was violated.<sup>1098</sup>

The setting and conduct of proceedings must take into account the child's age and maturity, intellectual and emotional capacity and allow the child to participate freely.<sup>a 1099</sup>

The Committee on the Rights of the Child has stated that a child cannot participate in the proceedings and effectively exercise the right to be heard where the environment is intimidating, hostile, insensitive or age-inappropriate: "Proceedings must be both accessible and child-appropriate. Particular attention needs to be paid to the provision and delivery of child-friendly information, adequate support for self-advocacy, appropriately trained staff, design of courtrooms, clothing of judges and lawyers, sight screens, and separate waiting rooms."<sup>1100</sup>

The European Court held that subjecting an 11-year-old to the formality of an adult criminal court in a trial open to the public was so intimidating that the boy could not effectively participate in his own defence. It held that modifications to the proceedings in light of the defendant's age, such as regular breaks, were insufficient to ensure a fair hearing.<sup>1101</sup>

Particular care must be taken to ensure that the conduct of proceedings does not reinforce discrimination of any kind, including gender stereotypes.<sup>1102</sup>

A child who does not understand or speak the language used in the juvenile justice system has the right to free assistance of an interpreter, which should not be limited to the court trial but should also be available at all stages of the juvenile justice process. It is important for the interpreter to have been trained to work with children, because children's use and understanding of their mother tongue might be different from that of adults.<sup>1103</sup> (See **Chapter 23**.)

### 27.6.1 ARREST

The arrest of a child must be a measure of last resort. Any deprivation of a child's liberty should be for the shortest appropriate time.<sup>b</sup>

Any child who is arrested and deprived of liberty should be brought before a competent authority within 24 hours to examine the legality of detention.<sup>1104</sup>

<sup>a</sup> Article 14(4) of the ICCPR, Articles 12 and 40(1) of the Convention on the Rights of the Child, Rule 14(2) of the Beijing Rules, Guideline 10 §53(h) of the Principles on Legal Aid

<sup>b</sup> Article 37(b) of the Convention on the Rights of the Child, Section O(j) of the Principles on Fair Trial in Africa

<sup>1098</sup> *Adamkiewicz v Poland* (54729/00), European Court (2010) §107.

<sup>1099</sup> CRC General Comment 12, §60; HRC General Comment 32, §42; *Adamkiewicz v Poland* (54729/00), European Court (2010) §70; Inter-American Court, *Advisory Opinion OC-17/2002*, §101; See European Court Grand Chamber: *T. v United Kingdom* (24724/94), (1999) §86, *V. v United Kingdom* (24888/94), (1999) §84.

<sup>1100</sup> CRC General Comment 12, §34, see also §§42-43, 132-34.

<sup>1101</sup> *T. v United Kingdom* (24724/94), European Court Grand Chamber (1999) §§86, 89.

<sup>1102</sup> CRC General Comment 12, §77.

<sup>1103</sup> CRC General Comment 10, §62.

<sup>1104</sup> CRC General Comment 10, §83.

<sup>a</sup> Section 0(j) of the Principles on Fair Trial in Africa

<sup>b</sup> Rule 10.1 of the Beijing Rules, Guideline 10 §53(b) of the Principles on Legal Aid, Section 0(g) of the Principles on Fair Trial in Africa

<sup>c</sup> Guideline 10 §53(d) of the Principles on Legal Aid

<sup>d</sup> Article 37(d) of the Convention on the Rights of the Child

<sup>e</sup> Article 40(2)(b)(ii) of the Convention on the Rights of the Child

<sup>f</sup> Article 17(2)(c)(iii) of the African Charter on the Rights of the Child, Article 18(2)(f) of the African Youth Charter, Principle 3 §§20 and 22 and Guideline 10(b) and (c) of the Principles on Legal Aid, Section 0(n)(v) of the Principles on Fair Trial in Africa

<sup>g</sup> Principle 3 §22 of the Principles on Legal Aid

<sup>h</sup> Principle 11 §34 of the Principles on Legal Aid

<sup>i</sup> Principle 11 §35 of the Principles on Legal Aid

<sup>j</sup> Guideline 6 §46 of the Principles on Legal Aid

<sup>k</sup> Principle 11 §35 of the Principles on Legal Aid

<sup>l</sup> Guideline 9 §52(b) of the Principles on Legal Aid

<sup>m</sup> Guideline 1 §41(c) of the Principles on Legal Aid

<sup>n</sup> See Guideline 1 §41(c) and Principles 3, 10 and 11 of the Principles on Legal Aid

The Principles on Fair Trial in Africa call for children to be released within 48 hours after arrest.<sup>a</sup>

The European Court found that Turkey violated the liberty and security of several 16-year-olds who were held in police custody for three days and nine hours before being given access to a lawyer or being brought before a judge. During this time, they were questioned about alleged involvement in terrorism-related activity.<sup>1105</sup>

## 27.6.2 PARENTAL NOTIFICATION AND PARTICIPATION

Parents, legal guardians or relatives should be notified of their child's arrest at once.<sup>b</sup> Detaining authorities have a responsibility to take affirmative measures to ensure that parents or guardians receive actual notice of their child's arrest.<sup>1106</sup>

Parents or guardians should be present at all stages of the proceedings, including during questioning, unless their presence is not in the child's best interest.<sup>1107</sup> Children should be able to consult freely and in full confidentiality with parents or guardians as well as legal counsel.<sup>c</sup> The Committee on the Rights of the Child recommends that the law should expressly provide for the maximum possible involvement of parents or guardians.<sup>1108</sup>

## 27.6.3 LEGAL AND OTHER ASSISTANCE

Children in conflict with the law have the right to legal and other assistance at all stages of the process, including during questioning by police.<sup>1109</sup>

Under the Convention on the Rights of the Child, children deprived of their liberty are guaranteed both legal *and* other appropriate assistance, access to which must be prompt.<sup>d</sup> The Convention on the Rights of the Child guarantees children who have not been deprived of their liberty but are suspected of criminal charges the right to legal or other appropriate assistance in the preparation and presentation of their defence.<sup>e</sup> Subsequently adopted standards recognize that such children are entitled to the assistance of a lawyer.<sup>f</sup>

(See **Chapters 3** and **20** on the right to counsel.)

Children should have access to legal aid under the same conditions as, or more lenient conditions than, adults.<sup>g</sup> The best interests of the child should be a primary consideration in all legal aid decisions affecting children.<sup>h</sup> Children should receive priority for legal aid<sup>i</sup> and children who are detained should be given legal aid.<sup>j</sup> The legal assistance afforded to children should be accessible, age-appropriate, multidisciplinary, effective and responsive to the specific legal and social needs of children.<sup>k</sup> States should take active steps wherever possible to ensure that female lawyers are available to represent girls.<sup>l</sup>

Children should always be exempt from means testing, where states use a means test for determining eligibility for legal aid.<sup>m</sup> Legal aid to children should be free of charge.<sup>n 1110</sup>

The Committee against Torture has criticized the practice of subjecting children to police questioning in the absence of a guardian or lawyer<sup>1111</sup> – sometimes using illegal methods, including threats, blackmail, and physical abuse<sup>1112</sup> – and has called for

<sup>1105</sup> *Ipek and Others v Turkey* (17019/02 and 30070/02), European Court (2009) §36.

<sup>1106</sup> *Bulacio v Argentina*, Inter-American Court (2003) §130.

<sup>1107</sup> See HRC General Comment 32, §42; CAT Concluding Observations: *Albania*, UN Doc. CAT/C/CR/34/ALB (2005) §8(i).

<sup>1108</sup> CRC General Comment 10, §§53-54.

<sup>1109</sup> CRC General Comment 10, §52; CAT Concluding Observations: *Liechtenstein*, UN Doc. CAT/C/LIE/CO/3 (2010) §28;

See HRC General Comment 32, §42.

<sup>1110</sup> CRC General Comment 10, §49; See CoE Committee of Ministers Recommendation on social reactions to juvenile delinquency, R (87) 20, §8.

<sup>1111</sup> CAT Concluding Observations: *Austria*, UN Doc. CAT/C/AUT/CO/4-5 (2010) §10, *Belgium*, UN Doc. CAT/C/BEL/CO/2 (2008) §16.

<sup>1112</sup> CAT Concluding Observations: *Kazakhstan*, UN Doc. CAT/C/KAZ/CO/2 (2008) §12.

children to receive prompt access to an independent lawyer, an independent doctor and a family member from the outset of their detention.<sup>1113</sup>

The European Court found that questioning a 15-year-old without his lawyer and the state's failure to give the lawyer access to his client during the early stages of proceedings violated the boy's right to a fair hearing; because of his age, it would not have been reasonable to expect the boy to know of his right to seek legal counsel or understand the consequences of failing to do so.<sup>1114</sup> The Court also found that the "manifest failure" of a child's lawyer to represent him properly, coupled with factors such as the child's age and the seriousness of the charges, should have led the trial court to consider that the applicant urgently required adequate legal representation.<sup>1115</sup>

All written and oral communications between children and their legal counsel should take place under conditions which ensure respect for confidentiality.<sup>a 1116</sup>

In addition to the assistance of lawyers, children in detention should have access to a doctor.<sup>1117</sup> Social workers, and others who provide assistance to children in the context of criminal proceedings, must be trained to work with children in conflict with the law.<sup>1118</sup>

#### 27.6.4 PARTICULAR DUTY TO PROTECT AGAINST SELF-INCRIMINATION

States must take particular care to ensure respect for children's right to be free from compulsion to confess guilt or to incriminate themselves. The prohibitions against coercion and compulsion should be interpreted broadly; they are not limited to the prohibition of physical force. (See **Chapter 16**.) Children may be led to confess or incriminate themselves because of their age and state of development, deprivation of liberty, the length of interrogation, their lack of understanding, the fear of unknown consequences or of imprisonment, or the promise of lighter sanctions or release.<sup>1119</sup>

A child should not be questioned unless a lawyer and a parent or guardian are present.<sup>b</sup> Among other things, the presence of counsel and parents or guardians can help deter coerced confessions. (See **Chapter 3.2** and **Chapter 9.2** on the right to counsel during questioning.)

The European Court held that merely warning an underage suspect of his right to remain silent, and then conducting an interrogation in the absence of guardians and without informing the child of the right to obtain legal representation, was insufficient to protect his right to remain silent.<sup>1120</sup>

The Inter-American Court has raised the possibility that the American Convention may preclude states from relying on admissions of guilt by children.<sup>1121</sup>

Other safeguards against coerced self-incrimination include independent scrutiny of the methods of interrogation to ensure that the evidence is voluntary and not coerced, given the totality of the circumstances, and is reliable. Courts should consider the age of the child as well as the length of custody and interrogation and the presence of legal or other representatives and parents or guardians during questioning.<sup>1122</sup> Records of questioning should be kept.

<sup>a</sup> Guideline 10 §53(d) of the Principles on Legal Aid; See Articles 40(2)(b)(vii) and 16 of the Convention on the Rights of the Child

<sup>b</sup> Guideline 10 §53(b) of the Principles on Legal Aid, Section 0(I)(vi) of the Principles on the Right to Fair Trial in Africa

<sup>1113</sup> CAT Concluding Observations: [Israel](#), UN Doc. CAT/ISR/CO/4 (2009) §28; See CAT Concluding Observations: [Belgium](#), UN Doc. CAT/BEL/CO/2 (2008) §16.

<sup>1114</sup> See, European Court: *Adamkiewicz v Poland* (54729/00), (2010) §§89-92, *Panovits v Cyprus* (4268/04), (2008) §84; See *Salduz v Turkey* (36391/02), European Court Grand Chamber (2008) §§60, 63.

<sup>1115</sup> *Güveç v Turkey* (70337/01), European Court (2009) §131.

<sup>1116</sup> CRC General Comment 10, §50.

<sup>1117</sup> See Recommendation of the CoE concerning new ways of dealing with juvenile delinquency, [Rec2003\(20\)](#) §15.

<sup>1118</sup> See CRC General Comment 10, §§49-50.

<sup>1119</sup> CRC General Comment 10, §57.

<sup>1120</sup> European Court: *Panovits v Cyprus* (4268/04), (2008) §74, *Salduz v Turkey* (36391/02), Grand Chamber (2008) §§54-55.

<sup>1121</sup> See Inter-American Court, *Advisory Opinion OC-17/2002*, §131.

<sup>1122</sup> CRC General Comment 10, §58.

Electronic recording of interrogations of all suspects (adults as well as children) is required by some standards and is recommended by a range of human rights bodies and mechanisms (see **Chapter 9.6** on records of questioning, including electronic recording).

### 27.6.5 RIGHT TO INFORMATION ABOUT CHARGES AND RIGHTS

Children should be promptly informed of their rights and the charges against them. Parents should also be informed in addition to, and not as an alternative to, informing the child.<sup>1123</sup> Information about charges and rights must be provided in a way that the child can understand and in a manner appropriate to the child's age and maturity.<sup>a</sup>

<sup>a</sup> Article 40(2)(b)(ii) of the Convention on the Rights of the Child, Guideline 10 §53(e) of the Principles on Legal Aid

The right of the child to be informed about any charges in a language he or she understands may also require a "translation" of the formal legal language often used in criminal cases into terms that the child can understand. Providing the child with an official document is not enough: an oral explanation may often be necessary. It is the responsibility of the authorities to ensure that the child understands each of the charges faced.<sup>1124</sup> (See **Chapters 2.3-2.4** and **8.4**.)

### 27.6.6 RIGHT TO BE HEARD

Children have the right to express their views freely on all matters that affect them and to be heard, either directly or through a representative, in any judicial or administrative proceedings.<sup>b</sup>

<sup>b</sup> Article 12 of the Convention on the Rights of the Child, Article 4(2) of the African Charter on the Rights of the Child

So that they can exercise this right effectively, children must be informed about the matters, options and possible decisions to be taken and their consequences by those who are responsible for hearing them and by their parents or guardians.<sup>1125</sup>

Lawyers and other representatives should inform children of their right to examine, or have examined, witnesses (see **Chapter 22**). Children should be allowed to express their views on the presence and examination of witnesses.<sup>1126</sup>

<sup>c</sup> Article 12 of the Convention on the Rights of the Child

Children's views are to be given due weight in accordance with their age and maturity.<sup>c</sup> <sup>1127</sup> Since the appropriate weight to give to a child's views is not determined by age alone, it must be assessed on a case-by-case basis. As the Committee on the Rights of the Child notes: "information, experience, environment, social and cultural expectations, and levels of support all contribute to the development of a child's capacities to form a view."<sup>1128</sup>

The child's right to be heard must be fully observed during all stages of the judicial process: from the pre-trial stage when the child has the right to remain silent, to the right to be heard by the police, the prosecutor and the investigating judge, if any. It applies throughout the process, including trial, adjudication, sentencing, appeal and implementation of imposed measures.<sup>1129</sup>

If the right of the child to be heard is breached in judicial or administrative proceedings, the child must have access to appeals and complaints procedures which provide remedies.<sup>1130</sup>

### 27.6.7 PRE-TRIAL DETENTION

Deprivation of a child's liberty, including before trial, must be a measure of last resort and implemented for the shortest appropriate time. Alternatives to detention must be available and their appropriateness explored.<sup>d</sup>

<sup>d</sup> Article 37(b) of the Convention on the Rights of the Child, Section O(j) of the Principles on Fair Trial in Africa

<sup>1123</sup> CRC General Comment 10, §§47-48; HRC General Comment 32, §42.

<sup>1124</sup> CRC General Comment 10, §§47-48.

<sup>1125</sup> CRC General Comment 12, §25.

<sup>1126</sup> CRC General Comment 10, §59.

<sup>1127</sup> CRC General Comment 12, §28.

<sup>1128</sup> CRC General Comment 12, §29.

<sup>1129</sup> CRC General Comment 12, §58.

<sup>1130</sup> CRC General Comment 12, §47.

The UN General Assembly and the Human Rights Committee have called on states to avoid, wherever possible, the use of pre-trial detention for children.<sup>1131</sup>

The European Court has ruled that prolonged pre-trial detention in adult facilities of an individual who was under 18 at the time of the crime violated the European Convention, including the prohibition of inhuman and degrading treatment.<sup>1132</sup>

In exceptional cases when a decision is taken to detain a child pending trial, the decision must be subject to appeal.<sup>a</sup>

States must also provide by law for regular review of the continuing necessity and appropriateness of the pre-trial detention, preferably every two weeks.<sup>1133</sup> (See **Chapter 6.3.**)

Children who are deprived of their liberty have the right to challenge the legality of their detention before a court or other competent, independent and impartial authority and have the right to a prompt decision on any challenge. They have the right to be assisted by counsel for this purpose.<sup>b</sup> (See **Chapter 6.**)

The Committee on the Rights of the Child has stated that decisions on such challenges must be rendered as soon as possible, and in any case not later than two weeks after the challenge is made.<sup>1134</sup>

As with adults, the acceptable time limits for completing the criminal process are even shorter when children are deprived of their liberty.<sup>1135</sup> (See **Chapter 7.**)

### 27.6.8 TRIAL AS SPEEDILY AS POSSIBLE

Children facing criminal proceedings are entitled to be brought to trial as speedily as possible, and decisions in juvenile proceedings should be taken without delay.<sup>c</sup> <sup>1136</sup> The time between the commission of the offence and the final response to this act should be as short as possible. The longer this period, the more likely it is that the response loses its desired impact, and the more the child will be stigmatized.<sup>1137</sup>

The time frame for completing cases brought against children should be much shorter than that for adults. However, the time frame must respect the rights of the child, including to adequate time and facilities to prepare and present a defence.<sup>1138</sup>

The Committee on the Rights of the Child calls for a final decision on charges not later than six months after they have been presented.<sup>1139</sup>

(See **Chapter 8.1**, Adequate time and facilities to prepare a defence, **Chapter 7** on detainees' right to trial within a reasonable time, and **Chapter 19** on right to trial without undue delay.)

### 27.6.9 CONFIDENTIALITY OF PROCEEDINGS

Children have the right to have their privacy fully respected at all stages of criminal proceedings.<sup>d</sup> <sup>1140</sup> This includes during a child's initial contact with law enforcement officers.<sup>1141</sup>

<sup>a</sup> Rule 18 of the CoE Rules on remand in custody

<sup>b</sup> Article 9(4) of the ICCPR, Article 37(d) of the Convention on the Rights of the Child

<sup>c</sup> Article 10(2)(b) of the ICCPR, Article 40(2)(b)(iii) of the Convention on the Rights of the Child, Article 17(2)(c)(iv) of the African Charter on the Rights of the Child; See Section 0(n)(iv) of the Principles on Fair Trial in Africa

<sup>d</sup> Article 40(2)(b)(vii) (and see Article 16) of the Convention on the Rights of the Child, Rule 8.1 of the Beijing Rules, Section 0(n)(ix) of the Principles on Fair Trial in Africa

<sup>1131</sup> UN General Assembly resolution 65/213, §14; HRC General Comment 32, §42.

<sup>1132</sup> European Court: *Selçuk v Turkey* (21768/02), (2006) §§35-37, *Güveç v Turkey* (70337/01), (2009) §98; See *Nart v Turkey* (20817/04), European Court (2008) §§28-35.

<sup>1133</sup> CRC General Comment 10, §83.

<sup>1134</sup> CRC General Comment 10, §83.

<sup>1135</sup> CRC General Comment 10, §§52, 51; See *Nart v Turkey* (20817/04), European Court (2008) §§30-35.

<sup>1136</sup> HRC General Comment 17, §2; See, HRC General Comment 32, §42.

<sup>1137</sup> CRC General Comment 10, §51.

<sup>1138</sup> CRC General Comment 10, §52; See CoE Recommendation No. R (87) 20, §4.

<sup>1139</sup> CRC General Comment 10, §83.

<sup>1140</sup> *T. v United Kingdom* (24724/94), European Court Grand Chamber (1999) §74; CoE Recommendation No. R (87) 20, §8; See Inter-American Court, *Advisory Opinion OC-17/2002*, §134.

<sup>1141</sup> CRC General Comment 10, §64.

<sup>a</sup> Section 0(h) of the Principles on Fair Trial in Africa

<sup>b</sup> Article 17(2)(d) of the African Charter on the Rights of the Child

<sup>c</sup> Rules 21.1-21.2 of the Beijing Rules

<sup>d</sup> Guideline 10 §54 of the Principles on Legal Aid

<sup>e</sup> Article 14(1) of the ICCPR, Article 40(2)(vii) of the Convention on the Rights of the Child, Section 0(h) and (n)(ix) of the Principles on Fair Trial in Africa; See Article 8(5) of the American Convention, Article 6(1) of the European Convention

<sup>f</sup> Article 14(5) of the ICCPR, Article 40(2)(b)(v) of the Convention on the Rights of the Child

<sup>g</sup> Section 0(o)(i) of the Principles on Fair Trial in Africa

Information that could identify a child suspected or accused of having committed a criminal offence should not be made public.<sup>a</sup>

To protect a child's right to privacy, courts and other bodies should hold closed hearings. Any exceptions should be set out in law.<sup>1142</sup> The African Charter on the Rights of the Child requires states to prohibit the press and the public from attending trials of children.<sup>b</sup> The Committee on the Rights of the Child has underscored that the right to privacy requires all professionals involved in the implementation of measures taken by the court or other competent authorities "to keep all information that may result in the identification of a child confidential in all of their external contacts".<sup>1143</sup>

The records of juvenile offenders should also be kept confidential. Juvenile records should not be used in adult proceedings in subsequent cases involving the same offender and should not be used to enhance sentencing in any such adult proceedings.<sup>c</sup><sup>1144</sup> The names of juvenile offenders should be removed from the criminal records when the child reaches 18.<sup>1145</sup>

No information should be made public that may lead to the identification of a child in conflict with the law, because of its effect of stigmatization, and its possible impact on the child's ability to have access to education, work and housing or to be safe.<sup>1146</sup> The privacy and personal data of a child involved in judicial or non-judicial proceedings and other interventions should be protected at all stages, and such protection should be guaranteed by law.<sup>d</sup>

### 27.6.10 NOTIFICATION OF DECISION

The tribunal's decision must be communicated in a way that preserves the privacy of the child<sup>e</sup> and that the child can understand. (See **Chapter 24** on judgments and **Chapter 25.1** on punishments.) Since children have the right to have their views given due weight, the decision-maker must inform the child of the outcome of the process and explain how his or her views were considered.<sup>1147</sup>

### 27.6.11 APPEAL

Every child who is found to have infringed penal law has the right to appeal.<sup>f</sup> The Committee on the Rights of the Child has noted that the right of appeal is not limited to the most serious cases and has called on states that have entered reservations to that provision of the Convention on the Rights of the Child to withdraw those reservations.<sup>1148</sup> (See **Chapter 26.**)

## 27.7 RESOLUTION OF CASES

The state's response to offences committed by children must make substantial efforts toward their rehabilitation in order to allow them to play a constructive and productive role in society.<sup>1149</sup>

Punishments should be proportionate not only to the circumstances and the gravity of the offence, but also to the age, lesser culpability, circumstances and needs of the child.<sup>g</sup><sup>1150</sup>

A strictly punitive approach is not in accordance with the leading principles for juvenile justice.<sup>1151</sup> Retribution is not an appropriate element in a juvenile justice system.<sup>1152</sup>

<sup>1142</sup> CRC General Comment 12, §61, CRC General Comment 10, §66.

<sup>1143</sup> CRC General Comment 10, §66; See HRC General Comment 17, §2.

<sup>1144</sup> CRC General Comment 10, §66.

<sup>1145</sup> CRC General Comment 10, §67.

<sup>1146</sup> CRC General Comment 10, §64.

<sup>1147</sup> CRC General Comment 12, §45.

<sup>1148</sup> CRC General Comment 10, §61.

<sup>1149</sup> *Case of the "Street Children" (Villagrán-Morales et al) v Guatemala*, Inter-American Court (1999) §197; See *Michael*

*Domingues v United States* (12.285), Inter-American Commission (2002) §83; See Inter-American Commission Rapporteurship on the Rights of the Child, *Juvenile Justice and Human Rights in the Americas*, (2011) §31.

<sup>1150</sup> CRC General Comment 10, §71.

<sup>1151</sup> CRC General Comment 10, §71.

<sup>1152</sup> Inter-American Commission Rapporteurship on the Rights of the Child, *Juvenile Justice and Human Rights in the Americas* (2011) §59; See Thomas Hammarberg, *Human Rights in Europe: No Grounds for Complacency*, Strasbourg: Council of Europe Publishing, 2011, pp176-80.

Deprivation of liberty should be a last resort. When deprivation of liberty is used, it should be for as short a period of time as possible.<sup>a 1153</sup> If deprivation of liberty is used, its aim must be rehabilitative.<sup>1154</sup> Conditions of detention must be appropriate to children's age and legal status.<sup>1155</sup> If deprived of their liberty, children must be held separately from detained adults.

Alternative measures, including diversion and restorative justice, should be encouraged.<sup>b 1156</sup>

### 27.7.1 THE PROHIBITION ON HOLDING CHILDREN WITH ADULTS

Children deprived of their liberty must be held separately from adults at all times, whether following arrest, awaiting trial or serving a sentence, unless, exceptionally, this is counter to the child's best interest.<sup>c 1157</sup> As the Committee on the Rights of the Child notes, "the placement of children in adult prisons or jails compromises their basic safety, well-being, and their future ability to remain free of crime and to reintegrate."<sup>1158</sup>

The exception to the general prohibition on the commingling of children and adults – if it is considered in the child's best interest – should be narrowly construed. The Committee on the Rights of the Child cautions that "the child's best interests does not mean for the convenience of the States parties."<sup>1159</sup> The European Committee for the Prevention of Torture notes that "there may be exceptional situations (e.g. children and parents being held as immigration detainees) in which it is plainly in the best interests of juveniles not to be separated from particular adults. However, to accommodate juveniles and unrelated adults together inevitably brings with it the possibility of domination and exploitation."<sup>1160</sup>

The Human Rights Committee has held that the detention of children with adults violates both Article 10 of the ICCPR on deprivation of liberty and the right of children to special measures of protection, guaranteed in Article 24.<sup>1161</sup>

The Inter-American Commission has concluded that the failure to house detained children separately from adults and in specialized facilities violates the American Convention.<sup>1162</sup>

To comply with the prohibition on holding children with adults and in fulfilment of the aims of juvenile justice, states should establish separate facilities for children deprived of their liberty, which include distinct, child-centred personnel, policies and practices.<sup>d 1163</sup>

### 27.7.2 ALTERNATIVES TO DEPRIVATION OF LIBERTY

States must ensure that a variety of alternatives to detention or other institutional care are available for dealing with children found to have infringed the criminal law.<sup>e</sup> These should include care, guidance and supervision, counselling, probation, community monitoring or day report centres, foster care, educational and training programmes, and other alternatives to institutional care. This range of measures (known as dispositions) should aim to ensure that children are dealt with in a manner appropriate to their well-being, and proportionate to both their circumstances and the offence committed.<sup>1164</sup>

<sup>a</sup> Article 37(b) of the Convention on the Rights of the Child; See Section 0(o)(iii) of the Principles on Fair Trial in Africa

<sup>b</sup> Guideline 10 §53(g) of the Principles on Legal Aid, Section 0(o)(ii) of the Principles on Fair Trial in Africa

<sup>c</sup> Article 10(2)(b) and (3) of the ICCPR, Article 37(c) of the Convention on the Rights of the Child, Article 17(2)(b) of the African Charter on the Rights of the Child, Article 18(2)(b) and (c) of the African Youth Charter, Article 36 of the Robben Island Guidelines, Section 0(k) and (l)(viii) of the Principles on Fair Trial in Africa

<sup>d</sup> See Rule 26 of the Beijing Rules

<sup>e</sup> Article 40(4) of the Convention on the Rights of the Child

1153 UN General Assembly resolution 65/213, §14.

1154 See HRC General Comment 17, §2.

1155 HRC General Comment 17, §2.

1156 Human Rights Council resolution 10/2, §9; UN General Assembly resolution 65/230 (Salvador Declaration), §27.

1157 HRC General Comment 17, §2; Human Rights Council resolution 10/2, preamble; CHR: Human rights in the administration of justice, in particular of children and juveniles in detention, UN Doc. E/CN.4/RES/1998/39, preamble, §15, UN Doc. E/CN.4/RES/2000/39, preamble, UN Doc. E/CN.4/RES/2004/43, preamble, Rights of the Child, UN Doc. E/CN.4/RES/2001/75, §28(b), UN Doc. E/CN.4/RES/2002/92, §31(b), UN Doc. E/CN.4/RES/2003/86, §35(c), UN Doc. E/CN.4/RES/2004/48, §35(c); CPT 9th General Report, CPT/Inf (99) 12, §25.

1158 CRC General Comment 10, §85; See CPT 9th General Report,

CPT/Inf (99) 12, §25.

1159 CRC General Comment 10, §85.

1160 CPT 9th General Report, CPT/Inf (99) 12, §25.

1161 *Damian Thomas v Jamaica*, HRC, UN Doc. CCPR/C/65/D/800/1998 (1999) §6.5-6.

1162 *Minors in Detention in Honduras* (11.491), Inter-American Commission (1999) §125; See Inter-American Commission resolution 2/11 Regarding the Situation of the Detainees at Guantánamo Bay, MC 259-02, p3.

1163 CRC General Comment 10, §85; See CPT 9th General Report, CPT/Inf (99) 12, §28. For a summary of principles and rules relating to detention practices to be followed for children, see *United Nations Rules for the Protection of Juveniles Deprived of Their Liberty*; CRC General Comment 10, §§85-89.

1164 CRC General Comment 10, §23, and see §§28, 70.

Because reintegration into society is a purpose of the justice system, the Committee on the Rights of the Child has warned against actions that can hamper the child's full participation in their community, such as stigmatization, social isolation or negative publicity.<sup>1165</sup>

### 27.7.3 PROHIBITED SENTENCES

The death penalty and sentences of life imprisonment without possibility of release (or parole) may not be imposed for offences committed by people under the age of 18 at the time of the crime.<sup>a</sup>

<sup>1166</sup> The prohibition on such sentences is absolute: the Convention on the Rights of the Child forbids the imposition of such sentences for "offences committed by persons below eighteen years of age," a formulation that leaves no latitude for states that set an earlier age of majority.

The ICCPR allows no derogation from the prohibition on the death penalty for people under 18 at the time of the crime.<sup>b</sup> Furthermore, the Human Rights Committee and the Inter-American Commission consider that the prohibition on executing children is a peremptory norm of customary international law, binding on all states and permitting no derogations.<sup>1167</sup>

The assertion by some states that they are in compliance with international law if they defer executions until a juvenile offender has turned 18 is inconsistent with international law.

International law is clear that the age of the individual at the time of the crime is decisive, not the age at trial, sentencing or implementation of the sentence.<sup>1168</sup>

The wording of Article 7 of the Arab Charter seems to allow an exception to this prohibition if permitted by the law in force at the time of the crime. However, all parties to the Arab Charter are prohibited from applying the death penalty to anyone under 18 when the crime was committed because they are also parties to the more protective Convention on the Rights of the Child.<sup>c</sup>

If there is doubt about whether an individual was under 18 at the time of the crime, the individual should be presumed to be a child, unless the prosecution proves otherwise.<sup>1169</sup>

The imposition of life imprisonment without parole on individuals who were under 18 at the time of the crime is prohibited.<sup>d</sup> In addition, the Committee on the Rights of the Child has observed that all forms of life imprisonment of a child, even those that provide for periodic review and the possibility of earlier release, make it very difficult, if not impossible, to achieve the aims of juvenile justice. These aims include release, reintegration, and the ability to assume a constructive role in society, achieved through education, treatment and care. Accordingly, the Committee strongly recommends the abolition of all forms of life imprisonment for offences committed by people under 18 years of age.<sup>1170</sup> The Inter-American Court has held that life imprisonment for crimes committed before age 18 does not comply with the purpose of children's social reintegration and violates the American Convention.<sup>1171</sup>

The Committee on the Elimination of Racial Discrimination has concluded that the practice in the USA of sentencing young offenders, including children, to life without

<sup>a</sup> Article 6(5) of the ICCPR, Article 37(a) of the Convention on the Rights of the Child, Article 5(3) of the African Charter on the Rights of the Child, Article 4(5) of the American Convention, Rule 17.2 of the Beijing Rules, Paragraph 3 of the Death Penalty Safeguards, Section 0(o)(iv) of the Principles on Fair Trial in Africa, Article 68 of the Fourth Geneva Convention, Article 77(5) of Protocol I and Article 6(4) of Protocol II to the Geneva Conventions

<sup>b</sup> Article 4(2) of the ICCPR

<sup>c</sup> Article 43 of the Arab Charter

<sup>d</sup> Article 37(a) of the Convention on the Rights of the Child

<sup>1165</sup> CRC General Comment 10, §29.

<sup>1166</sup> HRC General Comment 17, §2; See UN General Assembly resolution 65/213, §16; Human Rights Council resolution A/HRC/7/29, §30(a); CHR: The Question of the Death Penalty, UN Doc. E/CN.4/RES/2000/65, §3(a), UN Doc. E/CN.4/RES/2001/68, §4(a), UN Doc. E/CN.4/RES/2002/77, §4(a), UN Doc. E/CN.4/RES/2003/86, §35(a), UN Doc. E/CN.4/RES/2005/59, §7(a), Rights of the Child, UN Doc. E/CN.4/RES/2004/48, §35(a), UN Doc. E/CN.4/RES/2005/44, §27(c); Sub-Commission on Human Rights, *The Death Penalty in Relation to Juvenile Offenders*, Res. 2000/17 (2000).

<sup>1167</sup> HRC General Comment 24, §8; *Michael Domingues v United States* (12.285), Inter-American Commission (2002) §§84, 85; See Amnesty International, *The exclusion of child offenders from the death penalty under general international law*, Index: ACT/50/004/2003.

<sup>1168</sup> See CRC General Comment 10, §75.

<sup>1169</sup> Human Rights Council resolution 19/37, §55.

<sup>1170</sup> CRC General Comment 10, §77.

<sup>1171</sup> *Mendoza y otros v Argentina* (12.651), Inter-American Court (2013) §§166-167.



parole violates the right to equal treatment before the courts, noting that this practice has a disproportionately negative effect on racial and ethnic minorities.<sup>1172</sup>

Corporal punishment is also a prohibited punishment (both for adults and children). It violates the prohibition on torture and other cruel, inhuman or degrading treatment or punishment and is inconsistent with the purposes of juvenile justice.<sup>a 1173</sup> (See also **Chapter 25.5** on the prohibition of corporal punishment.)

Other sentences that amount to cruel, inhuman, or degrading punishment are also prohibited. (See **Chapter 25** on punishments.)

The UN General Assembly and the Human Rights Council, as well as its precursor the Commission on Human Rights, have repeatedly called on states to ensure that no child in detention is sentenced to forced labour.<sup>1174</sup>

## 27.8 CHILD VICTIMS AND WITNESSES

The treatment accorded to children who are victims of crime or witnesses in criminal proceedings must be consistent with the right of the child to be heard and the principle of best interests of the child.<sup>1175</sup> (See **Chapter 22.4**, Rights of victims and witnesses and **Chapter 22.4.1**, Child witnesses and victims of gender-based violence.)

<sup>a</sup> Section 0(o)(iv) of the Principles on Fair Trial in Africa; See Article 7 of the ICCPR, Article 1 of the Convention against Torture, Articles 40(1), 37(a) of the Convention on the Rights of the Child

<sup>1172</sup> CERD Concluding Observations: USA, UN Doc. CERD/C/USA/CO/6 (2008) §21.

<sup>1173</sup> CRC General Comment 10, §71.

<sup>1174</sup> UN General Assembly: resolution 63/241, §46, reaffirmed by resolution 66/141, §19, resolution 58/157, §41(c); Human Rights

Council, UN Doc. A/HRC/7/L.34 (2008), §30; CHR, Rights of the Child: UN Doc. E/CN.4/RES/2001/75, §28(b), UN Doc. E/CN.4/RES/2002/92, §31(b), UN Doc. E/CN.4/RES/2004/48, §35(c), UN Doc. E/CN.4/RES/2005/44, §27(d).

<sup>1175</sup> See CRC: General Comment 12, §§32-34, General Comment 13, §63.

# CHAPTER 28

## DEATH PENALTY CASES

Amnesty International opposes the death penalty in all cases, because it violates the right to life and is the ultimate cruel, inhuman and degrading punishment. Under international human rights standards, people charged with crimes punishable by death are entitled to the strictest observance of all fair trial guarantees and to certain additional safeguards. These safeguards do not, however, justify retention of the death penalty.

### 28.1 Abolition of the death penalty

### 28.2 Prohibition of mandatory death sentences

### 28.3 No retroactive application, but the benefits of reform

### 28.4 Scope of crimes punishable by death

### 28.5 People who may not be executed

#### 28.5.1 Children under 18

#### 28.5.2 The elderly

#### 28.5.3 People with mental or intellectual disabilities or disorders

#### 28.5.4 Pregnant women and mothers of young children

### 28.6 Strict compliance with all fair trial rights

#### 28.6.1 Right to effective counsel

#### 28.6.2 Right to adequate time and facilities to prepare a defence

#### 28.6.3 Right to trial without undue delay

#### 28.6.4 Right to appeal

#### 28.6.5 Rights of foreign nationals

### 28.7 Right to seek pardon and commutation

### 28.8 No executions while appeals or clemency petitions are pending

### 28.9 Adequate time between sentence and execution

### 28.10 Duty of transparency

### 28.11 Prison conditions for individuals under sentence of death

<sup>a</sup> Article 6 of the ICCPR, Article 4 of the African Charter, Article 4 of the American Convention, Article 5 of the Arab Charter, Article 2 of the European Convention; See Article 3 of the Universal Declaration, Article 6 of the Convention on the Rights of the Child

<sup>b</sup> Among others, Article 5 of the Universal Declaration, Article 7 of the ICCPR, Article 5 of the African Charter, Article 5 of the American Convention, Article 8 of the Arab Charter, Article 3 of the European Convention

<sup>c</sup> Article 4(2) of the ICCPR, Article 27(2) of the American Convention, Article 4(2) of the Arab Charter, Article 15(2) of the European Convention

## 28.1 ABOLITION OF THE DEATH PENALTY

Amnesty International opposes the death penalty in all cases, on grounds that it violates the right to life and is the ultimate cruel, inhuman and degrading punishment. This view is increasingly reflected in international standards, jurisprudence and in resolutions of the international community.

The arbitrary deprivation of life,<sup>a 1176</sup> as well as torture and other ill-treatment and punishment<sup>b</sup> are absolutely prohibited, at all times and in all circumstances. States are prohibited from derogating from their treaty obligations to respect these rights.<sup>c</sup> These prohibitions are norms of customary international law and may never be restricted.<sup>1177</sup> (See **Chapter 31** on states of emergency and **Chapter 10** on torture and other ill-treatment.)

<sup>1176</sup> Special Rapporteur on extrajudicial executions, UN Doc. A/67/275 (2012) §14.

<sup>1177</sup> HRC General Comment 24, §8; See, Special Rapporteur on extrajudicial executions, UN Doc. A/67/275 (2012) §11; CAT General Comment 2, §1.

The imposition of the death penalty following an unfair trial violates the right to life and the prohibition of inhuman or degrading treatment or punishment.<sup>1178</sup>

Some international human rights treaties require abolition of the death penalty, in peacetime, or at all times.<sup>a</sup> Other international standards encourage progressive restriction and eventual abolition.<sup>b</sup><sup>1179</sup>

States which are parties to treaties aiming at the abolition of the death penalty are prohibited from extraditing or otherwise forcibly removing or transferring a person to the jurisdiction of a prosecuting state if there are substantial grounds for believing that there is a real risk that they would face the death penalty. Such states include parties to the Protocols cited at “a” in the margin, all parties to the European Convention, and parties to the ICCPR that have abolished the death penalty.<sup>1180</sup>

All states should refuse requests for extradition of an individual who risks being sentenced to death, in the absence of reliable, effective and binding assurances that the death penalty will not be sought or applied.<sup>c</sup><sup>1181</sup>

The international community, regional inter-governmental organizations, courts, human rights bodies and experts, including the African Commission, encourage abolition of the death penalty,<sup>1182</sup> and have called on states that have not yet abolished it to establish a moratorium on executions as a first step.<sup>d</sup><sup>1183</sup>

International criminal tribunals established by the international community may not impose the death penalty, even though these courts have jurisdiction over the most heinous crimes, including genocide, crimes against humanity and war crimes.<sup>1184</sup>

The Council of Europe made abolition of the death penalty a requirement for membership, and campaigns worldwide for abolition.<sup>1185</sup> In 2010, the European Court indicated that the death penalty could be considered as inhuman or degrading treatment and concluded that Article 2(1) of the European Convention (the right to life) had been amended so as to prohibit the death penalty.<sup>1186</sup>

The reinstatement of the death penalty after it has been abolished is expressly prohibited under the American Convention,<sup>e</sup> and is considered by the Special Rapporteurs on extrajudicial executions and torture to be incompatible with the ICCPR.<sup>1187</sup> The UN General Assembly has called for states that have abolished the death penalty not to reintroduce it.<sup>1188</sup> The expansion of the scope of the death penalty is also expressly prohibited by the American Convention<sup>f</sup><sup>1189</sup> and is considered by the Special Rapporteur on extrajudicial executions to be inconsistent with the intent of Article 6(2) of the ICCPR.<sup>1190</sup> The Commission on Human Rights, the Human

<sup>a</sup> **Second Optional Protocol to the ICCPR, Protocol to the American Convention on Human Rights to Abolish the Death Penalty, Protocol 6 and Protocol 13 to the European Convention**

<sup>b</sup> **Article 6(2) and (6) of the ICCPR; See Article 4(2) and (3) of the American Convention**

<sup>c</sup> **Article 9 of the Inter-American Convention on Extradition; See Article 11 of the European Convention on Extradition, Article 4(3) of the Protocol amending the European Convention on the Suppression of Terrorism, Article 21 of the CoE Convention on the Prevention of Terrorism, Article 16 of the CoE Agreement on Illicit Traffic by Sea**

<sup>d</sup> **Section N(9)(d) of the Principles on Fair Trial in Africa**

<sup>e</sup> **Article 4(3) of the American Convention**

<sup>f</sup> **Article 4(2) of the American Convention**

**1178** *Öcalan v Turkey* (46221/99), European Court Grand Chamber (2005) §§166-169.

**1179** See UN General Assembly resolution **65/206**, §3(c); HRC Concluding Observations: *USA*, UN Doc. CCPR/C/USA/CO/3/Rev.1 (2006) §29.

**1180** *Judge v Canada*, HRC, UN Doc. CCPR/C/78/D/829/1998 (2002) §10.6; *Al-Saadoon and Mufdhi v United Kingdom* (61498/08), European Court (2010) §§115-145, 160-166; *Special Rapporteur on extrajudicial executions*, UN Doc. A/67/275 (2012) §§74-75.

**1181** CHR resolution **2005/59** §10.

**1182** UN General Assembly: resolution **32/61**, §1, resolution **67/176**, §§1, 3, 4-6; CHR resolution **2005/59** §5(a); HRC Concluding Observations: *Chad*, UN Doc. CCPR/C/TCD/CO/1 (2009) §19, *Cameroon*, UN Doc. CCPR/C/CMR/CO/4 (2010) §14, *Russia*, UN Doc. CCPR/C/RUS/CO/6 (2009) §12; See, Inter-American Court: *Advisory Opinion OC-3/83* (1983) §57, *Dacosta Cadogan v Barbados*, (2009) §49; African Commission: resolution **136**, (2008) §3, *Interights et al v Botswana* (240/2001), (2003) §52; *CoE Death Penalty Fact Sheet* (2007).

**1183** UN General Assembly: resolution **67/176**, §4(e), resolution

**65/206** §3(d), resolution **62/149**, §2(d); CHR: resolution **2005/59**, §5(a), resolution **1997/12** §5; African Commission: *Resolution 136*, (2008) §2, *Interights et al v Botswana* (240/2001), (2003) §52, *Concluding Observations: Uganda*, 3rd Periodic Report (2009), §V(h).

**1184** UN Security Council: resolution **827** (1993), resolution **955** (1994); See UN Secretary-General, UN Doc. S/2004/616 (2004) §64(d).

**1185** *CoE Death Penalty Fact Sheet* (2007).

**1186** *Al-Saadoon and Mufdhi v United Kingdom* (61498/08), European Court (2010) §§115, 120; See *Special Rapporteur on torture*, UN Doc. A/67/279 (2012) §§V-VI.

**1187** *Special Rapporteur on extrajudicial executions*: UN Doc. **A/67/275** (2012) §76, *USA*, UN Doc. E/CN.4/1998/68/Add.3 (1998) §19; *Special Rapporteur on torture*, UN Doc. **A/HRC/10/44** (2009) §30.

**1188** UN General Assembly resolution **67/176**, §5.

**1189** See *Advisory Opinion OC-3/83*, Inter-American Court, §§67-76.

**1190** *Special Rapporteur on extrajudicial executions*: *USA*, UN Doc. E/CN.4/1998/68/Add.3 (1998) §19; see HRC Concluding Observations: *Peru*, UN Doc. CCPR/C/79/Add.67 (1996) §15.

Rights Committee and the Special Rapporteur on extrajudicial executions have called on states which maintain the death penalty not to expand the scope of its application.<sup>1191</sup>

For the decreasing number of states that maintain the death penalty, the circumstances in which it may lawfully be applied are strictly limited. The Special Rapporteur on extrajudicial executions has underscored that “executions carried out in violation of those limits are unlawful killings”.<sup>1192</sup>

## 28.2 PROHIBITION OF MANDATORY DEATH SENTENCES

The mandatory imposition of the death penalty, even for the most serious crimes, is prohibited.<sup>1193</sup>

Mandatory death sentences remove the ability of the courts to consider relevant evidence and potentially mitigating circumstances when sentencing an individual. They preclude the court from taking into account different degrees of moral reprehensibility. Human rights treaty monitoring bodies and experts and the Inter-American Court have noted that such sentences also make it inevitable that some people will be sentenced to death even though the penalty is disproportionate given the circumstances of the crime; this is incompatible with the right to life. Individualized sentencing is required to prevent the arbitrary deprivation of life.<sup>1194</sup>

Neither the possibility that during a trial a charge may be reduced from one carrying a mandatory death penalty (for example from murder to manslaughter), nor the existence of a clemency procedure, remedy the unlawfulness of mandatory death sentences.<sup>1195</sup>

(See also **Chapter 25.2** and **25.4** on the prohibition of other punishments.)

## 28.3 NO RETROACTIVE APPLICATION, BUT THE BENEFITS OF REFORM

The death penalty may not be imposed unless it was a punishment prescribed by law for the crime when the crime was committed.<sup>a</sup>

This is consistent with the prohibition against imposing a penalty heavier than the one applicable at the time the crime was committed.<sup>b</sup>

Furthermore, a person charged or convicted of a capital offence must benefit when a change of law following charge or conviction imposes a lighter penalty for that crime.<sup>c</sup><sup>1196</sup>

When the death penalty has been abolished, all death sentences must be commuted. The new sentence must respect international standards and should take into account the amount of time that a person has spent under sentence of death.<sup>1197</sup>

(See **Chapter 25.3**, Retroactive application of lighter penalties.)

<sup>a</sup> Article 6(2) of the ICCPR, Article 7(2) of the African Charter, Article 4(2) of the American Convention, Article 6 of the Arab Charter, Article 2(1) of the European Convention, Paragraph 2 of the Death Penalty Safeguards, Section N(9)(b) of the Principles on Fair Trial in Africa

<sup>b</sup> Article 11(2) of the Universal Declaration, Article 15(1) of the ICCPR, Article 9 of the American Convention, Article 15 of the Arab Charter, Article 7 of the European Convention, Section N(7)(a) of the Principles on Fair Trial in Africa; See Article 7 of the African Charter

<sup>c</sup> Paragraph 2 of the Death Penalty Safeguards; See Article 15(1) of the ICCPR, Article 9 of the American Convention, Article 15 of the Arab Charter, Section N(7)(b) of the Principles on Fair Trial in Africa

<sup>1191</sup> CHR resolution 2005/59, §5(b); HRC Concluding Observations: *Central African Republic*, UN Doc. CCPR/C/CAF/CO/2 (2006) §13; Special Rapporteur on extrajudicial executions: *USA*, UN Doc. E/CN.4/1998/68/Add.3 1998) §156(d).

<sup>1192</sup> Special Rapporteur on extrajudicial executions, UN Doc. A/HRC/14/24 (2010) §50.

<sup>1193</sup> Special Rapporteur on extrajudicial executions: UN Doc. A/HRC/14/24 (2010) §51(d), UN Doc. A/HRC/4/20 (2007) §§55-66; HRC Concluding Observations: *Botswana*, UN Doc. CCPR/C/BWA/CO/1 (2008) §13; Special Rapporteur on torture, UN Doc. A/67/279 (2012) §59.

<sup>1194</sup> Special Rapporteur on extrajudicial executions: UN Doc. E/CN.4/2005/7 (2004) §§63-64, UN Doc. A/HRC/4/20 (2007) §§55-66; HRC: *Thompson v Saint Vincent*, UN Doc. CCPR/C/70/D/806/1998 (2000) §8.2, *Kennedy v Trinidad and Tobago*, UN Doc. CCPR/C/74/D/845/1998 (2002) §7.3, *Carpo et al v*

*The Philippines*, UN Doc. CCPR/C/77/D/1077/2002 (2003) §8.3, *Larañaga v The Philippines*, UN Doc. CCPR/C/87/D/1421/2005 (2006) §7.2, *Mwamba v Zambia*, UN Doc. CCPR/C/98/D/1520/2006 (2010) §6.3; Inter-American Court: *Hilaire, Constantine, Benjamin et al v Trinidad and Tobago*, (2002) §§84-109, *Boyce et al v Barbados*, (2007) §§47-63, *Raxcacó-Reyes v Guatemala*, (2005) §§73-82; *Jacob v Grenada* (12.158), Inter-American Commission (2002) §§70-71.

<sup>1195</sup> Inter-American Court: *Boyce et al v Barbados*, (2007) §§59-60, *Dacosta Cadogan v Barbados*, (2009) §57; *Thompson v Saint Vincent*, HRC, UN Doc. CCPR/C/70/D/806/1998 (2000) §8.2.

<sup>1196</sup> *Scoppola v Italy (No.2)*, European Court Grand Chamber (2009) §109.

<sup>1197</sup> HRC Concluding Observations: *Rwanda*, UN Doc. CCPR/C/RWA/CO/3 (2009) §14, *Tunisia*, UN Doc. CCPR/CTUN/CO/5 (2008) §14.

## 28.4 SCOPE OF CRIMES PUNISHABLE BY DEATH

Death sentences may be imposed only for the most serious crimes.<sup>a</sup>

The Human Rights Committee has stated that “the expression ‘most serious crimes’ must be read restrictively to mean that the death penalty should be a quite exceptional measure”.<sup>1198</sup> According to the Death Penalty Safeguards, crimes punishable by death should “not go beyond intentional crimes with lethal or other extremely grave consequences”.<sup>b</sup> Following an exhaustive study of the jurisprudence of UN bodies, in 2007 the Special Rapporteur on extrajudicial executions clarified that this should be understood to mean that crimes punishable by death must be limited to those in which there was intention to kill and which resulted in loss of life.<sup>1199</sup> In 2012 the Special Rapporteur on extrajudicial executions reaffirmed that “capital punishment may be imposed only for intentional killing...”.<sup>1200</sup>

Concerns continue to be raised about laws prescribing the death penalty for crimes which are not among “the most serious”,<sup>1201</sup> including robbery with violence,<sup>1202</sup> kidnapping and abduction,<sup>1203</sup> economic crimes including embezzlement,<sup>1204</sup> drug-related offences,<sup>1205</sup> offences related to consensual sexual activity,<sup>1206</sup> or to religion,<sup>1207</sup> and political crimes including treason and membership of political groups.<sup>1208</sup>

The American Convention expressly prohibits the death penalty as a punishment for political offences or related common crimes.<sup>c</sup>

## 28.5 PEOPLE WHO MAY NOT BE EXECUTED

International standards restrict the imposition of the death penalty on people in certain categories.

The Inter-American Commission has clarified that the American Convention requires a procedure for an accused to make representations about the prohibition of the death penalty in their case and any potentially mitigating circumstances. The court imposing the sentence must have discretion to consider those factors in determining whether the death penalty is a permissible or appropriate punishment.<sup>1209</sup>

(See also **Chapter 25.2** and **25.4** on the prohibition of other punishments.)

### 28.5.1 CHILDREN UNDER 18

People who were under the age of 18 at the time the crime was committed may not be sentenced to death, let alone be executed, regardless of their age at the time of trial or sentencing.<sup>d</sup><sup>1210</sup> If there is doubt about whether an individual was under 18, the individual should be presumed to be a child, unless the prosecution proves otherwise.<sup>1211</sup>

<sup>a</sup> Article 6(2) of the ICCPR, Article 4(2) of the American Convention, Article 6 of the Arab Charter, Paragraph 1 of the Death Penalty Safeguards, Section N(9)(b) of the Principles on Fair Trial in Africa

<sup>b</sup> Paragraph 1 of the Death Penalty Safeguards

<sup>c</sup> Article 4(4) of the American Convention

<sup>d</sup> Article 6(5) of the ICCPR, Article 37(a) of the Convention on the Rights of the Child, Article 5(3) of the African Charter on the Rights of the Child, Article 4(5) of the American Convention, Rule 17.2 of the Beijing Rules, Paragraph 3 of the Death Penalty Safeguards, Article 68 of the Fourth Geneva Convention, Article 77(5) of Protocol I and Article 6(4) of Protocol II to the Geneva Conventions

<sup>1198</sup> HRC General Comment 6, §7.

<sup>1199</sup> Special Rapporteur on extrajudicial executions, UN Doc. A/HRC/4/20 (2007) §§53, 65.

<sup>1200</sup> Special Rapporteur on extrajudicial executions, UN Doc. A/67/275 (2012) §67.

<sup>1201</sup> UN Secretary-General, UN Doc. A/HRC/21/29 (2012) §§24-30; Special Rapporteur on extrajudicial executions, UN Doc. A/HRC/4/20 (2007) §51.

<sup>1202</sup> HRC Concluding Observations: Kenya, UN Doc. CCPR/C/KEN/CO/3 (AV) (2012) §10.

<sup>1203</sup> *Raxcacó-Reyes v Guatemala*, Inter-American Court (2005) §§71-72.

<sup>1204</sup> Special Rapporteur on extrajudicial executions, UN Doc. E/CN.4/1996/4, §556; Special Rapporteur on torture, China, UN Doc. E/CN.4/2006/6/Add.6 (2006) §82(r); HRC Concluding Observations: Madagascar, CCPR/C/MDG/CO/3 (2007) §15.

<sup>1205</sup> HRC Concluding Observations: Thailand, UN Doc.

CCPR/CO/84/THA (2005) §14; Special Rapporteur on torture, UN Doc. A/HRC/10/44 (2009) §66.

<sup>1206</sup> HRC Concluding Observations: Sudan, UN Doc. CCPR/C/79/Add.85 (1997) §8, Islamic Republic of Iran, UN Doc. CCPR/C/79/Add.25 (1993) §8; Special Rapporteur on extrajudicial executions, Nigeria, UN Doc. A/HRC/8/3/Add.3 (2008) §§76-77.

<sup>1207</sup> UN Secretary-General, UN Doc. A/HRC/21/29 (2012) §§28, 30, 19.

<sup>1208</sup> HRC Concluding Observations: United Kingdom (Turks and Caicos Islands), UN Doc. CCPR/CO/73/UKOT (2001) §37, Libya, UN Doc. CCPR/C/LBY/CO/4 (2007) §24.

<sup>1209</sup> *Jacob v Grenada* (12.158), Inter-American Commission (2002) §§70-71.

<sup>1210</sup> UN General Assembly resolution 63/241, §43(a); Human Rights Council resolution 10/2, §11; *Johnson v Jamaica*, HRC, UN Doc. CCPR/C/64/D/592/1994 (1998) §10.3-10.4.

<sup>1211</sup> Human Rights Council resolution 19/37, §55.

<sup>a</sup> Article 43 of the Arab Charter

The wording of Article 7 of the Arab Charter seems to allow an exception to this prohibition if permitted by the law in force at the time of the crime. However, all parties to the Arab Charter are prohibited from applying the death penalty to anyone under 18 when the crime was committed because they are also parties to the more protective Convention on the Rights of the Child.<sup>a</sup>

The Human Rights Committee and the Inter-American Commission consider that the prohibition on executing children is a peremptory norm of customary international law, binding on all states and permitting no derogations.<sup>1212</sup>

(See **Chapter 27.7.3** on prohibited sentences for children.)

**28.5.2 THE ELDERLY**<sup>b</sup> Article 4(5) of the American Convention

The American Convention prohibits the execution of people over the age of 70.<sup>b</sup>

The UN Economic and Social Council has recommended that states should establish “a maximum age beyond which a person may not be sentenced to death or executed”.<sup>1213</sup>

The Human Rights Committee has raised concern about executions of individuals of an advanced age.<sup>1214</sup>

<sup>c</sup> Paragraph 3 of the Death Penalty Safeguards**28.5.3 PEOPLE WITH MENTAL OR INTELLECTUAL DISABILITIES OR DISORDERS**

States must not sentence to death or execute a person with mental or intellectual disabilities or disorders. This includes people who have developed mental disorders after being sentenced to death.<sup>c 1215</sup>

<sup>d</sup> Article 6(5) of the ICCPR, Article 4(2) of the Protocol to the African Charter on the Rights of Women in Africa, Article 4(5) of the American Convention, Article 7(2) of the Arab Charter, Paragraph 3 of the Death Penalty Safeguards, Section N(9)(c) of the Principles on Fair Trial in Africa, Article 76(3) of Protocol I, Article 6(4) of Protocol II

The Inter-American Court held that the failure of the state to carry out or to inform the accused and his lawyer of his right to a psychiatric evaluation, when the mental capacity of the accused was at issue in a capital case, violated the individual's right to a fair trial.<sup>1216</sup>

<sup>e</sup> Article 4(2) of the Protocol to the African Charter on the Rights of Women in Africa, Article 7(2) of the Arab Charter, Paragraph 3 of the Death Penalty Safeguards, Section N(9)(c) of the Principles on Fair Trial in Africa, Article 76(3) of Protocol I, Article 6(4) of Protocol II**28.5.4 PREGNANT WOMEN AND MOTHERS OF YOUNG CHILDREN**

The death penalty may not be applied to pregnant women.<sup>d</sup> This prohibition is considered to be a peremptory norm of customary international law.<sup>1217</sup>

Nor may the death penalty be carried out on mothers of young children.<sup>e 1218</sup> The Arab Charter sets a minimum time of two years from the date of delivery for nursing mothers, and specifies that the best interest of the child shall be the primary consideration.

<sup>f</sup> See Paragraph 5 of the Death Penalty Safeguards**28.6 STRICT COMPLIANCE WITH ALL FAIR TRIAL RIGHTS**

In view of the irreversible nature of the death penalty, the proceedings in capital cases must scrupulously observe all relevant international standards protecting the right to a fair trial, no matter how heinous the crime.<sup>f 1219</sup>

<sup>1212</sup> HRC General Comment 24, §8; *Michael Domingues v United States* (12.285), Inter-American Commission (2002) §§84, 85; See *Amnesty International, The exclusion of child offenders from the death penalty under general international law*, Index: ACT/50/004/2003.

<sup>1213</sup> ECOSOC resolution 1989/64, §1(c).

<sup>1214</sup> HRC Concluding Observations: *Japan*, UN doc. CCPR/C/JPN/CO/5 (2008) §16.

<sup>1215</sup> CHR resolution 2005/59, §7(c); HRC: Concluding Observations: *USA*, UN Doc. CCPR/C/USA/CO/3/Rev.1 (2006) §7,

*Japan*, UN Doc. CCPR/C/JPN/CO/5 (2008) §16, *Sahadath v Trinidad and Tobago*, UN Doc. CCPR/C/78/D/684/1996 (2002) §7.2; Special Rapporteur on extrajudicial executions, UN Doc. A/51/457 (1996) §§115-116.

<sup>1216</sup> *Dacosta Cadogan v Barbados*, Inter-American Court (2009) §§87-90.

<sup>1217</sup> HRC General Comment 24, §8.

<sup>1218</sup> Special Rapporteur on extrajudicial executions, UN Doc. A/51/457 (1996) §115; CHR resolution 2005/59, §7(b).

<sup>1219</sup> HRC: General Comment 6, §7, General Comment 32, §59.

The proceedings must conform to the highest standards of independence, competence, objectivity and impartiality of judges and juries. All individuals who risk facing the death penalty must benefit from the services of competent defence counsel at every stage of the proceedings.<sup>1220</sup> They must be presumed innocent until their guilt has been proved based upon clear and convincing evidence leaving no room for an alternative explanation of the facts, in strict application of the highest standards for gathering and assessing evidence. In addition, all mitigating factors must be taken into account. The proceedings must guarantee the right to review of both the factual and the legal aspects of the case by a higher tribunal, composed of judges who did not hear the case at first instance. The individual's right to seek pardon, commutation of sentence (substitution of a lighter penalty) or clemency must be ensured.<sup>1221</sup>

Given that the right to life may never be restricted, this applies equally in emergency situations, including armed conflict.<sup>1222</sup> (See **Chapter 31.5.1** and **Chapter 32.6.**)

Amnesty International takes the position that all executions violate the right to life. Although this view is not yet universally accepted, international human rights bodies and experts and regional human rights courts agree that it is a violation of the right to life to execute a person after an unfair trial.<sup>1223</sup> The passing of a death sentence following criminal proceedings that violate the ICCPR's provisions violates the right to life.<sup>a</sup> <sup>1224</sup>

The Human Rights Committee, the African Commission and the Inter-American Court and Commission have found violations of the right to life in a number of capital cases in which fair trial provisions were violated.<sup>1225</sup>

The Special Rapporteur on extrajudicial executions stated that military and other special courts should not have the authority to impose the death penalty.<sup>1226</sup> The Working Group on Arbitrary Detention has taken the same view on military courts.<sup>1227</sup>

The Inter-American Court and Commission have found violations of fair trial rights in the sentencing phase of capital cases.<sup>1228</sup> The Special Rapporteur on extrajudicial executions cautioned against systems which rely too heavily on victim impact statements in capital cases, giving rise to potential concerns about due process and the independence and impartiality of justice.<sup>1229</sup>

Discriminatory imposition of the death penalty constitutes an arbitrary deprivation of the right to life.<sup>1230</sup>

Concern has been expressed about discriminatory imposition of the death penalty, including the disproportionate imposition of the death penalty on particular ethnic or

<sup>a</sup> Article 6(2) of the ICCPR; See Article 4 of the African Charter, Article 4(2) of the American Convention, Article 5 of the Arab Charter

<sup>1220</sup> See HRC: *Pinto v Trinidad and Tobago*, UN Doc. CCPR/C/39/D/232/1987 (1990) §12.5, *Kelly v Jamaica*, UN Doc. CCPR/C/41/D/253/1987 (1991) §5.10.

<sup>1221</sup> Special Rapporteur on extrajudicial executions, UN Doc. A/51/457 (1996) §111.

<sup>1222</sup> HRC General Comment 29, §§11, 15; Inter-American Commission Report on Terrorism and Human Rights, (2002) Section III §94.

<sup>1223</sup> HRC: General Comment 32, §59, *Domukovsky et al v Georgia*, UN Doc. CCPR/C/62/D/623,624,626,627/1995 (1998) §18.10, *Kelly v Jamaica*, UN Doc. CCPR/C/41/D/253/1987 (1991) §5.14; Inter-American Court: *Dacosta Cadogan v Barbados*, (2009) §§47, 85, Advisory Opinion OC-16/99 (1999) §§135-137, Advisory Opinion OC-3/83 (1983) §55; Inter-American Commission: Report on Terrorism and Human Rights, (2002) §94.

<sup>1224</sup> See e.g., Special Rapporteur on the independence of judges and lawyers, UN Doc. A/62/207 (2007) §62.

<sup>1225</sup> See e.g., HRC: *Mbenge v Zaire* (16/1977), UN Doc. A/38/40 Supp.No 40 (1983) §§14.1-14.2, 17, *Idieva v Tajikistan*, UN Doc. CCPR/C/95/D/1276/2004 (2009) §9.2-9.7, *Aliiev v Ukraine*, UN Doc.

CCPR/C/78/D/781/1997 (2003) §7.2-7.4; African Commission: *Malawi African Association and Others v Mauritania* (54, 61/91, 98/93, 164/97-196/97 and 210/98) 13th Annual Report (2000) §§9, 120; *International Pen, Constitutional Rights Project, Interrights on behalf of Ken Saro-Wiwa Jr. and Civil Liberties Organisation v Nigeria* (137/94, 139/94, 154/96 and 161/97), 12th Annual Report (1998) §103; *Medellin et al v United States* (12,644) Inter-American Commission Report 90/09 (2009) §§124-148, 154-155; *Dacosta Cadogan v Barbados*, Inter-American Court (2009) §§86-90, 128(6).

<sup>1226</sup> Special Rapporteur on extrajudicial executions: UN Doc. A/67/275 (2012), USA, UN Doc. A/HRC/11/2/Add.5 (2009) §§38-41.

<sup>1227</sup> WGAD, UN Doc. E/CN.4/1999/63 (1998) §80.

<sup>1228</sup> Inter-American Commission: *Jacob v Grenada* (12.158), (2002) §§70-71, *Medellin et al v United States* (12.644), Inter-American Commission, Report 90/09 (2009) §§146-148.

<sup>1229</sup> Special Rapporteur on extrajudicial executions, UN Doc. A/61/311 (2006) §64.

<sup>1230</sup> *William Andrews v United States* (11.139), Inter-American Commission, Report 57/96 (1996) §177; See Special Rapporteur on extrajudicial executions, UN Doc. A/67/275 (2012) §14.

racial groups. Women have been disproportionately convicted of adultery, which is punishable in some countries by stoning to death, a cruel, inhuman and degrading punishment.<sup>1231</sup>

In addition, the Human Rights Committee has concluded that a death sentence passed after an unfair trial violates the prohibition of inhuman treatment.<sup>1232</sup>

The European Court ruled that removing two individuals to Syria, where they faced a real risk of the death penalty following an unfair trial, violated both their right to life and the prohibition of cruel, inhuman or degrading treatment or punishment.<sup>1233</sup>

The Special Rapporteur on extrajudicial executions stated that: “if a state’s judicial system cannot ensure respect for fair trials, the Government should impose a moratorium on executions”.<sup>1234</sup>

The following sub-sections **28.6.1** to **28.6.4** do not repeat all the fair trial guarantees which apply to everyone accused of a criminal offence. They cover only provisions whose interpretation in death penalty cases has provided extra protection or where additional guarantees apply.

### 28.6.1 RIGHT TO EFFECTIVE COUNSEL

Everyone detained or accused of a criminal offence has the right to counsel during detention, at preliminary stages of the proceedings, at trial and at appeal.<sup>a</sup> <sup>1235</sup> (See **Chapter 3**, Right to legal counsel before trial and **Chapter 20.3**, Right to be assisted by counsel.) In addition, the right to counsel extends to clemency procedures and to individuals seeking review by constitutional courts of capital cases.<sup>b</sup> <sup>1236</sup>

A person charged with a capital offence has the right to be represented by counsel of choice, even if this requires a hearing to be adjourned.<sup>1237</sup>

#### Death Penalty Safeguards, Paragraphs 4, 5 and 6

“4. Capital punishment may be imposed only when the guilt of the person charged is based upon clear and convincing evidence leaving no room for an alternative explanation of the facts.

5. Capital punishment may only be carried out pursuant to a final judgement rendered by a competent court after legal process which gives all possible safeguards to ensure a fair trial, at least equal to those contained in article 14 of the International Covenant on Civil and Political Rights, including the right of anyone suspected of or charged with a crime for which capital punishment may be imposed to adequate legal assistance at all stages of the proceedings.

6. Anyone sentenced to death shall have the right to appeal to a court of higher jurisdiction, and steps should be taken to ensure that such appeals shall become mandatory.”

<sup>a</sup> Principle 3 of the Principles on Legal Aid, Paragraph 5 of the Death Penalty Safeguards, Article 14(3)(d) of the ICCPR, Article 7(1)(c) of the African Charter, Article 8(2)(d)-(e) of the American Convention, Article 16(3) and (4) of the Arab Charter, Article 6(3)(c) of the European Convention, Principle 1 of the Basic Principles on the Role of Lawyers, Section N(2)(c) of the Principles on Fair Trial in Africa

<sup>b</sup> Guideline 6 §47(c) of the Principles on Legal Aid; See Section H(c) of the Principles on Fair Trial in Africa

<sup>1231</sup> CERD Concluding Observations: USA, UN Doc. CERD/C/USA/CO/6 (2008) §23; Special Rapporteur on torture, UN Doc. A/HRC/7/3 (2008) §40; UN Secretary-General, UN Doc. A/65/280 (2010) §72.

<sup>1232</sup> HRC: *Larrañaga v Philippines*, UN Doc. CCPR/C/87/D/1421/2005 (2006) §7.11, *Mwamba v Zambia*, UN Doc. CCPR/C/98/D/1520/2006 (2010) §6.8.

<sup>1233</sup> *Bader and Kanbor v Sweden* (13284/04), European Court (2005) §§42-48.

<sup>1234</sup> Special Rapporteur on extrajudicial executions: UN Doc. A/HRC/14/24 (2010) §51(a), *Afghanistan*, UN Doc. A/HRC/11/2/Add.4 (2009) §§65, 89.

<sup>1235</sup> HRC: *Clive Johnson v Jamaica*, UN Doc. CCPR/C/64/D/592/1994 (1998) §10.2, *Brown v Jamaica*, UN Doc. CCPR/C/65/D/775/1997 (1999) §6.6, *Idieva v Tajikistan*, UN Doc. CCPR/C/95/D/1276/2004 (2009) §9.5, *Kelly v Jamaica*, UN Doc.

CCPR/C/41/D 253/1987 (1991) §5.10.

<sup>1236</sup> HRC: *Currie v Jamaica*, UN Doc. CCPR/C/50/D/337/1989 (1994) §13.3-13.4, *Henry v Trinidad and Tobago*, UN Doc. CCPR/C/64/D/752/1997 (1999) §7.6; *Hilaire, Constantine and Benjamin et al v Trinidad and Tobago* (94/2002), Inter-American Court (2002) §152(b).

<sup>1237</sup> See *Pinto v Trinidad and Tobago*, HRC, UN Doc. CCPR/C/39/D/232/1987 (1990) §12.5. See African Commission: *Avocats Sans Frontières (on behalf of Bwampamyé) v Burundi* (231/990) 14th Annual Report (2000) §§5, 27-30, *Amnesty International and Others v Sudan* (48/90, 50/91, 52/91 and 89/93) 13th Annual Report (1999) §§64-66, *International Pen et al on behalf of Ken Saro-Wiwa Jr. and Civil Liberties Organisation v Nigeria* (137/94, 139/94, 154/96 and 161/97) 12th Annual Report (1998) §§97-103.



If a person accused of a capital charge does not have counsel of choice, the interests of justice always require them to be assisted by appointed counsel, free of charge if necessary.<sup>a 1238</sup> The state must therefore ensure sufficient resources to provide competent legal aid defence counsel in capital cases.<sup>b 1239</sup>

If counsel is appointed to represent the accused free of charge, the accused does not have an absolute right of choice. However, in death penalty cases, the state should take into account the preferences of the accused, including for the appeal.<sup>1240</sup> (See **Chapter 20.3.1**)

Death penalty cases should not proceed unless the accused is assisted by competent and effective counsel.<sup>1241</sup> The state and the court have a particular obligation in death penalty cases to ensure that appointed counsel is competent, has the requisite skills and experience commensurate with the gravity of the offence, and is effective.<sup>c</sup> If the authorities or the court are notified that counsel is not effective, or if counsel's ineffectiveness is manifest, the court must ensure that counsel performs his or her duties or is replaced.<sup>1242</sup>

## 28.6.2 RIGHT TO ADEQUATE TIME AND FACILITIES TO PREPARE A DEFENCE

All people charged with a criminal offence punishable by death have the right to adequate time and facilities to prepare a defence.<sup>d 1243</sup> (See **Chapter 8**.)

The defence should seek additional time for preparation of the defence if it is required; in response a court should grant adequate time for such preparation.<sup>1244</sup>

The Inter-American Court ruled that the rights of the accused to adequate time and means to prepare the defence and to prior notice of the charges were violated when, at the end of a trial for aggravated rape, the prosecutor asked the trial court to find the accused guilty of murder, which carried the death penalty. The court did so without offering the defence the opportunity of responding to the murder charge and without informing the accused of his right to seek an adjournment or offer additional evidence.<sup>1245</sup>

## 28.6.3 RIGHT TO TRIAL WITHOUT UNDUE DELAY

Proceedings in capital cases, including investigation, trial and appeal, must be completed without undue delay.<sup>e 1246</sup> (See **Chapter 7**, Right of detainees to trial within a reasonable time or to release, and **Chapter 19**, Right to be tried without undue delay.)

While the reasonableness of delays is determined on a case-by-case basis, the Human Rights Committee has held that the following delays were too long in a capital case: a delay of one week between arrest and bringing the accused before a judge (violating Article 9(3) of the ICCPR); holding the accused in detention for 16 months before trial; and a delay of 31 months between trial and dismissal of the appeal.<sup>1247</sup>

<sup>a</sup> Principle 3 of the Principles on Legal Aid, Section H(a) and (c) of the Principles on Fair Trial in Africa

<sup>b</sup> Principle 3 of the Basic Principles on the Role of Lawyers; See Principles 2 §15 and 13 §37 of the Principles on Legal Aid

<sup>c</sup> Principle 13 of the Principles on Legal Aid

<sup>d</sup> Article 14(3)(b) of the ICCPR, Article 8(2)(c) of the American Convention, Article 16(2) of the Arab Charter, Article 6(3)(b) of the European Convention, Section N(3) of the Principles on Fair Trial in Africa

<sup>e</sup> Articles 9(3) and 14(3)(c) of the ICCPR, Article 7(1)(d) of the African Charter, Articles 7(5) and 8(1) of the American Convention, Articles 5(3) and 6(1) of the European Convention, Article 14(5) of the Arab Charter (relating to pre-trial detention)

<sup>1238</sup> *Robinson v Jamaica*, HRC, UN Doc. CCPR/C/35/D/223/1987 (1989) §§10.2-10.3; See ECOSOC *Death Penalty Safeguards*, §5.

<sup>1239</sup> Special Rapporteur on extrajudicial executions, UN Doc. E/CN.4/1996/4, §547; See Special Rapporteur on extrajudicial executions, USA, UN Doc. A/HRC/11/2/Add.5 (2009) §§13-16, 21-22, 74; See *Medellin et al v United States* (12.644), Inter-American Commission, Report 90/09 (2009) §139.

<sup>1240</sup> See *Pinto v Trinidad and Tobago*, HRC, UN Doc. CCPR/C/39/D/232/1987 (1990) §12.5; *Civil Liberties Organisation, Legal Defence Centre, Legal Defence and Assistance Project v Nigeria* (218/98), African Commission, 14th Annual Report (2001) §§28-31.

<sup>1241</sup> *Robinson v Jamaica*, HRC, UN Doc. CCPR/C/35/D/223/1987 (1989) §§10.2-10.3; See *Abdool Saleem Yasseen and Noel Thomas v Guyana*, HRC, UN Doc. CCPR/C/62/D/676/1996 (1998) §7.8.

<sup>1242</sup> See HRC: *Pinto v Trinidad and Tobago*, UN Doc. CCPR/C/39/D/232/1987 (1990) §12.5, *Kelly v Jamaica*, UN Doc.

CCPR/C/41/D/253/1987 (1991) §5.10, *Chan v Guyana*, UN Doc. CCPR/C/85/D/913/2000 (2005) §§6.2-6.3, *Brown v Jamaica*, UN Doc. CCPR/C/65/D/775/1997 (1999) §6.8, *Burrell v Jamaica*, UN Doc. CCPR/C/57/D/546/1993 (1996) §9.3.

<sup>1243</sup> ECOSOC resolution 1989/64, §1(a); *Kelly v Jamaica*, HRC, UN Doc. CCPR/C/41/D/253/1987 (1991) §5.10.

<sup>1244</sup> HRC: *Kelly v Jamaica*, UN Doc. CCPR/C/41/D/253/1987 (1991) §5.9, *Larrañaga v Philippines*, UN Doc. CCPR/C/87/D/1421/2005 (2006) §7.5, *Chan v Guyana*, UN Doc. CCPR/C/85/D/913/2000 (2005) §§6.2-6.3; See *Berry v Jamaica*, HRC, UN Doc. CCPR/C/50/D/330/1988 (1994) §11.4.

<sup>1245</sup> *Fermin Ramirez v Guatemala*, Inter-American Court (2005) §§58-80.

<sup>1246</sup> *Kelly v Jamaica*, HRC, UN Doc. CCPR/C/41/D/253/1987 (1991) §5.12.

<sup>1247</sup> *McLawrence v Jamaica*, HRC, UN Doc. CCPR/C/60/D/702/1996, (1997) §§5.6, 5.11.

<sup>a</sup> Article 14(5) of the ICCPR, Article 8(2)(h) of the American Convention, Article 16(7) of the Arab Charter, Article 2 of Protocol 7 to the European Convention, Paragraph 6 of the Death Penalty Safeguards, Section N(10)(b) of the Principles on Fair Trial in Africa; See Article 7(a) of the African Charter

<sup>b</sup> Article 6(2) of the ICCPR, Article 4(2) of the American Convention, Article 6 of the Arab Charter, Paragraph 5 of the Death Penalty Safeguards

<sup>c</sup> Article 36 of the Vienna Convention on Consular Relations, Article 17(2)(d) of the Convention on Enforced Disappearance, Article 16(7) of the Migrant Workers Convention, Principle 16(2) of the Body of Principles, Guideline 3 §43(c) of the Principles on Legal Aid, Section M(2)(d) of the Principles on Fair Trial in Africa, Principle V of the Principles on Persons Deprived of Liberty in the Americas

<sup>d</sup> Among others, Article 6(3) of the Convention against Torture, Article 10(3) of the Convention on Enforced Disappearance, Article 7(3) of the International Convention for the Suppression of Terrorist Bombings, Article 15(3) of the CoE Convention on the Prevention of Terrorism

<sup>e</sup> See Rule 27(2) of the CoE Rules on remand in custody

## 28.6.4 RIGHT TO APPEAL

Everyone convicted of an offence carrying the death penalty has the right to review of the conviction and the sentence by a higher independent, impartial and competent tribunal.<sup>a</sup> (See **Chapter 26**.)

The death penalty may only be carried out after a final judgment by a competent court.<sup>b</sup>

The Human Rights Committee has clarified that the denial of legal aid to a person sentenced to death who cannot pay for counsel is not only a violation of the right to counsel but also of the right to appeal.<sup>1248</sup>

The time within which an appeal must be filed should be long enough to enable the accused to obtain and review court records and to prepare and file grounds for appeal.<sup>1249</sup>

Appeals in death penalty cases, once filed, must be heard and decided without undue delay.<sup>1250</sup>

## 28.6.5 RIGHTS OF FOREIGN NATIONALS

Foreign nationals (regardless of their immigration status<sup>1251</sup>) who have been arrested, detained or imprisoned must be notified of their right to contact and receive assistance from officials from the embassy or the consular post of the country of their nationality, or another relevant consular post. If the person is a refugee or stateless person, or is under the protection of an intergovernmental organization, they must be notified of their right to communicate with an appropriate international organization or with a representative of the state where they reside.<sup>c</sup>

This right is also enshrined in treaties establishing duties to investigate and prosecute crimes under international law.<sup>d</sup>

Consular officials (or representatives appropriate to refugees and stateless people) may provide a range of assistance, including arranging a lawyer, obtaining evidence from the home country and monitoring treatment, including respect for the individual's rights.<sup>1252</sup>

The International Court of Justice ruled that the failure of the USA to inform foreign nationals charged with capital crimes of their rights to consular assistance violated the individuals' rights, as well as the USA's obligations to the foreign states under international law. The Court considered that the USA was required to review and reconsider the conviction and sentence of the individuals concerned.<sup>1253</sup>

The Inter-American Court concluded that the imposition of the death penalty when the authorities had failed to inform a detained foreign national of his right to consular assistance violated the right to life.<sup>1254</sup>

Given the assistance and protection that such representatives can provide, the right to communicate with and be visited by consular representatives should be afforded to individuals who are nationals of both the state that has arrested or detained them and a foreign state.<sup>e</sup>

<sup>1248</sup> HRC: *General Comment 32*, §51, *Mansaraj et al v Sierra Leone*, UN Doc. CCPR/C/72/D/839/1998 (2001) §5.6, *Aliboev v Tajikistan*, UN Doc. CCPR/C/85/D/985/2001 (2005) §6.5; See *Civil Liberties Organisation et al v Nigeria* (218/98), African Commission, 14th Annual Report (2001) §§32-34.

<sup>1249</sup> See Special Rapporteur on extrajudicial executions, UN Doc. E/CN.4/2006/53/Add.2 (Sudan) (2006) §151.

<sup>1250</sup> HRC: *Thomas v Jamaica*, UN Doc. CCPR/C/65/D/614/1995 (1999) §9.5, *Mwamba v Zambia*, UN Doc. CCPR/C/98/D/1520/2006 (2010) §6.6.

<sup>1251</sup> UN General Assembly resolution 65/212, §4(g); Human Rights Council resolution 12/6, §4(b).

<sup>1252</sup> Inter-American Court Advisory Opinion OC-16/99 (1999) §86; *Avena and Other Mexican Nationals (Mexico v USA)*, ICJ (2004) §85.

<sup>1253</sup> ICJ: *LaGrand Case (Germany v the USA)*, (2001) §§77, 91, 89, 123-125, 128(3), 128(7), *Avena and Other Mexican Nationals (Mexico v USA)*, (2004) §§41, 50-51, 153.

<sup>1254</sup> *Advisory Opinion OC-16/99*, Inter-American Court (1999) §137; See *CHR resolution 2002/62*, Preambular §14, §6.

If the individual is a national of two or more foreign states, Amnesty International considers that the individual should be allowed to communicate with and receive visits and assistance from representatives of each such state, should he or she so choose.

(See **Chapter 2.5**, **Chapter 4.6** and **Chapter 25.8**.)

## 28.7 RIGHT TO SEEK PARDON AND COMMUTATION

Anyone sentenced to death has the right to seek pardon or commutation (substitution of a lighter penalty).<sup>a 1255</sup>

The International Court of Justice considered that such clemency procedures, though carried out by the executive rather than the judiciary, are an integral part of the overall system for ensuring justice and fairness in the legal process.<sup>1256</sup>

Respect for the right to seek pardon or commutation requires a fair and adequate procedure that accords the opportunity to present all favourable evidence relevant to the granting of clemency,<sup>1257</sup> and gives the competent official(s) the power to grant pardons or commute death sentences. Legal Aid should be available for such requests.<sup>b</sup>

Essential guarantees for pardon and commutation procedures include the rights of condemned individuals to:

- make representations in support of the request and respond to comments made by others;
- be informed in advance of when the request will be considered;
- be informed promptly of the decision;<sup>1258</sup>
- receive legal counsel.

The competent officials must genuinely consider such requests.

In states where Islamic law systems operate which allow victims' families to accept payment in lieu of a death sentence, there must also be a separate, public system for condemned people to seek an official pardon or commutation. The Special Rapporteur on extrajudicial executions stated that while such systems are not necessarily inconsistent with international human rights law, they must operate in a manner that is not discriminatory and does not violate the right to due process, including the right to a final judgment by the court and the right to seek pardon or commutation from state authorities. Examples of impermissible discrimination include systems where only wealthy individuals are able to buy back their freedom or life, or systems that set different levels of compensation on prohibited grounds, for example depending on whether the victim is a woman or a non-Muslim.<sup>1259</sup>

The Human Rights Committee considered that the preponderant role of the victim's family in Yemen in deciding whether or not the death penalty is carried out on the basis of financial compensation violates the ICCPR.<sup>1260</sup>

### ICCPR, Article 6(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."

<sup>a</sup> Article 6(4) of the ICCPR, Article 4(6) of the American Convention, Article 6 of the Arab Charter, Paragraph 7 of the Death Penalty Safeguards, Section N(10)(d) of the Principles on Fair Trial in Africa

<sup>b</sup> Guideline 6 §47(c) of the Principles on Legal Aid, Section H(c) of the Principles on Fair Trial in Africa

<sup>1255</sup> *Fermin Ramírez v Guatemala*, Inter-American Court (2005) §§107-109.

<sup>1256</sup> *Avena Case (Mexico v United States)*, ICJ (2004) §142; See also *Fermin Ramírez v Guatemala*, Inter-American Court (2005) §109.

<sup>1257</sup> *Hilaire and Others v Trinidad and Tobago*, Inter-American Court (2002) §§184-189.

<sup>1258</sup> Special Rapporteur on extrajudicial executions, UN Doc. A/HRC/8/3 (2008) §§59-67; *Baptiste v Grenada* (11.743), Inter-American Commission (2000) §121; See UN General Assembly resolution 65/208, §5.

<sup>1259</sup> Special Rapporteur on extrajudicial executions, UN Doc. A/61/311 (2006) §§55-63.

<sup>1260</sup> HRC Concluding Observations: *Yemen*, UN Doc. CCPR/CO/84/YEM (2005) §15.

<sup>a</sup> Article 4(6) of the American Convention, Paragraph 8 of the Death Penalty Safeguards; See Articles 14(5) and 6(4) of the ICCPR, Article 6 of the Arab Charter

## 28.8 NO EXECUTIONS WHILE APPEALS OR CLEMENCY PETITIONS ARE PENDING

The death penalty may not be carried out until:<sup>a</sup>

- all rights to appeal have been exhausted;
- and recourse proceedings have been completed, including applications to international and regional bodies (such as the Human Rights Committee, Committee against Torture, the European Court or the Inter-American Commission);
- and requests for pardon or commutation have been exhausted.<sup>1261</sup>

States should ensure that no one is executed while any legal or clemency procedure at the national or international level is pending.<sup>1262</sup> Officials involved in executions should be fully informed of the status of appeals and petitions for clemency and should be instructed not to carry out an execution while any appeal or other recourse procedure is still pending.<sup>1263</sup>

Regional human rights courts and international and regional human rights bodies have made clear that executions while proceedings before them are pending is a violation of rights, including the right to redress. The violation is exacerbated when the court or body has issued interim or temporary measures requesting a stay of execution.<sup>1264</sup>

The International Court of Justice considered that the USA breached its obligation when it executed a Mexican national despite provisional measures ordered by the Court to stay the execution.<sup>1265</sup>

## 28.9 ADEQUATE TIME BETWEEN SENTENCE AND EXECUTION

States should allow adequate time between sentence and execution for the preparation and completion of appeals and petitions for clemency, as well as for the condemned person to attend to personal matters.<sup>1266</sup>

If an execution takes place too quickly after sentencing, challenges in the courts, clemency petitions and petitions for redress to international human rights bodies are hindered or prevented. It also denies the individual and family members the opportunity to prepare themselves psychologically and to say goodbye.

## 28.10 DUTY OF TRANSPARENCY

Secrecy around the use of the death penalty is not compatible with the rights of the condemned individuals, their families and the public at large. Such secrecy violates the rights to a fair and public trial, the prohibition of cruel, inhuman and degrading treatment and the right to information.<sup>1267</sup>

Transparency is essential for the public and the international community to know how the death penalty is being applied and to allow informed debate about its use.<sup>1268</sup> Full and accurate details

<sup>1261</sup> See M. Nowak, *U.N. Covenant on Civil and Political Rights; CCPR Commentary, 2nd revised edition*, Engel, 2005, p146.

<sup>1262</sup> CHR resolution 2005/59, §7(j).

<sup>1263</sup> ECOSOC resolution 1996/15, §6; Special Rapporteur on extrajudicial executions, UN Doc. E/CN.4/1996/4, (1996) §553.

<sup>1264</sup> *International Pen, et al on behalf of Ken Saro-Wiwa Jr. and Civil Liberties Organisation v Nigeria* (137/94, 139/94, 154/96 and 161/97), African Commission, 12th Annual Report (1998) §§102-103; *Hilaire, Constantine and Benjamin et al v Trinidad and Tobago* (94/2020), Inter-American Court (2002) §§198-200; See also *Al-Saadoon and Mufdhi v United Kingdom* (61498/08), European Court (2010) §§151-165.

<sup>1265</sup> *Avena and Other Mexican Nationals (Mexico v United States)*, ICJ, Judgment on Request for Interpretation of the Judgment of 31 March 2004 (19 January 2009) §§50-53, 61(2)–(3); See also the *LaGrand Case (Germany v the USA)*, ICJ (2001) §§110-116, 128(5).

<sup>1266</sup> ECOSOC resolution 1996/15, §5; See *Interights et al v Botswana* (240/2001), African Commission, 17th Annual Report (2003) §41; Special Rapporteur on extrajudicial executions: UN Doc. E/CN.4/1996/4, (1996) §553, UN Doc. E/CN.4/1998/68, (1998) §118.

<sup>1267</sup> See, UN General Assembly resolution 65/206, §3(b); UN Secretary General, UN Doc. A/65/280 (2010) §72; HRC: Concluding Observations: *Botswana*, UN Doc. CCPR/C/BWA/CO/1 (2008) §13, *Japan*, UN Doc. CCPR/C/79/Add.102 (1998) §21, *Kovaleva et al v Belarus*, UN Doc. CCPR/C/106/D/2120/2011 (2012) §11.10; Special Rapporteur on extrajudicial executions, UN Doc. E/CN.4/2006/53/Add.3 (2005) §37; *Bader and Kanbor v Sweden* (13284/04), European Court (2005) §46.

<sup>1268</sup> Special Rapporteur on extrajudicial executions, UN Doc. A/67/275 (2012) §§98-115, in particular §103; *Toktakunov v Kyrgyzstan* (1470/2006), HRC, UN Doc. CCPR/C/101/D/1470/2006 (2011) §7.1-7.8.

of each execution should be published, including name, charge, date and place. In addition, such information should be consolidated and published at least once a year.<sup>1269</sup>

Transparency also requires that condemned prisoners and their lawyers are officially informed of the date of execution, in sufficient time to take any further recourse available at the national or international level and to prepare themselves.<sup>1270</sup>

The families of anyone suspected or convicted of a capital offence have the right to visit them. They also have the right to information about the progress of judicial and clemency proceedings. They have the right to be officially informed in advance of an execution so as to allow for a last visit or communication with the condemned person, and to be informed of the execution.<sup>1271</sup> The bodies of executed individuals should be returned to the family for private burial.<sup>1272</sup>

Carrying out executions in public is, however, a violation of the prohibition against cruel, inhuman or degrading treatment or punishment.<sup>1273</sup>

## 28.11 PRISON CONDITIONS FOR INDIVIDUALS UNDER SENTENCE OF DEATH

Conditions of imprisonment for individuals under sentence of death must not violate the right to be treated with respect for the inherent dignity of the human person or the absolute prohibition against torture or other cruel, inhuman or degrading treatment or punishment. Individuals on death row must not be denied contact with others, including their families. At a minimum, the Standard Minimum Rules and the Bangkok Rules must be respected. (See **Chapter 10.3** on conditions of detention and **Chapter 25.5** on corporal punishment.)

In several death penalty cases, the Human Rights Committee has reaffirmed that Article 10 of the ICCPR encompasses the duty to provide adequate medical care, basic sanitary facilities, adequate food and recreational facilities for people held under sentence of death.<sup>1274</sup> The jurisprudence of the Inter-American Court is similar.<sup>1275</sup>

The Committee against Torture raised particular concern at reports of death row prisoners in Mongolia being detained in isolation, kept handcuffed and shackled, and denied adequate food, noting that the Special Rapporteur on torture had qualified such conditions as torture.<sup>1276</sup>

The Special Rapporteur on extrajudicial executions raised concern about lack of access of non-governmental organizations and visiting European parliamentarians to individuals on death row in Japan in 2001 and 2002.<sup>1277</sup>

**1269** Special Rapporteur on extrajudicial executions: UN Doc. E/CN.4/2006/53 (2006) §§28-32, 56-57, Press release on Iraq (27 July 2012), UN Doc. A/HRC/8/3/Add.3 (Nigeria) (2008) §§81-82, UN Doc. E/CN.4/2006/53 (2006) §§28-32, 56-57, UN Doc. E/CN.4/2005/7 (2004) §87; HRC Concluding Observations: Japan, UN Doc. CCPR/C/JPN/CO/5 (2008) §16; Special Rapporteur on torture, UN Doc. A/67/279 §52; Human Rights Council resolution 19/37, §69.

**1270** HRC: *Pratt and Morgan v Jamaica* (210/1986 and 225/1987), UN Doc. Supp. No. 40 (A/44/40) at 222 (1989) §13.7.

**1271** *Schedko v Belarus*, HRC, UN Doc. CCPR/C/77/D/886/1999 (2003) §10.2.

**1272** HRC Concluding Observations: *Botswana*, UN Doc. CCPR/C/BWA/CO/1 (2008) §13.

**1273** Special Rapporteur on extrajudicial executions, UN Doc.

E/CN.4/2006/53/Add.3 (2006) §§42-43; See, UN General Assembly resolution 65/225, §1(a)(i); CHR resolution 2005/59, §7(i).

**1274** HRC: *Kelly v Jamaica*, UN Doc. CCPR/C/41/D/253/1987 (1991) §5.7, *Henry and Douglas v Jamaica*, UN Doc. CCPR/C/37/D/571/1994 §9.5, *Linton v Jamaica*, UN Doc. CCPR/C/46/D/255/1987 (1992) §8.5.

**1275** See, e.g., Inter-American Court: *Hilaire and Others v Trinidad and Tobago*, (2002) §§133-172, *Raxcacó-Reyes v Guatemala*, (2005) §§94-102.

**1276** CAT Concluding Observations: *Mongolia*, UN Doc. CAT/C/MNG/CO/1 (2010) §16.

**1277** Special Rapporteur on extrajudicial executions, UN Doc. E/CN.4/2006/53/Add.3 (2006) §44.

# CHAPTER 29

## SPECIAL, SPECIALIZED AND MILITARY COURTS

Fair trial rights apply to trials in all courts, including special or specialized courts and military courts. The criminal jurisdiction of military courts should be limited to trials of members of the military for breaches of military discipline; it should not extend to crimes over which civilian courts have jurisdiction, human rights violations or crimes under international law.

### 29.1 Right to a fair trial in criminal proceedings before any court

#### 29.2 Special courts

#### 29.3 Specialized courts

#### 29.4 Military courts

##### 29.4.1 Competence, independence and impartiality of military courts

##### 29.4.2 Trials of military personnel by military courts

##### 29.4.3 Trials in military courts for human rights violations and crimes under international law

##### 29.4.4 Trials of civilians by military courts

## 29.1 RIGHT TO A FAIR TRIAL IN CRIMINAL PROCEEDINGS BEFORE ANY COURT

Special or extraordinary courts have been established in many countries to try particular cases or certain offences, such as crimes against the state, terrorism-related offences or drug offences. Frequently, the procedures in such special courts, including state security courts and special criminal courts, afford fewer guarantees of fair trial than the ordinary courts.

Specialized courts are courts or tribunals established to try people with special legal status, such as children (see **Chapter 27**) or members of the military, or particular categories of cases such as labour disputes, disputes involving the law of the sea or matrimonial issues. Military courts should be used only to try military personnel for breaches of military discipline, to the exclusion of human rights violations, or any crime under international law.<sup>1278</sup> However, some states have used military courts to try civilians, including for crimes against the state and terrorism-related offences, and to try members of the military charged with ordinary crimes, human rights violations and crimes under international law.

While the ICCPR and regional human rights treaties do not expressly prohibit the establishment of special or specialized courts, they require all courts to be competent, independent and impartial. Furthermore, fair trial rights enshrined in international standards apply to criminal proceedings in all courts.<sup>a 1279</sup> The standards that apply to proceedings in these courts may depend, to some degree, on whether a state of emergency has been declared and whether the laws of armed conflict are applicable. (See **Chapters 31** and **32**.)

<sup>a</sup> Article 10 of the Universal Declaration, Article 14 of the ICCPR, Article 40 of the Convention on the Rights of the Child, Articles 7 and 26 of the African Charter, Article 8 of the American Convention, Articles 13 and 16 of the Arab Charter, Article 6 of the European Convention, Principle 23(b) of the Basic Principles on Reparation, Sections A(1), A(4)(a) and Q(a) of the Principles on Fair Trial in Africa

<sup>1278</sup> Amnesty International uses the term “crimes under international law” to refer to a category of crimes that includes genocide, crimes against humanity, war crimes, torture, enforced disappearance and extrajudicial execution. These crimes are unlawful under international law; they must be criminalized by states

and investigated, and individuals suspected of such crimes should be tried before civilian or international courts.

<sup>1279</sup> HRC General Comment 32, §22; Principles 1, 2, 3, and 15 of the Draft Principles Governing the Administration of Justice Through Military Tribunals, UN Doc. E/CN.4/2006/58.

Additional standards apply to cases against children. (See **Chapter 27**.)

Everyone has the right to be tried by ordinary courts or tribunals using established legal procedures. Tribunals that do not use the duly established procedures of the legal process must not be created to displace the jurisdiction belonging to the ordinary courts.<sup>a 1280</sup>

The Human Rights Committee, African Commission, Inter-American Court and European Court have concluded that fair trial rights have been violated in criminal proceedings before special or military courts throughout the world, many involving terrorism or drug-related offences.

In “faceless judge courts” the judges remain anonymous, undermining the independence and impartiality of the court. Such courts often exclude the public. Proceedings have violated defence rights and the principle of equality of arms by restricting or prohibiting an accused’s access to their lawyer of choice during detention and precluding the accused and their lawyer from questioning or presenting witnesses and other evidence.<sup>1281</sup> Examining trials in such courts in Colombia and Peru, the Human Rights Committee concluded that they violated the right to a fair trial.<sup>1282</sup>

The Special Rapporteur on human rights and counter-terrorism has called for states to avoid using special or specialized courts in terrorism cases.<sup>1283</sup> Human rights bodies have raised concerns about procedures in such courts which are inconsistent with fair trial rights, including the right to a trial before an independent, impartial court, the exclusion of evidence obtained by torture or other ill-treatment and the right to appeal to a higher tribunal.<sup>1284</sup>

Customary (also called traditional) courts must also respect international standards. Concern has been raised that criminal trials in some customary courts fail to guarantee fair trial rights, including the right to counsel, the right to an interpreter and the prohibition of discrimination.<sup>1285</sup> The Human Rights Committee has clarified that in order to conform to the ICCPR:

- the criminal jurisdiction of such courts should be limited to minor offences;
- the proceedings must be consistent with fair trial guarantees set out in the ICCPR;
- their judgments must be validated by state courts in light of such guarantees; and
- the accused must have the right to challenge the court’s rulings in proceedings which meet the requirements of the ICCPR.<sup>1286</sup>

The Principles on Fair Trial in Africa also require such courts to respect international fair trial standards, but permit appeals before a higher traditional court, administrative authority or a judicial tribunal.<sup>b</sup>

### Basic Principles on the Independence of the Judiciary, Principle 5

“Everyone shall have the right to be tried by ordinary courts or tribunals using established legal procedures. Tribunals that do not use the duly established procedures of the legal process shall not be created to displace the jurisdiction belonging to the ordinary courts or judicial tribunals.”

<sup>a</sup> Principle 5 of the Basic Principles on the Independence of the Judiciary, Sections A(4)(e) and L(a)-(c) of the Principles on Fair Trial in Africa

<sup>b</sup> Section Q of the Principles on Fair Trial in Africa

<sup>1280</sup> CHR resolution 2005/30, §3; *Castillo Petruzzi et al v Peru*, Inter-American Court (1999) §129; *Centre for Free Speech v Nigeria* (206/97), African Commission, 13th Annual Report (1999) §§12-14.

<sup>1281</sup> HRC General Comment 32, §23.

<sup>1282</sup> HRC: *Becerra Barney v Colombia*, UN Doc. CCPR/C/87/D/1298/2004 (2006) §§7.2, 8, *Guerra de la Espriella v Colombia*, UN Doc. CCPR/C/98/D/1623/2007 (2010) §9.2-9.3, *Polay Campos v Peru*, UN Doc. CCPR/C/61/D/577/1994 (1997) §8.8.

<sup>1283</sup> Special Rapporteur on human rights and counter-terrorism, UN Doc. A/63/223 (2008) §45(b).

<sup>1284</sup> Special Rapporteur on human rights and counter-terrorism: UN Doc. A/63/223 (2008) §§24, 27, 32, *Egypt*, UN Doc. A/HRC/13/37/Add.2 (2009) §§32-35, *Spain*, UN Doc. A/HRC/10/3/Add.2 (2008) §§16-17, *Tunisia*, UN Doc. A/HRC/16/51/Add.2 (2010) §§35-36; HRC Concluding Observations: *France*, UN Doc. CCPR/C/79/Add.80 (1997) §23; See also *Report on Terrorism and Human Rights*, Inter-American Commission (2002), Section D §230.

<sup>1285</sup> HRC Concluding Observations: *Botswana*, UN Doc. CCPR/C/BWA/CO/1 (2008) §§21, 12, *Madagascar*: UN Doc. CCPR/C/MDG/CO/3 (2007) §16.

<sup>1286</sup> HRC General Comment 32, §24.

## 29.2 SPECIAL COURTS

Special courts have sometimes been established in order to apply exceptional procedures that often do not comply with fair trial standards.<sup>1287</sup>

<sup>a</sup> **Principle 5 of the Basic Principles on the Independence of the Judiciary, Sections A(4)(e) and L(c) of the Principles on Fair Trial in Africa**

Special courts may not be created to displace the jurisdiction of ordinary courts.<sup>a 1288</sup> They should not try offences that fall within the jurisdiction of ordinary courts. Such courts must be independent and impartial and must respect fair trial standards.<sup>1289</sup>

The right to equality before the courts means that similar cases must be dealt with in similar proceedings. If exceptional criminal procedures or specially constituted courts are used to hear a certain category of cases, objective and reasonable grounds must be provided to justify the distinction.<sup>1290</sup>

(See **Chapter 11**, Right to equality before the law and courts.)

<sup>b</sup> **Article 14(1) of the ICCPR, Article 8 of the American Convention, Article 13 of the Arab Charter, Article 6(1) of the European Convention, Article XXVI of the American Declaration**

The jurisdiction of special courts – like that of all courts – must be established by law.<sup>b 1291</sup> (See **Chapter 12.2**, Right to be heard by a tribunal established by law.)

Analysis of the fairness of proceedings in a special or extraordinary court generally focuses on whether: the court is established by law; the jurisdiction of the court guarantees non-discrimination and equality; the judges are independent of the executive and other authorities; the judges are competent and impartial; and the procedures conform to international fair trial standards, including the right to appeal.<sup>1292</sup>

The Human Rights Committee concluded that a trial before a special court in Libya – the People’s Court – violated fair trial rights. Among other things, the trial was not public; the accused was never given access to the case file or the charges against him; and the accused was not given the opportunity to be represented by counsel of choice.<sup>1293</sup> Although this court was replaced by the State Security Court in 2005, it was unclear how the new court differed from the People’s Court.<sup>1294</sup>

The African Commission has found that a number of special courts violated the right to a trial before an independent, impartial tribunal. For example, it found that special tribunals established under the Civil Disturbances Act in Nigeria were not impartial because their composition was at the discretion of the executive.<sup>1295</sup> It also concluded that transferring criminal cases from the ordinary courts to a section of a Special Court in Mauritania headed by a senior military officer, assisted by two members of the armed forces, violated fair trial guarantees.<sup>1296</sup>

Examining trials of civilians on charges related to national security before the National Security Court in Turkey, the European Court found that there were legitimate reasons to doubt the independence and impartiality of the court. One of the three judges on each panel was a military officer in the Military Legal Service. Although the military judges

<sup>1287</sup> See e.g., CAT Concluding Observations: *Syria*, UN Doc. CAT/C/SYR/CO/1 (2010) §11; WGAD Opinion 23/2008 (*Rastanawi v Syria*), UN Doc. A/HRC/13/30/Add.1 (2008) §§15-17.

<sup>1288</sup> *Castillo Petruzzi et al v Peru*, Inter-American Court (1999) §129.

<sup>1289</sup> CHR resolution 2005/30.

<sup>1290</sup> HRC: General Comment 32, §14, *Kavanagh v Ireland*, UN Doc. CCPR/C/71/D/819/1998 (2001) §§10.2-10.3, 12; See HRC Concluding Observations: *Ireland*, UN Doc. CCPR/C/IRL/CO/3 (2008) §20.

<sup>1291</sup> HRC Concluding Observations: *Iraq*, UN Doc. CCPR/C/79/Add.84 (1997) §15.

<sup>1292</sup> See Inter-American Commission Report on Terrorism and Human Rights (2002), Section D §230.

<sup>1293</sup> *Aboussedra v Libyan Arab Jamahiriya*, HRC, UN Doc. CCPR/C/100/D/1751/2008 (2010) §7.8.

<sup>1294</sup> HRC Concluding Observations: *Libyan Arab Jamahiriya*, UN Doc. CCPR/C/LBY/CO/4 (2007) §22; See HRC Concluding Observations: *Syrian Arab Republic*, UN Doc. CCPR/CO/84/SYR (2005) §10.

<sup>1295</sup> *International Pen, Constitutional Rights Project, Interrights on behalf of Ken Saro-Wiwa Jr. and Civil Liberties Organisation v Nigeria* (137/94, 139/94, 154/96 and 161/97), African Commission, 12th Annual Report (1998) §86.

<sup>1296</sup> *Malawi African Association and Others v Mauritania* (54/91, 61/91, 98/93, 164/97-196/97 and 210/98), African Commission, 13th Annual Report (2000) §§98-100.



enjoyed many constitutional guarantees of independence and had the same training as civilian judges, they remained serving members of the military, subject to military discipline and assessments, and their term of appointment to the court was limited, but renewable.<sup>1297</sup>

### 29.3 SPECIALIZED COURTS

Specialized criminal courts may not be created to try people on the basis of their race, colour, sex, language, religion or belief, political or other opinion, national or social origin, wealth, birth or other status. Such courts would contravene the principle of equality before the courts and the prohibition of discrimination.<sup>a</sup> (See **Chapter 11**, Right to equality before the law and courts.)

However, the creation of specialized courts to try certain groups of people may be permissible if justified on objective and reasonable grounds.<sup>1298</sup> For example, juvenile courts should be established for criminal proceedings against people who were under 18 at the time of the alleged crime (see **Chapter 27**). Specialized criminal courts staffed by specially trained prosecutors and judges may be established to try those accused of gender-based violence as a temporary measure to redress the barriers to justice faced by victims of such violence.<sup>1299</sup> Military courts should only try members of the armed forces for breaches of military discipline (see **29.4** below). Such courts must be established by law, competent, independent and impartial and must ensure respect for fair trial rights.

### 29.4 MILITARY COURTS

Military courts have been established in many countries to try military personnel for breaches of military discipline. Worryingly, in some countries their jurisdiction has been extended to try civilians, or to try military personnel for “ordinary criminal offences”, human rights violations and crimes under international law.

Limitations on the scope of military courts’ jurisdiction under human rights law have been developed in view of the true purpose of such courts, the right to a fair trial by a competent, independent and impartial tribunal and the duty of states to ensure accountability and prevent impunity for human rights violations and crimes under international law.

The Inter-American Court has stated: “When a military court takes jurisdiction over a matter that regular courts should hear, the individual’s right to a hearing by a competent, independent and impartial tribunal previously established by law and, *a fortiori*, his right to due process are violated.”<sup>1300</sup>

The African Commission concluded that a trial of journalists before a military court violated Article 7(1) of the African Charter and was inconsistent with Principle 5 of the Basic Principles on the Independence of the Judiciary. In addition, the accused were denied access to counsel and the right to be represented by lawyers of their choice.<sup>1301</sup>

Fair trial standards must be respected when individuals are tried in military courts.<sup>1302</sup> This includes proceedings against members of the military for those breaches of military discipline

<sup>a</sup> Articles 2, 7 and 10 of the Universal Declaration, Articles 2, 14 and 26 of the ICCPR, Articles 2 and 3 of the African Charter, Article 1 of the American Convention, Articles 11 and 12 of the Arab Charter, Article 14 of the European Convention

<sup>1297</sup> *Incal v Turkey* (22678/93), European Court (1998) §§65-73; See *Öcalan v Turkey* (46221/99), European Court Grand Chamber (2005) §§112-118.

<sup>1298</sup> HRC: *General Comment 32*, §14, *Manzano et al v Colombia*, UN Doc. CCPR/C/98/D/1616/2007 (2010) §6.5.

<sup>1299</sup> Special Rapporteur on the independence of judges and lawyers: UN Doc. A/66/289 (2011) §§58, 97.

<sup>1300</sup> Inter-American Court: *Castillo Petruzzi et al v Peru*, (1999) §128, *Radilla-Pacheco v Mexico*, (2009) §273; See *La Cantuta v Peru*, (2006) §§138-143.

<sup>1301</sup> *Centre for Free Speech v Nigeria* (206/97), African Commission, 13th Annual Report (1999) §§12-14.

<sup>1302</sup> HRC *General Comment 32*, §22; *Civil Liberties Organisation et al v Nigeria* (218/98), African Commission, 14th Annual Report (2001) §44.

that, due to the nature of the offence or the seriousness of the potential penalty, are considered as “criminal” offences under international human rights law.<sup>1303</sup>

Analysis of whether a criminal proceeding in a military court is fair should include whether: the court’s jurisdiction is consistent with domestic law and international standards (see **29.4.2-29.4.4** below); the tribunal is free from interference by superiors or outside influence; the tribunal has the judicial capacity for the proper administration of justice; the judges are, and are seen to be, competent, independent and impartial; and the accused is afforded at least the minimum guarantees set out in international fair trial standards.

### 29.4.1 COMPETENCE, INDEPENDENCE AND IMPARTIALITY OF MILITARY COURTS

In assessing the independence of a military court, questions include whether the judges, who are often members of the military, have appropriate training and qualifications in law; whether the procedure for their appointment, their conditions of service and their tenure guarantee their independence; whether, in exercising their duties as judges, they are independent of their superiors; and whether there are any hierarchical links between the prosecution and the judges sitting on a military tribunal.

Military courts, like ordinary courts, must be, and must be seen to be, independent and impartial. (See **Chapter 12.**)

A number of human rights mechanisms expressed concern about the military commissions established to try people detained by the USA at Guantánamo Bay. Concerns have included: the appointment of the judges by the US Department of Defense and ultimately the President; the power of an appointee of the executive to remove judges from the Commissions; and the determination of conflicts of jurisdiction by an appointee of the executive rather than the judiciary.<sup>1304</sup> The Special Rapporteur on extrajudicial executions stated in 2009 that the provisions governing the trials of people detained at Guantánamo Bay constituted a gross infringement on the right to a fair trial and that it would violate international law to execute anyone after such a trial.<sup>1305</sup> The UN High Commissioner for Human Rights, among others, called on the USA to ensure that trials of those detained at Guantánamo Bay were heard by regular courts.<sup>1306</sup>

The African Commission found violations of the African Charter in cases from countries including Mauritania, Nigeria and Sudan where civilians and members of the military were convicted by military courts which were not independent or impartial. For example, a military tribunal that tried 26 civilians in Sudan was made up of serving members of the military who were in active service and subject to military regulations.<sup>1307</sup> In Nigeria, members of the military and a civilian were tried for alleged involvement in a coup plot before a Special Military Tribunal. It failed the independence test as it was chaired by a member of the military who sat on the Provisional Ruling Council of the country.<sup>1308</sup>

Human rights mechanisms have stated categorically that military courts should not have the authority to impose the death penalty. (See **Chapter 28.6.**)

**1303** CoE *Recommendation CM/Rec (2010) 4* on human rights of members of the armed forces, Annex, §28; European Court: *Engel and Others v Netherlands* (5100-5102/71 and 5354/72), (1976) §82, *Campbell and Fell v United Kingdom*, (7189/77 and 7878/77), (1984) §68.

**1304** UN Joint Mechanisms Report on detainees at Guantánamo Bay, UN Doc. *E/CN.4/2006/120* (2006) §§30-34.

**1305** Special Rapporteur on extrajudicial executions, USA, UN Doc. *A/HRC/11/2/Add.5* (2009) §§38-41.

**1306** OHCHR *Annual Report 2010*, pp32-33.

**1307** African Commission: *Law Office of Ghazi Suleiman v Sudan* (222/98 and 229/99), 16th Annual Report (2003) §§63-67; See *Amnesty International and Others v Sudan* (48/90, 50/91, 52/91 and 89/93), 13th Annual Report (1999) §§67-70.

**1308** *Civil Liberties Organisation, Legal Defence Centre, Legal Defence and Assistance Project v Nigeria*, (218/98), African Commission, 14th Annual Report (2001) §§24-27, 43-44, 32-34.

### 29.4.2 TRIALS OF MILITARY PERSONNEL BY MILITARY COURTS

Trials by military courts of serving military personnel for alleged breaches of military discipline are not considered incompatible with international human rights standards as long as the courts are independent and impartial and the alleged breaches are not “ordinary crimes”, violations of human rights or crimes under international law. If the offence is “criminal” in nature under human rights law, fair trial rights must be respected.<sup>1309</sup>

The jurisdiction of military courts over criminal cases should be limited to trials of military personnel for breaches of military discipline.<sup>a 1310</sup>

The Human Rights Committee<sup>1311</sup>, the Committee against Torture<sup>1312</sup>, the Inter-American Court, the African Commission,<sup>1313</sup> and the Commission on Human Rights<sup>1314</sup> have said, in similar language, that the jurisdiction of military courts should be restricted to trials of members of the military for offences against military discipline proscribed by law.

A number of human rights bodies have called for military personnel charged with ordinary criminal offences to be tried before an ordinary (civilian) rather than a military court.

The Human Rights Committee expressed concern about the absence of fair trial guarantees in proceedings before military courts in the Democratic Republic of the Congo and called on the authorities to abolish the jurisdiction of military courts for ordinary offences.<sup>1315</sup>

The African Commission concluded that the trial by a military court of members of the military and civilians charged with a civilian offence (theft) was a violation of African regional standards and of “good justice”.<sup>1316</sup>

The European Convention does not exclude the trial of members of the military by military courts on criminal charges. However, the CoE Guidelines on human rights of members of the armed forces, which largely summarize the European Court’s jurisprudence, state that fair trial guarantees apply to all proceedings against members of the military which qualify as criminal under the European Convention, regardless of their classification in domestic law. They emphasize the importance of: the independence of the court at every stage of the proceedings; a clear separation between the prosecuting authorities and the decision-makers; the right to a public hearing; respect for the rights of the defence; and the right to appeal to an independent, impartial and competent higher tribunal.<sup>1317</sup>

### 29.4.3 TRIALS IN MILITARY COURTS FOR HUMAN RIGHTS VIOLATIONS AND CRIMES UNDER INTERNATIONAL LAW

There is a growing acceptance that military courts should not have jurisdiction to try members of the military and security forces for human rights violations<sup>1318</sup> or other crimes under

<sup>a</sup> See Section L(a) of the Principles on Fair Trial in Africa

**1309** The Dakar Declaration on the Right to a Fair Trial in Africa, §3; *Wetsh’okonda Koso and Others v Democratic Republic of the Congo* (281/2003), African Commission, 26th Annual Report (2008) §84; *Las Palmeras v Colombia*, Inter-American Court (2001) §§51-52; Inter-American Commission *Report on Terrorism and Human Rights*, (2002) Section D §232; European Court: *Morris v United Kingdom* (38784/97), (2002) §59, *Engel and Others v Netherlands* (5100-5102/71 and 5354/72), (1976) §82, *Campbell and Fell v United Kingdom* (7189/77 and 7878/77), (1984) §68.

**1310** Principle 29 of the *Updated Impunity Principles*.

**1311** HRC Concluding Observations: Chile, UN Doc. CCPR/C/CHL/CO/5 (2007) §12, Uzbekistan: UN Doc. CCPR/CO/71/UZB (2001) §15.

**1312** CAT Concluding Observations: Guatemala, UN Doc. CAT/C/GTM/CO/4 (2006) §14.

**1313** See e.g., *Durand and Ugarte v Peru*, Inter-American Court (2000) §117; *Wetsh’okonda Koso and Others v Democratic Republic*

*of the Congo* (281/2003), African Commission, 26th Annual Report (2008) §§84-88.

**1314** CHR resolution 1999/19 (*Equatorial Guinea*), §8(a).

**1315** HRC Concluding Observations: *Democratic Republic of the Congo*, UN Doc. CCPR/C/COD/CO/3 (2006) §21.

**1316** *Wetsh’okonda Koso and Others v Democratic Republic of the Congo* (281/2003), African Commission, 26th Annual Report (2008) §§85-87.

**1317** Appendix to CoE Recommendation CM/Rec (2010)4, §§28-34.

**1318** Principle 29 of the *Updated Impunity Principles*; See Principles 5, 8 and 9 of the *Draft Principles Governing the Administration of Justice Through Military Tribunals*, UN Doc. E/CN.4/2006/58; Special Rapporteur on torture, UN Doc. A/56/156 (2001) §39(j); CAT Concluding Observations: Peru, UN Doc. CAT/C/PER/CO/4 (2006) §16(a); WGAD: Ecuador, UN Doc. A/HRCI.4/40/Add.2 (2006) §101(e).

international law. Because most military courts are composed of members of the military, respect for the right to trial by an independent and impartial tribunal, both in fact and appearance, is threatened.

The Special Rapporteur on extrajudicial executions expressed concern about “trials of members of the security forces before military courts where it is alleged, they evade punishment because of an ill-conceived *esprit de corps*, which generally results in impunity”. He cited countries such as Colombia, Indonesia and Peru as well-known examples.<sup>1319</sup>

The Inter-American Court clarified that military courts cannot have jurisdiction over cases concerning human rights violations against civilians.<sup>1320</sup>

The Human Rights Committee and the Committee against Torture called on countries including Lebanon, Brazil, Mexico and Colombia to transfer competence from military courts to ordinary (civilian) courts in all cases concerning the violation of human rights by members of the military, including military police.<sup>1321</sup>

International standards prohibit trials in military or special courts of members of the security forces or other officials accused of participating in enforced disappearances.<sup>a 1322</sup>

The Committee against Torture and the Special Rapporteur on torture have clarified that individuals accused of torture should not be tried before military courts.<sup>1323</sup>

Amnesty International calls for trials of human rights violations and crimes under international law to take place before civilian – not military – courts, given concerns about lack of independence and impartiality of military courts and concerns about impunity.<sup>1324</sup>

#### 29.4.4 TRIALS OF CIVILIANS BY MILITARY COURTS

In some countries, military courts have jurisdiction to try civilians charged with committing offences on military property or with crimes against state security.

##### Updated Impunity Principles, Principle 29

“The jurisdiction of military tribunals must be restricted solely to specifically military offences committed by military personnel, to the exclusion of human rights violations, which shall come under the jurisdiction of the ordinary domestic courts or, where appropriate, in the case of serious crimes under international law, of an international or internationalized criminal court.”

##### Declaration on Disappearance, Article 16(2)

“They [people alleged to have committed acts of enforced disappearance] shall be... tried only by the competent ordinary courts in each State, and not by any other special tribunal, in particular military courts.”

<sup>a</sup> Article 16(2) of the Declaration on Disappearance, Article IX of the Inter-American Convention on Disappearance

<sup>1319</sup> Special Rapporteur on extrajudicial executions, UN Doc. A/51/457 (1996) §125.

<sup>1320</sup> *Radilla-Pacheco v Mexico*, Inter-American Court (2009) §274; See *Annual Report of the Inter-American Commission on Human Rights*: Colombia (2011) Chapter IV, p349, §31.

<sup>1321</sup> HRC Concluding Observations: *Lebanon*, UN Doc. CCPR/C/79/Add.78 (1997) §14, *Brazil*, UN Doc. CCPR/C/BRA/CO/2 (2005) §9, *Mexico*, UN Doc. CCPR/C/MEX/CO/5 (2010) §§11, 18, *Colombia*, UN Doc. CCPR/C/COL/6 (2010) §14; CAT Concluding Observations: *Mexico*, UN Doc. CAT/C/MEX/CO/4 (2006) §14; See OHCHR *Annual Report 2010* (Mexico), p28; CHR, UN Doc. E/CN.4/2001/167 (Colombia), pp361-366, §8.

<sup>1322</sup> *Radilla-Pacheco v Mexico*, Inter-American Court (2009) §§277, 290-314.

<sup>1323</sup> Special Rapporteur on torture: UN Doc. A/56/156 (2001) §39(j); CAT Concluding Observations: *Peru*, UN Doc. CAT/C/PER/CO/4 (2006) §16(a).

<sup>1324</sup> For example, Amnesty International: *Democratic Republic of the Congo: The time for justice is now: New strategy needed in the Democratic Republic of the Congo*, Index: AFR 62/006/2011, p21, *Tunisia: One Step Forward, Two Steps Back?: One year since Tunisia's landmark elections*, Index: MDE 30/010/2012, p8, *Amnesty International's written statement to the 22nd session of the UN Human Rights Council: The Need for Accountability for Gaza/Israel conflicts*, Index: MDE 02/001/2013, p2.

There is growing acceptance that military courts should not have jurisdiction to try civilians, owing to the nature of these courts and because of concerns about their independence and impartiality.

The Principles on Fair Trial in Africa prohibit the use of military courts to try civilians.<sup>a</sup>

The Inter-American Court has declared that military jurisdiction should be limited to trying military personnel for offences which, by their nature, are damaging to the military system and that civilians should in no circumstances be tried before military courts. The Court has also clarified that retired members of the military should be considered civilians and should be tried for criminal offences by civilian rather than military courts.<sup>1325</sup>

Furthermore, the Draft Principles Governing the Administration of Justice through Military Tribunals set out the principle that military courts should have no jurisdiction to try civilians.<sup>1326</sup>

While the Human Rights Committee and the European Court have not yet held that trials of civilians before military courts are altogether prohibited, they have said that they should be exceptional and that the courts must be independent, impartial and competent and must respect minimum guarantees of fairness.<sup>1327</sup> Furthermore, states permitting such trials must show that they are necessary and justified and that the regular civilian courts are unable to undertake such trials, or that they are authorized by international humanitarian law. The European Court requires justification for the trial of a civilian before a military court in each individual case. It stated that laws allocating certain categories of offence to military courts were not sufficient justification.<sup>1328</sup>

Nonetheless, in Concluding Observations, the Human Rights Committee has called on governments in several countries, including for example Slovakia, to prohibit the trials of civilians before military courts.<sup>1329</sup> The Committee has also called on Israel to refrain from holding criminal proceedings against Palestinian children in military courts.<sup>1330</sup>

Trials of civilians before military courts have raised a number of fair trial issues including: the lack of independence, impartiality and competence of such courts,<sup>1331</sup> violations of the right to equality before the courts,<sup>1332</sup> and violations of a range of guarantees including the right to counsel of choice and the right to appeal.

For example, examining two sets of criminal proceedings held in military courts, the European Court held that the accused's concerns about the independence and impartiality of the tribunal were objectively justified. In one UK case, the military court comprised two civilians and six serving military officers, one of whom – the senior officer – was the convening officer, with a civilian judge-advocate advising. In the case of an editor tried before a Turkish military court on charges relating to his publication of an article, the European Court noted that the military court was composed only of military

<sup>a</sup> Section L(c) of the Principles on Fair Trial in Africa

**1325** Inter-American Court: *Palamara-Iribarne v Chile* (2005) §§124, 139, 269(14); *Cesti-Hurtado v Peru*, (1999) §151.

**1326** Principle 5 of the UN Draft Principles Governing the Administration of Justice through Military Tribunals, UN Doc. E/CN.4/2006/58, cited in Special Rapporteur on the independence of judges and lawyers, UN Doc. A/HRC/11/41 (2009) §36 and in *Ergin v Turkey (No.6)* (47533/99), European Court (2006) §45.

**1327** HRC General Comment 32, §22; *Ergin v Turkey (No.6)* (47533/99), European Court (2006) §§42-48.

**1328** HRC General Comment 32, §22; WGAD, UN Doc. A/HRC/7/4 (2008) §§65-66; *Ergin v Turkey (No.6)* (47533/99), European Court (2006) §47; See HRC: *Kurbanova v Tajikistan*, UN Doc. CCPR/C/79/D/1096/2002 (2003) §7.6, *Madani v Algeria*, UN Doc.

CCPR/C/89/D/1172/2003 (2007) §8.7, *El-Abani v Libyan Arab Jamahiriya*, UN Doc. CCPR/C/99/D/1640/2007 (2010) §7.8.

**1329** HRC Concluding Observations: Slovakia, UN Doc. CCPR/C/79/Add.79 (1997) §20; See HRC Concluding Observations: Lebanon, UN Doc. CCPR/C/79/Add.78 (1997) §14, Chile, UN Doc. CCPR/C/CHL/CO/5 (2007) §12, Tajikistan, UN Doc. CCPR/CO/84/TJK (2004) §18, Ecuador, UN Doc. CCPR/C/ECU/CO/5 (2009) §5.

**1330** HRC Concluding Observations: Israel, UN Doc. CCPR/C/ISR/CO/3 (2010) §22; See, CAT Concluding Observations: Israel, UN Doc. CAT/ISR/CO/4 (2009) §27.

**1331** *Ergin v Turkey (No.6)* (47533/99), European Court (2006) §§50-54.

**1332** HRC General Comment 32, §14, 22. (See Chapter 11.2.)

officers, and given the charges against him, the individual could legitimately fear that the court would be influenced by partial considerations.<sup>1333</sup>

The Inter-American Court<sup>1334</sup> and African Commission<sup>1335</sup> have found in numerous cases that trials of civilians in military courts violated fair trial rights.<sup>1336</sup>

The Working Group on Arbitrary Detention has called for states in legal transition that permit trials of civilians before military courts to provide a procedure through which civilians are able to challenge the competence of the military court before an independent civilian judicial authority.<sup>1337</sup>

(See also **Chapter 32.4.1** on fair trial rights under international humanitarian law.)

**1333** *Martin v United Kingdom* (40426/98), European Court (2006), *Ergin v Turkey (No.6)* (47533/99), European Court (2006).

**1334** See e.g., *Castillo Petruzzi et al v Peru*, Inter-American Court (1999) §128.

**1335** See e.g. African Commission: *Law Office of Ghazi Suleiman v Sudan*, (222/98, 229/99), 16th Annual Report (2003) §§63-67, *Civil Liberties Organisation, Legal Defence Centre, Legal Defence and*

*Assistance Project v Nigeria* (218/98), 14th Annual Report (2000) §§43-44, *Kevin Mgwanga Gunme et al v Cameroon* (266/03), 26th Annual Report (2009) §§127-128.

**1336** See Report of the Special Rapporteur on the independence of judges and lawyers, UN Doc. *A/61/384* (2006) ch.IV.

**1337** WGAD, UN Doc. *A/HRC/7/4* (2008) §82(c).

# CHAPTER 30

## RIGHT TO COMPENSATION FOR MISCARRIAGES OF JUSTICE

People who have been convicted and subjected to punishment as a result of a miscarriage of justice have the right to compensation in particular circumstances.

### 30.1 Right to compensation for miscarriages of justice

#### 30.2 Who qualifies for compensation for a miscarriage of justice?

### 30.1 RIGHT TO COMPENSATION FOR MISCARRIAGES OF JUSTICE

International standards require states to compensate victims of miscarriages of justice in particular circumstances.<sup>a</sup> This right is distinct from the right to compensation for unlawful detention (see **Chapter 6.4**, Right to reparation for unlawful arrest or detention). It is also distinct from the right to reparation for violations of other human rights, including fair trial rights. (See **Chapter 26.6**, Retrials on grounds of newly discovered facts.)

With the exception of Article 10 of the American Convention, international standards contain similar language.

Legal aid should be available to individuals seeking compensation on these grounds if they do not have a lawyer of choice or cannot afford to pay a lawyer.<sup>b</sup>

### 30.2 WHO QUALIFIES FOR COMPENSATION FOR A MISCARRIAGE OF JUSTICE?

In order to qualify for compensation for a miscarriage of justice, an individual must have been:<sup>c</sup>

- convicted by a final decision of a criminal offence (including petty offences). A conviction is considered to be final when no further judicial reviews or appeals are available either because they have been exhausted or because the time limits have passed;<sup>1338</sup> and

#### ICCPR, Article 14(6)

“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.”

#### American Convention, Article 10

“Every person has the right to be compensated in accordance with the law in the event he has been sentenced by a final judgment through a miscarriage of justice.”

<sup>a</sup> Article 14(6) of the ICCPR, Article 18(6) of the Migrant Workers Convention, Article 10 of the American Convention, Article 3 of Protocol 7 to the European Convention, Section N(10)(c) of the Principles on Fair Trial in Africa, Article 85(2) of the ICC Statute

<sup>b</sup> Guideline 11 §55(b) of the Principles on Legal Aid

<sup>c</sup> Article 14(6) of the ICCPR, Article 18(6) of the Migrant Workers Convention, Article 3 of Protocol 7 to the European Convention, Section N(10)(c) of the Principles on Fair Trial in Africa

<sup>1338</sup> See, e.g., Explanatory Report Protocol 7 to the European Convention, §22; *Irving v Australia*, HRC, UN Doc. CCPR/C/74/D/880/1999 (2002) §8.3-8.4.

- subjected to punishment as a result of the conviction. The punishment may be a sentence of imprisonment or any other type of punishment. Lawfully imposed pre-trial detention does not constitute punishment;<sup>1339</sup> *and*
- (under all but the American Convention), pardoned or had their conviction reversed on the grounds that new or newly discovered facts showed that there had been a miscarriage of justice, provided that the non-disclosure was not attributable to the accused. The burden of proving that the non-disclosure was attributable to the accused rests with the state.<sup>1340</sup>

The European Court held that where the basis for reversing a final conviction was a reassessment of the evidence, rather than new or newly discovered evidence, the requirement to pay compensation did not apply.<sup>1341</sup>

The Human Rights Committee has clarified that Article 14(6) of the ICCPR does not require compensation to be paid if an individual is pardoned on humanitarian or other grounds, including equity, which are unrelated to the miscarriage of justice.<sup>1342</sup> In addition the Committee indicated that compensation was not required where the grounds for quashing a conviction were that the individual had been subjected to an unfair trial, rather than on the basis of newly discovered facts showing a miscarriage of justice.<sup>1343</sup>

Article 10 of the American Convention does not require the miscarriage of justice to be based on new or newly discovered facts.

Most international standards do not require a state to pay compensation if a charge is dismissed or an accused is acquitted at trial or on appeal (as there has been no final conviction).<sup>1344</sup> However, under some national systems compensation is payable in such circumstances. In addition, the Arab Charter guarantees the right to compensation to anyone whose innocence has been established by a final judgment. The ICC Statute grants the Court discretion to award compensation when it finds that there has been a grave and manifest miscarriage of justice, if the individual has been acquitted by a final judgment or the proceedings have been terminated on grounds of the miscarriage.<sup>a</sup>

<sup>a</sup> Article 19(2) of the Arab Charter, Article 85(3) of the ICC Statute

The ICCPR, the Migrant Workers Convention, the American Convention and the European Convention do not require a finding by a court that the individual is innocent – only that there has been a miscarriage of justice.<sup>1345</sup> (See **Chapter 15.4** on the presumption of innocence after acquittal.)

States must enact laws which provide for compensation to victims of miscarriages of justice.<sup>1346</sup> Such laws generally regulate the procedures for granting compensation and may specify amounts to be paid. However, a state is not relieved of its obligation to pay compensation for miscarriages of justice because there is no law or procedure in place.

The European Court concluded that non-pecuniary damages, such as distress, anxiety and inconvenience, should be compensated as well as financial losses.<sup>1347</sup>

If the miscarriage of justice resulted from a violation of human rights, in addition to compensation, the individual has rights to other forms of reparation such as restitution, rehabilitation, satisfaction and guarantees of non-repetition.<sup>b</sup> <sup>1348</sup> (See **Chapter 6.4**, Right to reparation for unlawful arrest or detention, **Chapter 26.6** on retrials and **Chapter 26.7** on reopening of cases.)

<sup>b</sup> Principles 18-23 of the Basic Principles on Reparation

<sup>1339</sup> *W.J.H. v The Netherlands*, HRC, UN Doc. CCPR/C/45/D/408/1990 (1992) §§6.3, 4.3.

<sup>1340</sup> HRC General Comment 32, §53.

<sup>1341</sup> *Matveyev v Russia* (26601/02), European Court (2008) §§39-45.

<sup>1342</sup> HRC General Comment 32, §53.

<sup>1343</sup> *Irving v Australia*, HRC, UN Doc. CCPR/C/74/D/880/1999 (2002) §§3-8.4.

<sup>1344</sup> HRC: General Comment 32, §53, *W.J.H. v The Netherlands*,

UN Doc. CCPR/C/45/D/408/1990 (1992) §6.3.

<sup>1345</sup> See *Hammern v Norway* (30287/96), European Court (2003) §§47-49, and Concurring Opinion, *Dumont v Canada*, HRC, UN Doc. CCPR/C/98/D/1467/2006 (2010) §§22-24.

<sup>1346</sup> HRC General Comment 32, §52.

<sup>1347</sup> *Poghosyan and Baghdasaryan v Armenia* (22999/06), European Court (2012) §§49-52.

<sup>1348</sup> See HRC General Comment 31, §16.



# CHAPTER 31

## FAIR TRIAL RIGHTS DURING STATES OF EMERGENCY

Some human rights are absolute and may never, in any circumstances, be restricted. However, certain treaties permit states parties to temporarily restrict aspects of (derogate from) certain human rights guarantees in some extreme emergencies. Many fair trial rights may not be temporarily restricted in times of emergency, although some human rights treaties do not expressly exclude these rights from derogation.

### 31.1 Fair trial rights during states of emergency

#### 31.2 Derogation

##### 31.2.1 Procedural requirements

##### 31.2.2 Compliance with international obligations

#### 31.3 Is there a state of emergency?

#### 31.4 Necessity and proportionality

#### 31.5 Fair trial rights that may never be restricted

##### 31.5.1 Non-derogable rights in death penalty cases

##### 31.5.2 International humanitarian law

### 31.1 FAIR TRIAL RIGHTS DURING STATES OF EMERGENCY

Some human rights guaranteed in international human rights treaties, like the right not to be subjected to torture or other ill-treatment, may never be restricted or limited in any circumstances.

However, the ICCPR, the American Convention, the Arab Charter and the European Convention permit states to “derogate from” (temporarily restrict the full exercise of)<sup>1349</sup> certain human rights guarantees in narrowly defined circumstances, but only to the extent strictly required by the situation.<sup>1350</sup> They each set out the permissible contexts for derogation, a catalogue of rights which are not subject to derogation and procedural requirements for derogation.

While not all fair trial rights are expressly listed as non-derogable in the ICCPR, American Convention, Arab Charter and European Convention, the Human Rights Committee and the jurisprudence of the Inter-American Court have clarified that a significant number of fair trial guarantees are non-derogable. (See **31.5** below.)

For example, the Human Rights Committee has clarified that respect for the rule of law and principles of legality requires that the fundamental requirements of fair trial must be respected at all times.<sup>1351</sup>

Furthermore, the Human Rights Committee has stated that proceedings in death penalty cases, including during states of emergency, must conform to the provisions of the ICCPR, including Articles 14 and 15.<sup>1352</sup>

<sup>1349</sup> Inter-American Court *Advisory Opinion OC-8/87*, (1987) §18; *Juan Carlos Abella v Argentina* (11.37), Inter-American Commission (1997) §§168-170.

<sup>1350</sup> HRC General Comment 29, §§3-4.

<sup>1351</sup> HRC General Comment 29, §16.

<sup>1352</sup> HRC General Comment 29, §15.

As derogating measures must not conflict with a state's other international law obligations, they must be consistent with the state's obligations under (other) treaties, international humanitarian law and customary international law. (See **Chapter 32**, Fair trial rights in armed conflict.)

The African Charter<sup>1353</sup> and some other (specialized) human rights treaties – including the Convention on the Rights of the Child, CEDAW, the Convention against Torture, the Convention on Enforced Disappearance, the Convention against Racism and the Migrant Workers Convention – do not permit derogation from any of the guarantees they set out in any circumstances. All of these treaties enshrine guarantees relevant to people suspected, accused or convicted of criminal charges.<sup>1354</sup>

Fair trial rights are also set out in a wide range of international non-treaty human rights standards, such as the Universal Declaration, the Body of Principles, the Basic Principles on the Role of Lawyers, the Basic Principles on the Independence of the Judiciary, and the Standard Minimum Rules. Non-treaty standards apply at all times and in all circumstances. They do not recognize the possibility that lower standards might be acceptable in times of an emergency.

The Principles on Fair Trial in Africa expressly state that “no circumstances whatsoever... may be invoked to justify derogations from the right to a fair trial”.<sup>a</sup>

<sup>a</sup> Section R of the Principles on the Right to Fair Trial in Africa

It is in times of national crisis that states are most likely to trample on fair trial rights. The declaration of an emergency generally lies exclusively with the executive, which often has the power to introduce emergency orders or regulations, sometimes without reference to normal processes. New criminal laws are frequently enacted, including restrictions on the rights to freedom of expression, association and assembly. Wider powers of arrest and detention, longer periods of detention in police custody, special tribunals and summary trial procedures are also often introduced.<sup>1355</sup>

## 31.2 DEROGATION

The ICCPR, the American Convention, the Arab Charter and the European Convention each set out the permissible contexts for derogation, a catalogue of rights that are expressly non-derogable under the treaty, and procedural requirements for derogation.<sup>b</sup> The provisions permit states to derogate from certain guarantees in narrowly defined circumstances, but only if, and to the extent, strictly required by the situation.<sup>1356</sup>

<sup>b</sup> Article 4 of the ICCPR, Article 27 of the American Convention, Article 4 of the Arab Charter, Article 15 of the European Convention

Derogating measures may not effectively nullify a right.<sup>1357</sup> Furthermore, any right or aspect of a right not specifically derogated from remains in full force.

Derogating measures must not discriminate on the basis of race, colour, sex, language, religion or social origin.<sup>c</sup> <sup>1358</sup>

<sup>c</sup> Article 4(1) of the ICCPR, Article 27(1) of the American Convention, Article 4(1) of the Arab Charter

Although the derogation provision of the European Convention does not expressly include a non-discrimination clause, the European Court held that a derogation by the

<sup>1353</sup> African Commission: *Article 19 v Eritrea*, (275/2003), 22nd Annual Report (2007) §§87, 98, *Commission Nationale des Droits de l'Homme et des Libertés v Chad* (74/92), (1995) §21, *Good v Botswana* (313/05), 29th Annual Report (2010) §175.

<sup>1354</sup> In addition, the following provisions of Protocols to the European Convention include non-derogation provisions: Article 4(3) of Protocol 7 (non-derogability of the prohibition against double jeopardy); Article 3 of Protocol 6 (non-derogability of the provisions of the protocol on the abolition of the death penalty); Article 2 of Protocol 13 (non-derogability of the prohibition of the death penalty in all circumstances).

<sup>1355</sup> See e.g., WGAD Opinion No. 23/2008 (*Rastanawi v Syrian Arab Republic*), UN Doc. A/HRC/13/30/Add.1 (2010) pp25-27, §§12-17; See CAT Concluding Observations: *Peru*, UN Doc. A/53/44 (1998) pp21-22, §202, *Cameroon*, UN Doc. CAT/C/CMR/CO/4(2010) §25; Special Rapporteur on torture, *Sri Lanka*, UN Doc. A/HRC/7/3/Add.6 (2009) §§41-46, 84, 91-92, 94.

<sup>1356</sup> HRC General Comment 29, §§3-4.

<sup>1357</sup> HRC General Comment 29, §4.

<sup>1358</sup> HRC General Comment 29, §8.

UK, which it concluded was concerned with national security rather than immigration measures, discriminated against non-nationals and was therefore disproportionate as the threat arose equally from nationals.<sup>1359</sup>

When proclaiming a state of emergency, a government is still bound by the rule of law, including those international law obligations from which it may not or has not derogated.<sup>1360</sup> Any temporary restrictions on rights must be consistent with the state's other obligations under international treaty and customary law, including international humanitarian law.<sup>a</sup> (See **Chapter 32** on fair trial rights under human rights law and humanitarian law during times of armed conflict and on the obligations of states when they exercise effective control over a territory or people beyond their borders.)

To ensure respect for the rule of law and human rights, both a declaration of a state of emergency and emergency measures must be subject to judicial oversight. Such oversight should ensure that the declaration, the emergency measures and their implementation are consistent with national and international law.<sup>1361</sup>

The aim of any derogation must be the restoration of a state of normalcy where human rights are fully respected. In practice, however, the strict limits on the permissible scope of emergency powers and procedural formalities have been ignored and derogation clauses have been misused, denying people their rights, including fair trial rights, under the cloak of a threat to national security.<sup>1362</sup>

Procedural and substantive requirements for derogation (described below) aim to limit the scope, extent and substance of restrictions on rights during emergencies.<sup>1363</sup>

### 31.2.1 PROCEDURAL REQUIREMENTS

The provisions of the human rights treaties that permit derogation contain important procedural requirements.

The requirement that the emergency be officially proclaimed<sup>b</sup> serves to give notice to the public in the state, and is intended to guarantee the principle of legality and the rule of law, and prevent arbitrariness.<sup>1364</sup>

Derogating states must notify the other states which are party to the treaty<sup>c</sup> (through the treaty depository) of the derogation and must include information about the derogating measures put in place.<sup>1365</sup>

The Human Rights Committee, the Inter-American Court and Commission, the Arab Human Rights Committee and the European Court, which review the implementation of the ICCPR, American Convention, Arab Charter and European Convention respectively, review the necessity and proportionality of the derogation and temporary measures adopted.<sup>1366</sup>

<sup>a</sup> Article 4(1) of the ICCPR, Article 27(1) of the American Convention, Article 4(1) of the Arab Charter, Article 15(1) of the European Convention

<sup>b</sup> Article 4(1) of the ICCPR, Article 4(1) of the Arab Charter

<sup>c</sup> Article 4(3) of the ICCPR, Article 27(3) of the American Convention, Article 4(3) of the Arab Charter, Article 15(3) of the European Convention

**1359** *A and Others v United Kingdom*, (3455/05), European Court Grand Chamber (2005) §§186-190.

**1360** HRC General Comment 29, §§2, 9; Inter-American Court Advisory Opinion No OC-8/87, (1987) §24; See *Advisory Opinion on the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, ICJ (2004), including §§89-113, especially 106; See HRC Concluding Observations: Israel, UN Doc. CCPR/C/ISR/CO/3 (2010) §3.

**1361** Special Rapporteur on states of emergency, UN Doc. E/CN.4/Sub.2/1997/19 (1997) §151; Special Rapporteur on the independence of judges and lawyers, UN Doc. A/613/271 (2008) §§16-19; See, Principle B(5) of the *Paris Minimum Standards of Human Rights Norms in a State of Emergency*.

**1362** HRC General Comment 29, §§1, 3; Special Rapporteur on the independence of judges and lawyers, UN Doc. A/62/207 (2007) §§34-35; Inter-American Court, *Advisory Opinion No OC-8/87*, (1987) §20.

**1363** HRC General Comment 29, §5.

**1364** See Principles 42 and 43 of the *Siracusa Principles*.

**1365** HRC General Comment 29, §17.

**1366** See HRC General Comment 29, §§17, 2-6; European Court: *Ireland v the United Kingdom* (5310/71), (1978) §207, *Lawless v Ireland (No.3)* (332/57), (1961) §40; See *The Greek Case: Denmark, Norway, Sweden and the Netherlands v Greece* (3321/67, 3322/67, 3323/67, 3344/67), Decision of the European Commission (1969) §§43-46.

### 31.2.2 COMPLIANCE WITH INTERNATIONAL OBLIGATIONS

Any temporary restrictions on the rights recognized in the ICCPR, the American Convention, the Arab Charter and the European Convention must be consistent with the state's other obligations under international law, including international humanitarian law and customary international law.<sup>a</sup>

<sup>a</sup> Article 4(1) of the ICCPR, Article 27(1) of the American Convention, Article 4(1) of the Arab Charter, Article 15(1) of the European Convention

This means that:

- obligations in other human rights treaties that are non-derogable or not derogated from must be respected;
- non-derogable obligations in customary human rights law, including fair trial obligations, prevail over any provision under a treaty permitting derogation;
- when international humanitarian law applies – during international armed conflict, occupation and non-international armed conflict – the fair trial guarantees under that law are also in force.<sup>1367</sup>

(See **Chapter 32** on fair trial rights during times of armed conflict.)

### 31.3 IS THERE A STATE OF EMERGENCY?

Under international human rights treaties, a state of emergency can be declared only if there is an exceptional and grave threat to the nation, such as the use or threat of force from within or externally that threatens a state's existence or territorial integrity.

Each treaty permitting derogation sets out the permissible context for derogation. The ICCPR, Arab Charter and European Convention permit derogations in times of a public emergency which threatens the life of the nation.<sup>b</sup>

<sup>b</sup> Article 4(1) of the ICCPR, Article 4(1) of the Arab Charter, Article 15 of the European Convention

The European Convention specifies, in addition, that derogations may take place “in times of war”.<sup>c</sup>

<sup>c</sup> Article 15 of the European Convention

The American Convention permits derogations “in time of war, public danger, or other emergency that threatens the independence or security of a State Party”.<sup>d</sup>

<sup>d</sup> Article 27(1) of the American Convention

#### ICCPR, Article 4

“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.”

<sup>1367</sup> *Advisory Opinion on the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, ICJ (2004), including §§89-113, especially 106.

The European Court has clarified that the words “public emergency threatening the life of the nation” refer to “an exceptional situation of crisis or emergency which affects the whole population and constitutes a threat to the organized life of the community of which the state is composed”.<sup>1368</sup>

The European Court has held that states have a “wide margin of appreciation” in deciding whether there is an emergency threatening the life of the nation.<sup>1369</sup> However, the European Court, like the Human Rights Committee and the Inter-American Court and Commission, assesses whether the declaration of a state of emergency is reasonable and whether the derogating measures are necessary and proportionate.

The European Commission has stated that to qualify as a situation in which derogation is permissible the public emergency must be actual or imminent; it must have effects on the whole nation; the continuance of organized life of the community must be threatened; and it must be exceptional in that normal measures or restrictions permitted by the European Convention must be plainly ineffective.<sup>1370</sup>

Many states have proclaimed states of emergency in response to violence, including from armed groups, which they characterized as “terrorism”. Significantly, human rights courts, including the European Court and the Inter-American Court did not dispute the characterization of such situations as emergencies in Northern Ireland,<sup>1371</sup> Turkey<sup>1372</sup> or in Peru;<sup>1373</sup> but, for example, in cases against Turkey and Peru they concluded that derogating measures taken were not strictly necessary or proportionate to address the emergency.<sup>1374</sup> (See **31.3** below.)

The CoE Guidelines on human rights and counter-terrorism, adopted following the attacks in the USA on 11 September 2001, which reflect the case law of the European Court, include the possibility of and parameters for derogations from the European Convention, when terrorism takes place “in a situation of war or other public emergency which threatens the life of the nation”.<sup>a</sup> The Parliamentary Assembly of the Council of Europe, however, called on Council of Europe member states not to derogate from the European Convention, in the context of their fight against terrorism.<sup>1375</sup> The only Council of Europe state that did so, following the attacks in the USA in 2001, was the UK (see **31.4** below).<sup>1376</sup>

By definition, a state of emergency is a temporary legal response to a threat.<sup>1377</sup> A perpetual state of emergency is a contradiction in terms. Unfortunately, a state of emergency sometimes becomes virtually permanent, because it is never lifted, is repeatedly renewed,<sup>1378</sup> or because the special measures are entrenched in laws after the emergency ends.

Rather than focusing on the temporary nature of derogating measures *per se*, the European Court has focused on the proportionality of the measures, considering such things as their scope, duration and the mechanisms for regular review of their continuing necessity.<sup>1379</sup>

<sup>a</sup> Guideline XV of the CoE Guidelines on human rights and counter-terrorism

**1368** European Court: *Lawless v Ireland (No. 3)* (332/57), (1961) The Law, §28, *A and Others v United Kingdom* (3455/05), Grand Chamber (2009) §176; See Principle 39 of the *Siracusa Principles*.

**1369** European Court: *Ireland v United Kingdom* (5310/71), (1978) §207, *Brannigan and McBride v United Kingdom* (14553/89, 14554/89), (1993) §43, *A and Others v United Kingdom* (3455/05), Grand Chamber (2009) §173.

**1370** *The Greek Case: Denmark, Norway, Sweden and the Netherlands v Greece* (3321/67, 3322/67, 3323/67, 3344/67) European Commission (1969) §113.

**1371** *Brannigan and McBride v United Kingdom* (14553/89, 14554/89), European Court (1993) §§41-47.

**1372** *Aksoy v Turkey* (21987/93), European Court (1996) §§68-70.

**1373** *Castillo Petruzzi et al v Peru*, Inter-American Court (1999) §109.

**1374** *Aksoy v Turkey* (21987/93), European Court (1996) §§71-84; *Castillo Petruzzi et al v Peru*, Inter-American Court (1999) §§110-112.

**1375** Parliamentary Assembly of the Council of Europe Resolution 1271 (2002) §§9, 12(w).

**1376** See *A and Others v United Kingdom* (3455/05), European Court Grand Chamber (2009) §180.

**1377** HRC General Comment 29, §2; UN General Assembly resolution 65/221, §5.

**1378** HRC Concluding Observations: *Syria*, UN Doc. CPCR/CO/84/SYR (2005) §6; See *A and Others v United Kingdom* (3455/05) European Court Grand Chamber (2009) §178.

**1379** *A and Others v United Kingdom* (3455/05), European Court Grand Chamber (2009) §178.

## 31.4 NECESSITY AND PROPORTIONALITY

<sup>a</sup> Article 4(1) of the ICCPR, Article 27(1) of the American Convention, Article 4(1) of the Arab Charter, Article 15(1) of the European Convention

<sup>b</sup> Article 4(1) of the ICCPR, Article 27(1) of the American Convention, Article 4(1) of the Arab Charter

Any temporary restriction of rights during a state of emergency, and the measures put in place (derogating measures), must be strictly required by the particular situation.<sup>a 1380</sup> The principle of proportionality requires that the derogating measures must be reasonable in light of what is necessary to address the particular emergency threatening the life of the nation. It also requires regular reviews of the necessity of the derogation by the legislative and executive branches, with a view to lifting the derogation as soon as possible.<sup>1381</sup>

The temporary restriction of rights and derogating measures must not involve or result in discrimination, including on grounds such as race, colour, sex, language, religion or social origin.<sup>b 1382</sup>

The degree of interference with rights and the scope of any measure of derogation (both in terms of the territory to which it applies and its duration) must “stand in a reasonable relation to what is actually necessary to combat an emergency threatening the life of the nation”.<sup>1383</sup> The requirement of proportionality may require that emergency measures are limited to a particular part of the country.<sup>1384</sup>

The Inter-American Court has stated that any action which goes beyond what is strictly required by the situation would be unlawful notwithstanding the existence of the emergency situation.<sup>1385</sup>

The European Court has indicated that for a measure of derogation to be considered necessary and lawful, it must be clear that it is not possible to use other measures with less impact, such as permissible restrictions on Convention rights to protect public safety, health or public order. In addition, the measure must be likely to contribute to the solution of the problem. The Court reviews the nature of the rights affected by the derogation, as well as the circumstances leading to and the duration of the emergency situation.<sup>1386</sup>

The European Court considered that a derogating measure allowing seven days’ detention before being brought before a judge, which was justified by the UK government on the ground of an “overriding need to bring terrorists to justice”, contained sufficient safeguards against abuse. The safeguards included access to a lawyer within 48 hours, access to a doctor and the rights to challenge the legality of detention, to notify a third person and to periodic review of the legislation.<sup>1387</sup>

However, the European Court considered that the safeguards against abuse within derogating measures in Turkey were insufficient. In one case examined, an individual had been detained for at least 14 days on terrorism-related charges without being brought before a judge. The man, who was tortured, was held incommunicado and without any realistic possibility of being brought before a court to challenge the legality of the detention.<sup>1388</sup>

**1380** HRC General Comment 32, §6.

**1381** HRC Concluding Observations: Algeria, UN Doc. CCPR/C/DZA/CO/3 (2007) §14, Israel, UN Doc. CCPR/C/ISR/CO/3 (2010) §7; Guideline XV(3) of the CoE Guidelines on human rights and counter-terrorism (2002); Report of the CoE Venice Commission on Counter-Terrorism and Human Rights, CDL-AD(2010)022, §17.

**1382** HRC General Comment 29, §8.

**1383** M. Nowak, *U.N. Covenant on Civil and Political Rights: CCPR Commentary, 2nd revised edition*, Engel, 2005, pp97-98, §§25-27; HRC General Comment 29, §4; See *A and Others v United Kingdom* (3455/05), European Court Grand Chamber (2009) §184; HRC Concluding Observations: Israel, UN Doc. CCPR/C/ISR/CO/3 (2010) §7.

**1384** *Sakik and Others v Turkey* (23878-81/94), European Court (1997) §§36-39.

**1385** Inter-American Court Advisory Opinion OC-8/87, (1987) §38.

**1386** See, European Court: *Lawless v Ireland (No. 3)*, (332/57), (1961) The Law, §§35-36, *A and Others v United Kingdom* (3455/05), Grand Chamber (2009) §§173, 176, 178, 182-184; UN Mechanisms Joint Report on detainees at Guantánamo Bay, UN Doc. E/CN.4/2006/120 (2006) §13.

**1387** *Brannigan and McBride v United Kingdom* (14553/89, 14554/89), (1993) §§55, 61-66. (Amnesty International made a third party submission to the Court in this case, arguing that the remaining safeguards were insufficient to protect detainees from torture or ill-treatment during the first 48 hours of incommunicado detention.)

**1388** *Aksoy v Turkey* (21987/93), European Court (1996) §§83-84; See European Court: *Demir and Others v Turkey* (21380/93, 21381/93, 21383/93), (1998) §§44-45, 49-58, *Şen v Turkey* (41478/98), (2003) §§27-29.

The European Court has also held that other derogating measures in the UK were disproportionate and discriminatory. The measures allowed indefinite detention without trial of foreign nationals certified by the executive as suspected terrorists and a threat to national security, but did not apply to UK nationals.<sup>1389</sup>

## 31.5 FAIR TRIAL RIGHTS THAT MAY NEVER BE RESTRICTED

The ICCPR, American Convention, Arab Charter and European Convention each contain a different catalogue of non-derogable rights.<sup>a</sup>

In addition to the non-derogable rights expressly enumerated in these treaties, the Human Rights Committee and the Inter-American Court have clarified that further rights and obligations, including some fair trial rights and associated rights, are non-derogable under human rights law.<sup>1390</sup>

The Human Rights Committee has emphasized that respect for the rule of law and the principle of legality requires that the fundamental requirements of fair trial must be respected at all times, including during a state of emergency.<sup>1391</sup>

The following fair trial rights and associated rights are specifically recognized and identified as non-derogable under human rights law, according to the treaty or authority indicated. This is a developing area of international human rights law, and therefore this list should not be considered as either exhaustive or closed. (The list does not include several rights that are guaranteed under international humanitarian law.)

(See also **31.5.1** on death penalty cases, as well as **31.5.2** and **Chapter 32** on fair trial rights under international humanitarian law.)

- The prohibition against torture or other cruel, inhuman or degrading treatment or punishment.<sup>b</sup> (See **Chapter 10**.)

This includes the prohibition of the use in proceedings of evidence obtained as a result of such treatment, except in proceedings against alleged perpetrators of torture or other ill-treatment.<sup>1392</sup> (See **Chapter 17**.)

Prolonged incommunicado detention<sup>1393</sup> and corporal punishment<sup>1394</sup> violate the prohibition against torture or other ill-treatment and are therefore impermissible at all times. (See **Chapters 4.3, 10** and **25**.)

- The right of people deprived of their liberty to humane treatment.<sup>c</sup> <sup>1395</sup> (See **Chapter 10.3**.)
- The prohibition of enforced disappearance.<sup>d</sup> <sup>1396</sup>
- The prohibition of arbitrary arrest or detention, including unacknowledged detention.<sup>1397</sup> (See **Chapter 1.3**.)

<sup>a</sup> Article 4(2) of the ICCPR, Article 6 of the Second Optional Protocol to the ICCPR, Article 27(2) of the American Convention, Article 4(2) of the Arab Charter, Article 15(2) of the European Convention, Article 4(3) of Protocol 7 to the European Convention, Article 2 of Protocol 13 to the European Convention

<sup>b</sup> Article 4(2) of the ICCPR, Article 2(2) of the Convention against Torture, Article 27(2) of the American Convention, Article 4(2) of the Arab Charter, Article 15(2) of the European Convention

<sup>c</sup> Article 27(2) of the American Convention, Article 4(2) of the Arab Charter

<sup>d</sup> Article 1(2) of the Convention on Enforced Disappearance, Article X of the Inter-American Convention on Disappearance

<sup>1389</sup> *A and Others v United Kingdom* (3455/05), European Court Grand Chamber (2009) §§176-190.

<sup>1390</sup> HRC General Comment 29, §15; Inter-American Court: Advisory Opinion OC-8/87 (1987), Advisory Opinion OC-9/87 (1987).

<sup>1391</sup> HRC General Comment 29, §16; HRC General Comment 32, §6.

<sup>1392</sup> HRC General Comment 32, §6.

<sup>1393</sup> WGAD, UN Doc. E/CN.4/2005/6 (2004) §76; See Rodley and Pollard, *The Treatment of Prisoners under International Law*, 3rd

edition, Oxford University Press, 2009, pp486-488, 492-493.

<sup>1394</sup> Among others, Special Rapporteur on torture: UN Docs. A/HRC/10/44 (2009) §37, A/60/316 (2006) §§18-28.

<sup>1395</sup> HRC General Comment 29, §13(a).

<sup>1396</sup> UN Mechanisms Joint Study on secret detention, UN Doc. A/HRC/13/42 (2010) §50.

<sup>1397</sup> HRC: General Comment 29, §11, General Comment 24, §8; WGAD Deliberation No. 9, UN Doc. A/HRC/22/44 (2012).

<sup>a</sup> Article 4(2) of the ICCPR, Article 27(2) of the American Convention, Article 4(2) of the Arab Charter

<sup>b</sup> Article 27(2) of the American Convention, Article X of the Inter-American Convention on Disappearance, Article 4(2) of the Arab Charter; See Section M(5)(e) of the Principles on Fair Trial in Africa

<sup>c</sup> Article 4(2) of the Arab Charter; See Article 27(2) of the Inter-American Convention

<sup>d</sup> Article 4(2) of the Arab Charter

<sup>e</sup> Article 4(2) of the ICCPR, Article 27(2) of the American Convention, Article 4(2) of the Arab Charter, Article 15(2) of the European Convention

<sup>f</sup> Article 27(2) of the American Convention, Article 4(2) of the Arab Charter

<sup>g</sup> Article 4(2) of the Arab Charter

<sup>h</sup> Article 27(2) of the American Convention

<sup>i</sup> Article 27(2) of the American Convention

<sup>j</sup> Article 4(2) of the Arab Charter, Article 4(3) of Protocol 7 to the European Convention

<sup>k</sup> Article 27(2) of the American Convention; See Article X of the Inter-American Convention on Disappearance, Article 4(2) of the Arab Charter; See Section M(5)(e) of the Principles on Fair Trial in Africa

■ The right to be recognized as a person before the law (guaranteeing the right to access to the courts to vindicate the individual's rights).<sup>a</sup>

■ The right to petition a court challenging the legality of detention.<sup>b 1398</sup> (See **Chapter 6**.)

Although this right is not among the non-derogable rights listed in Article 15(2) of the European Convention, the European Court has indicated in rulings in the context of emergency situations that it is an important safeguard against abuse,<sup>1399</sup> and that procedural guarantees, including providing the individual with sufficient information to effectively challenge the allegations against them, must be afforded.<sup>1400</sup>

■ The right to proceedings before an independent, impartial and competent court.<sup>c 1401</sup> (See **Chapter 12**, also see **Chapter 29** on permissible jurisdiction of military courts.)

The Human Rights Committee clarified that even in emergencies, only a court of law may try and convict a person for a criminal offence.<sup>1402</sup>

Article 13 of the Arab Charter, which is non-derogable, guarantees trials with "adequate safeguards" before independent, impartial and competent courts.

■ The right to a public trial, in all but exceptional cases which are warranted in the interests of justice.<sup>d</sup>

■ The requirement of clear and precise definitions of offences and punishments; the prohibition of retroactive application of criminal laws (including the imposition of a heavier penalty than was applicable at the time of the crime); and the right to benefit from a lighter penalty.<sup>e 1403</sup> (See **Chapters 18** and **25**.)

■ The obligation to separate people held in pre-trial detention from those who have been convicted and to treat them in line with their status as unconvicted.<sup>f</sup>

■ The right to the presumption of innocence.<sup>1404</sup> (See **Chapter 15**.)

■ The right to legal aid for those without adequate financial resources.<sup>g</sup> (See **Chapters 3** and **20.3.2**.)

■ The prohibition of collective punishment.<sup>h 1405</sup> (See **Chapters 25** and **32.5.1**.)

■ The principle that the essential aim of punishment involving deprivation of liberty is reform and rehabilitation.<sup>i</sup>

■ The prohibition against double jeopardy.<sup>j</sup> (See **Chapters 18.2** and **32.4.4**.)

■ Judicial guarantees, such as habeas corpus and *amparo*, to protect non-derogable rights.<sup>k 1406</sup>

**1398** HRC General Comment 29, §16; Inter-American Court: *Advisory Opinion OC-8/87*, (1987) §§42, 27, 29, *Neira Alegria et al v Peru*, (1995) §§77-84, 91(2), *Castillo Petruzzi et al v Peru*, (1999) §§184-88; SPT: *Honduras*, UN Doc. CAT/OP/HND/1 §282(b); See *A and Others v United Kingdom* (3455/05), European Court Grand Chamber (2009) §§216-217; See also *WGAD*, UN Doc. A/HRC/7/4 (2008) §§67-68, 82(a).

**1399** European Court: *Brannigan and McBride v United Kingdom*, (14553/89, 14554/89), (1993) §§55-56, 62-64, *Aksoy v Turkey*, (21987/93), (1996) §§82-84.

**1400** *A and Others v United Kingdom* (3455/05), European Court Grand Chamber (2005) §§202-224.

**1401** HRC: General Comment 32, §19, *González del Río v Peru*, UN Doc. CCPR/C/46/D/263/1987 (1992) §5.1; Inter-American Court: *Advisory Opinion OC-8/87*, (1987) §§27-30, *Reverón Trujillo v Venezuela*, (2009) §68.

**1402** HRC General Comment 29, §16.

**1403** HRC General Comment 29, §7; *Scoppola v Italy (No.2)* (10249/03), European Court Grand Chamber (2009) §§108-109, (recognized as inherent in Article 7 of the European Convention).

**1404** HRC: General Comment 29, §16, General Comment 32, §6.

**1405** HRC General Comment 29, §11.

**1406** HRC General Comment 29, §16, General Comment 32, §6; Inter-American Court *Advisory Opinion OC-9/87* (1987) §§23-41.



The Inter-American Court clarified that the determination of the judicial remedies which are essential for the protection of non-derogable rights “will differ depending on the rights that are at stake”. However, in all cases the judges must be independent and impartial and have the power to rule on the lawfulness of the emergency measures.<sup>1407</sup> The principles of due process should apply.<sup>1408</sup>

- The right to effective judicial remedies for violations of other human rights.<sup>1409</sup>

The Human Rights Committee has clarified that this right is inherent in all of the ICCPR and that states must provide effective remedies which are accessible to people who claim that their rights – whether non-derogable or restricted in the light of a derogation – were violated.<sup>1410</sup> Such remedies should provide an opportunity for national courts to examine claims regarding the lawfulness of emergency measures and alleged violations of individuals’ rights resulting from their implementation.

With regard to the right of arrested or detained people to be promptly brought before a judge, the Human Rights Committee has indicated that it is not subject to derogation.<sup>1411</sup> The jurisprudence of the European Court indicates that while some delay in bringing a person before a court may be permissible during states of emergency, the delay must not be prolonged. The European Court requires that there must be adequate safeguards against abuse, such as the right to access to a lawyer, doctor, and family and the right to habeas corpus.<sup>1412</sup>

- The right to compensation for individuals whose innocence is established by a final judgment.<sup>a</sup>

### 31.5.1 NON-DEROGABLE RIGHTS IN DEATH PENALTY CASES

The right to life and associated guarantees and the prohibition of torture and other ill-treatment are non-derogable.<sup>b</sup>

The non-derogability of the right to life means that proceedings against individuals charged with crimes carrying the death penalty must adhere strictly to international standards, including during states of emergency.

The Human Rights Committee has stated that proceedings in capital cases, including during states of emergency, must conform to the provisions of the ICCPR, including Articles 14 and 15.<sup>1413</sup>

The imposition of the death penalty following proceedings that fail to meet international standards violates the right to life.<sup>c</sup> <sup>1414</sup>

Furthermore:

- States that are party to Protocol 13 to the European Convention may not impose the death penalty at any time, including during times of emergency.<sup>d</sup>

<sup>a</sup> Article 4(2) of the Arab Charter

<sup>b</sup> Article 4(2) of the ICCPR, Article 27(2) of the American Convention, Article 4(2) of the Arab Charter, Article 15(2) of the European Convention

<sup>c</sup> See Articles 4(2) and 6(2) of the ICCPR, Article 27(2) of the American Convention

<sup>d</sup> Article 2 of Protocol 13 to the European Convention

<sup>1407</sup> Inter-American Court *Advisory Opinion OC-8/87*, (1987) §§28-30.

<sup>1408</sup> Inter-American Court *Advisory Opinion OC-9/87*, §§38-39, 41(3).

<sup>1409</sup> HRC *General Comment 29*, §14; Inter-American Court *Advisory Opinion OC-9/87*, (1987) §§23-41.

<sup>1410</sup> HRC *General Comment 29*, §14; See HRC *Concluding Observations: Gabon*, UN Doc. CCPR/CO/70/GAB (2000) §10.

<sup>1411</sup> HRC: UN Doc. *A/49/40*, vol. 1, (1994) annex XI, p119, §2 (also cited in footnote 9 of HRC *General Comment 29*); See HRC

Concluding Observations: *Israel*, UN Doc. CCPR/C/ISR/CO/3 (2010) §7, *Thailand*, UN Doc. CCPR/CO/84/THA (2005) §13.

<sup>1412</sup> European Court: *Brannigan and McBride v United Kingdom* (14553/89, 14554/89), (1993) §§61-66, *Aksoy v Turkey* (21987/93), (1996) §§83-84.

<sup>1413</sup> HRC *General Comment 29*, §§16, 15.

<sup>1414</sup> HRC: *General Comment 29*, §15, *General Comment 32*, §6; *Öcalan v Turkey* (46221/99), European Court Grand Chamber (2005) §§165-166; See *Al-Saadoon and Mufdhi v United Kingdom* (61498/08), European Court (2010) §§115-120.

<sup>a</sup> Article 6(2) of the Second Optional Protocol to the ICCPR, Article 2 of the Protocol to the American Convention on Human Rights to Abolish the Death Penalty, Articles 2 and 3 of Protocol 6 to the European Convention

<sup>b</sup> Article 4(2) of the ICCPR, Article 37(a) of the Convention on the Rights of the Child, Article 27(2) of the American Convention

<sup>c</sup> Article 27(2) of the American Convention

<sup>d</sup> Article 4(2) of the ICCPR, Article 27(2) of the American Convention

<sup>e</sup> Article 4(1) of the ICCPR, Article 27(1) of the American Convention, Article 4(1) of the Arab Charter, Article 15(1) of the European Convention

■ States which are party to the Second Optional Protocol to the ICCPR, the Protocol to the American Convention on Human Rights to Abolish the Death Penalty or Protocol 6 to the European Convention may not impose the death penalty in states of emergency – except in times of war, when the death penalty may only be imposed after conviction for serious crimes of a military nature, following fair proceedings.<sup>a 1415</sup>

■ The death penalty may never be imposed on a person who was under 18 at the time of the crime.<sup>b 1416</sup> Under the American Convention, it may not be imposed on a person who is over the age of 70.<sup>c</sup> These prohibitions are non-derogable.

■ The prohibition against executing pregnant women is also non-derogable.<sup>d</sup>

(See **Chapters 28** and **32.6** on death penalty cases.)

### 31.5.2 INTERNATIONAL HUMANITARIAN LAW

Fair trial rights are guaranteed under international humanitarian law. These rights are non-derogable in international human rights law as “other obligations under international law”,<sup>e</sup> at a minimum, in the situations in which they apply: international armed conflict, occupation and internal armed conflict.

The Human Rights Committee has stated that it finds no justification for derogating from the elements of the right to fair trial that are explicitly guaranteed under international humanitarian law during other emergency situations.<sup>1417</sup>

(See **Chapter 32** on fair trial guarantees in armed conflict.)

**1415** For this exception to apply to states parties to the Second Protocol to the ICCPR and to the Protocol to the American Convention on Human Rights to Abolish the Death Penalty, the state must have made a reservation or declaration (respectively) to the treaty at the time of ratification or accession.

**1416** HRC General Comment 24, §8; *Michael Domingues v United States* (12.285), Inter-American Commission, Report 62/02, §§84, 85.

**1417** HRC General Comment 29, §16.

# CHAPTER 32

## FAIR TRIAL RIGHTS IN ARMED CONFLICT

International humanitarian law, which provides minimum standards of conduct during armed conflict, contains important fair trial safeguards. These apply to various categories of people during armed conflict, whether international or non-international, including civil wars. Although the obligation to ensure a fair trial applies equally to states and to armed opposition groups, in most instances such groups will not have competent, independent and impartial courts able to guarantee a fair trial, so they will only be able to satisfy this obligation by surrendering suspects to an international criminal court or to a state exercising universal jurisdiction.

### 32.1 International humanitarian law

#### 32.1.1 International humanitarian law and human rights law

#### 32.1.2 Extraterritorial application

#### 32.1.3 International armed conflict

#### 32.1.4 Non-international armed conflict

#### 32.1.5 Fair trial rights

#### 32.1.6 Non-discrimination

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### 32.2 Before the trial hearing

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### 32.3 Rights in pre-trial detention

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### 32.4 Rights at trial

#### 32.4.1 Competent, independent and impartial tribunal

#### 32.4.2 Trial within a reasonable time

#### 32.4.3 Defence rights

#### 32.4.4 Prohibition of double jeopardy

#### 32.4.5 Protection against retrospective prosecutions or punishments

### 32.5 Sentencing in non-death penalty cases

#### 32.5.1 Prohibition of collective punishments

### 32.6 Death penalty cases

## 32.1 INTERNATIONAL HUMANITARIAN LAW

International humanitarian law governs the conduct of parties to armed conflict, although human rights law continues to apply in a complementary and reinforcing manner.

The right to fair trial is guaranteed in customary international humanitarian law and in treaties during both international and non-international armed conflict.<sup>1418</sup>

The rule of customary international humanitarian law, applicable in all armed conflict – “[n]o one may be convicted or sentenced, except pursuant to a fair trial affording all essential judicial guarantees” – is often broader than the guarantees found in international humanitarian law treaties. The “essential judicial guarantees” of the right to fair trial under customary international humanitarian law are reflected not only in international humanitarian law treaties, but also in instruments establishing international and internationalized criminal courts, such as the Statutes of the ICC, the Special Court for Sierra Leone and the Rwanda and Yugoslavia Tribunals, and in international and regional human rights treaties and instruments.<sup>1419</sup>

The starting point with regard to fair trial in international armed conflict is Article 75 of Protocol I to the Geneva Conventions. This treaty had been ratified by 173 states as of June 2013 and the fair trial guarantees in Article 75 are now recognized to reflect customary international humanitarian law.<sup>1420</sup> Its safeguards apply to all “people in the power of a party to an international armed conflict”, which includes prisoners of war, people denied combatant status and people charged with crimes against humanity and war crimes. Article 75 reinforces and, to the extent that it provides broader protection, supplants earlier, more specific safeguards for prisoners of war under the Third Geneva Convention and civilians under the Fourth Geneva Convention.

In non-international armed conflicts, including civil wars, the safeguards in Article 3 common to the four Geneva Conventions (“common Article 3”) and Protocol II apply. The principles in common Article 3 are now considered to apply in both international and non-international armed conflicts.<sup>1421</sup> Article 6 of Protocol II is largely based on the fair trial provisions in the Third and Fourth Geneva Conventions and the ICCPR.

Fair trial rights under international humanitarian law must be respected in all circumstances in which international humanitarian law applies – there can be no derogation from the relevant provisions. Denial of the right to a fair trial can amount to a war crime in certain circumstances.<sup>a 1422</sup>

Because fair trial guarantees under international humanitarian law treaties apply only in specified circumstances and to specific classes of people, and the two Protocols have not yet been ratified by all states, the applicability of each treaty provision must be carefully examined before citing it. Although the specific provisions may differ, the basic requirement that a trial be fair ensures that essentially the same guarantees apply in both international and non-international conflicts.

### 32.1.1 INTERNATIONAL HUMANITARIAN LAW AND HUMAN RIGHTS LAW

International human rights law continues to apply during armed conflict.<sup>1423</sup> As the International Court of Justice has stated: “the protection offered by human rights conventions does not cease in time of armed conflict, save through the effect of provisions for derogation of the kind to be found in Article 4 of the International Covenant on Civil and Political Rights”.<sup>1424</sup> However, derogation from any fundamental principles of fair trial is prohibited (see **Chapter 31**, Fair trial rights during states of emergency).

<sup>a</sup> Article 8(2)(a)(vi) and (c)(iv) of the ICC Statute

<sup>1418</sup> ICRC *Customary IHL Study*, Rule 100 (Fair Trial Guarantees).

<sup>1419</sup> ICRC *Customary IHL Study*, p354.

<sup>1420</sup> See e.g., Hillary Rodham Clinton, ‘Reaffirming America’s Commitment to Humane Treatment of Detainees’ (Press Statement, 7 March 2011) (declaring that the USA, “out of a sense of legal obligation, will adhere to the set of norms in Article 75 of Protocol I in international armed conflict”).

<sup>1421</sup> *Nicaragua v United States of America*, ICJ (1986) §219 (concerning military and paramilitary activities in and against Nicaragua).

<sup>1422</sup> ICRC *Customary IHL Study*, Rule 100 (Fair Trial Guarantees).

<sup>1423</sup> *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda)*, ICJ (2005) §216 (henceforth “*ICJ DRC v Uganda case*”); *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, ICJ Advisory Opinion (2004), §106 (henceforth “*ICJ Wall Advisory Opinion*”); *Legality of the Threat or Use of Nuclear Weapons*, ICJ Advisory Opinion, (1996), §25 (henceforth “*ICJ Nuclear Weapons Advisory Opinion*”).

<sup>1424</sup> *ICJ Wall Advisory Opinion*, §106; See ICJ: *Democratic Republic of the Congo v Uganda* (2005), §216, *Nuclear Weapons Advisory Opinion*, §25.

The Human Rights Committee has declared that obligations under the ICCPR apply “in situations of armed conflict to which the rules of international humanitarian law are applicable”.<sup>1425</sup> The concurrent application of human rights law and international humanitarian law in armed conflict is crucial because international humanitarian law treaties sometimes contain only minimum fair trial guarantees and there are some gaps that are filled by human rights law.

The International Court of Justice has stated: “there are thus three possible situations: some rights may be exclusively matters of international humanitarian law; others may be exclusively matters of human rights law; yet others may be matters of both these branches of international law”.<sup>1426</sup> The right to fair trial falls into the third category, as the two branches of law complement and reinforce this right.<sup>1427</sup>

In the very few instances where there may appear to be a conflict between international human rights and international humanitarian law, there are well established methods of interpretation to resolve the issue. The method chosen in each instance should be the one whose outcome is the most protective of the right to fair trial. The preferred method is *interprétation conforme*: whenever it is possible to do so, the two obligations are interpreted consistently with each other. Using the principle of *lex posterior* in case of a real conflict of norms, the most recent obligation prevails. Using the principle of *lex specialis*, the most specific obligation prevails over the more general one.

With regard to the right to a fair trial, international humanitarian law expressly or implicitly incorporates other international law, including human rights law, whenever that law is more protective. Therefore, it is rarely necessary to invoke these methods.

First, with regard to international humanitarian law treaties, Article 75(8) of Protocol I, applicable in international armed conflict, expressly states that none of the fair trial guarantees in that article “may be construed as limiting or infringing any other more favourable provision granting greater protection, under any applicable rules of international law”. Moreover, Article 75, which reflects customary international law, informs or supercedes any previous less protective treaty provision. Similarly, the fair trial guarantees in common Article 3 (the principles of which are applicable in all armed conflict), “must ... be given specific content by application of other bodies of law in practice”,<sup>1428</sup> which includes human rights law.

Second, under customary international humanitarian law, the right to fair trial includes “all essential judicial guarantees”, such as those found in instruments establishing international and internationalized criminal courts and human rights treaties and instruments.

As an example of how these interrelated obligations work in practice, Article 105 of the Third Geneva Convention provides that “[t]he advocate or counsel conducting the defence on behalf of the prisoner of war shall have at his disposal a period of two weeks at least before the opening of the trial, as well as the necessary facilities to prepare the defence of the accused.” Two weeks is clearly insufficient to prepare for trial of any serious crime and human rights law guarantees adequate time to prepare a defence. The state conducting the trial is bound under common Article 3 – the principles of which are applicable in all circumstances – to afford “all the judicial guarantees which are recognized as indispensable”, including the right to adequate time and facilities to

<sup>1425</sup> HRC General Comment 31, §11.

<sup>1426</sup> ICJ *Wall Advisory Opinion*, §106.

<sup>1427</sup> HRC General Comment 31, §11.

<sup>1428</sup> Jakob Kellenberger, President of the ICRC, ‘Statement to the 27th Annual Round Table on Current Problems of International Humanitarian Law’ (September 2003).

prepare a defence. In addition, the state is also bound under customary international law – independently of any treaty obligations – to provide “all essential judicial guarantees” of a fair trial, including adequate time to prepare a defence.

### 32.1.2 EXTRATERRITORIAL APPLICATION

The obligations imposed by international humanitarian law on a state extend beyond the borders of that state. It is also increasingly recognized that a state’s human rights obligations apply to people abroad who are under its power or effective control. This includes when agents of the state are abroad, for example during armed conflict, peacekeeping operations or in occupied territory.

The International Court of Justice has concluded that the ICCPR “is applicable in respect of acts done by a State in the exercise of its jurisdiction outside its own territory”.<sup>1429</sup> Similarly, the Human Rights Committee has declared that states parties to the ICCPR are required “to respect and to ensure” the rights guaranteed in that treaty “to all persons subject to their jurisdiction”, including “those within the power or effective control of the forces of a State Party acting outside its territory”.<sup>1430</sup>

States parties to the American Convention and the European Convention have similar obligations to individuals outside their territory who are within their authority or effective control.<sup>1431</sup>

### 32.1.3 INTERNATIONAL ARMED CONFLICT

People who are in the power of a party to an international armed conflict are guaranteed the right to a fair trial in Article 75 of Protocol I. In particular, under Article 75(7), individuals suspected of war crimes or crimes against humanity must be tried “in accordance with the applicable rules of international law” and, if they do not benefit from more favourable treatment under the Four Geneva Conventions or Protocol I, must be treated in accordance with Article 75. Other provisions concerning the right of prisoners of war to a fair trial in criminal cases are found in Articles 82 to 88 and 99 to 108 of the Third Geneva Convention.<sup>1432</sup>

Provisions guaranteeing a fair trial to civilian residents in occupied territory are found in Articles 64 to 78 of the Fourth Geneva Convention. The rights of civilian aliens in occupied territory are covered in Articles 35 to 46 and the rights of civilians who have been interned are found in Articles 79 to 141.

### 32.1.4 NON-INTERNATIONAL ARMED CONFLICT

The primary international humanitarian law provisions concerning the right to fair trial in non-international armed conflicts are found in Article 3 common to all four Geneva Conventions and Article 6 of Protocol II.

Common Article 3 applies to armed conflict “not of an international character” and its provisions apply to “[p]ersons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed *hors de combat* by sickness, wounds, detention, or any other cause”.

Protocol II, which supplements and develops, but does not restrict, common Article 3, has a more limited scope. Article 1(1) provides that it applies to armed conflicts involving “dissident armed forces or other organized armed groups” which exercise such control over territory “as

<sup>1429</sup> ICJ *Wall Advisory Opinion*, §§111, 113.

<sup>1430</sup> HRC *General Comment 31*, §10; See *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v Russian Federation)*, Order, Request for provisional measures, ICJ, 15 October 2008, §109.

<sup>1431</sup> Inter-American Commission *Report on Terrorism and Human Rights*, (2002) §44; *Al-Skeini v United Kingdom* (55721/07),

European Court Grand Chamber (2011) §149.

<sup>1432</sup> These rights to a fair trial in a criminal case should be distinguished from the rights to fair proceedings in disciplinary cases (where the sanctions do not exceed a fine or 30 days’ confinement), found in Articles 89 to 97 of the *Third Geneva Convention*.

to enable them to carry out sustained and concerted military operations and to implement this Protocol". Protocol II does not, under Article 1(2), however, "apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature, as not being armed conflicts".

### 32.1.5 FAIR TRIAL RIGHTS

When there is no express provision concerning a particular aspect of the right to fair trial in an international humanitarian law treaty, that does not mean that international humanitarian law permits that aspect of the right to be violated. The fair trial guarantees are broadly worded so as to incorporate the full range of contemporary fair trial guarantees, and they expressly specify only the minimum requirements to be respected in all circumstances.

Although the obligation to ensure a fair trial applies equally to states and to armed opposition groups, in most instances such groups will not have competent, independent and impartial courts able to guarantee a fair trial, so they will only be able to satisfy this obligation by surrendering suspects to an international criminal court or to a state exercising universal jurisdiction.

#### **Common Article 3 of the Geneva Conventions**

(non-international armed conflicts; principles applicable to all armed conflicts)

"...(1) Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed *hors de combat* by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria.

To this end the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons:

- (a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;
- (b) taking of hostages;
- (c) outrages upon personal dignity, in particular humiliating and degrading treatment;
- (d) the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples..."

#### **Protocol I, Article 75(4)**

(Applicable in international armed conflicts)

"No sentence may be passed and no penalty may be executed on a person found guilty of a penal offence related to the armed conflict except pursuant to a conviction pronounced by an impartial and regularly constituted court respecting the generally recognized principles of regular judicial procedure..."

#### **Protocol II, Article 6(2)**

(Applicable in non-international armed conflicts)

"No sentence shall be passed and no penalty shall be executed on a person found guilty of an offence except pursuant to a conviction pronounced by a court offering the essential guarantees of independence and impartiality..."

During international armed conflicts, Article 75(4) of Protocol I requires that trials of people in the power of one of the parties to the conflict must take place before “an impartial and regularly constituted court respecting the generally recognized principles of regular judicial procedure”. Article 75(4) of Protocol I then contains a non-exhaustive list of fair trial guarantees. Some are broadly worded, such as Article 75(4)(a) which requires that the procedure “shall afford the accused before and during his trial all necessary rights and means of defence”.

For civilians living in territory occupied during an international armed conflict, Article 71 of the Fourth Geneva Convention provides that “[n]o sentence shall be pronounced by the competent courts of the Occupying Power except after a regular trial”.

In non-international armed conflicts, common Article 3 requires that trials must afford “all the judicial guarantees which are recognized as indispensable by civilized peoples”. Article 6(2) of Protocol II requires that the court offer “the essential guarantees of independence and impartiality” and contains a short, non-exhaustive, list of guarantees.

### 32.1.6 NON-DISCRIMINATION

International humanitarian law contains two types of non-discrimination provision relevant to trials. People held by one party to an international armed conflict may not be deprived of rights guaranteed to members of that party’s forces or nationals. This means that prisoners of war cannot be subjected to punishments for criminal offences which do not apply to the military personnel of the state detaining them.<sup>1433</sup> Prisoners of war must be tried before the same courts and according to the same procedures as the personnel of the detaining state, and must not receive more severe sentences.<sup>a</sup> (See **32.4.1** below.)

<sup>a</sup> Article 102 of the Third Geneva Convention

In addition, under both customary and treaty international humanitarian law, discriminatory treatment is prohibited in any conflict, whether international or non-international, on the basis of race, colour, sex, language, religion or belief, political or other opinion, national or social origin, wealth, birth or other status, or on any other similar criteria.<sup>b 1434</sup>

<sup>b</sup> Article 75(1) of Protocol I, Article 2(1) of Protocol II

### 32.1.7 DURATION OF PROTECTION

International humanitarian law fair trial provisions apply in certain cases after hostilities have ceased. The fair trial guarantee in Protocol I for people arrested, detained or interned for reasons related to international armed conflict lasts “until their final release, repatriation or re-establishment, even after the end of the armed conflict”.<sup>c</sup>

<sup>c</sup> Article 75(6) of Protocol I

The right to fair trial of civilians in occupied territory applies from the onset of any conflict or occupation until one year after the general close of military operations. In addition, the Occupying Power is bound, for the duration of the occupation, to implement fair trial guarantees. In any event, “[p]rotected persons whose release, repatriation or re-establishment may take place after such dates shall meanwhile continue to benefit by the present Convention”.<sup>d</sup>

<sup>d</sup> Article 6 of the Fourth Geneva Convention

The fair trial guarantee in Article 6 of Protocol II continues to apply at the end of an internal armed conflict to people who have been deprived of their liberty, or whose liberty has been restricted for reasons related to the conflict.

<sup>1433</sup> However, they may be subjected to disciplinary punishments in such cases: [Third Geneva Convention](#), Article 82, §2.

<sup>1434</sup> See ICRC *Customary IHL Study*, [Rule 88](#) (Non-Discrimination).



## 32.2 BEFORE THE TRIAL HEARING

### 32.2.1 NOTIFICATION

Anyone deprived of liberty or accused of a criminal offence in connection with an international armed conflict has certain rights to information.

#### Notification of rights

In international armed conflicts, prisoners of war facing criminal charges must be advised of certain rights by the detaining power “in due time before the trial”. These are the rights “to assistance by one of his prisoner comrades, to defence by a qualified advocate or counsel of his own choice, to the calling of witnesses and, if he deems necessary, to the services of a competent interpreter”.<sup>a</sup>

#### Reasons for detention

Any person arrested, detained or interned for actions related to an international armed conflict must be informed promptly, in a language he or she understands, of the reasons why these measures have been taken.<sup>b</sup>

#### Charges

Any person who has been accused of a criminal offence in connection with an international armed conflict “must be informed without delay of the particulars of the offence alleged against him”.<sup>c</sup>

When a Detaining Power decides to institute judicial proceedings during an international armed conflict against a prisoner of war, it must inform the prisoner’s representative at least three weeks before the trial of the charge or charges, giving the legal provisions applicable, as well as the court which will try the case, its location and the start date.<sup>d</sup>

In addition, during an international armed conflict, a prisoner of war and his or her counsel must be informed “in good time before the opening of the trial” of the “[p]articulans of the charge or charges... in a language which he understands”.<sup>e</sup>

Civilians in occupied territory charged with a criminal offence by the Occupying Power are entitled to the same notice.<sup>f</sup>

#### Right to have family and friends notified

During an international armed conflict, the Third Geneva Convention provides that notice of the arrest of a prisoner of war on a criminal charge must be given to the Protecting Power, which has an obligation to inform the prisoner’s family and friends of the circumstances. A Protecting Power is a third state whose duty it is to safeguard the interests of the parties to the conflict and their nationals in enemy territory. Article 104 establishes detailed requirements for notice to the Protecting Power, and, if the detaining state fails to comply with these requirements, it must delay the start of the trial.

The Fourth Geneva Convention requires the Occupying Power to inform the Protecting Power, and thus, eventually, the family and friends, of proceedings in serious cases. The trial may not proceed if the detailed notice requirements are not fulfilled.<sup>g</sup> In addition, although Article 76 of the Fourth Geneva Convention does not provide for access to families and friends, it guarantees

<sup>a</sup> Article 105 of the Third Geneva Convention

<sup>b</sup> Article 75(3) of Protocol I

<sup>c</sup> Article 75(4)(a) of Protocol I

<sup>d</sup> Article 104 of the Third Geneva Convention

<sup>e</sup> Article 105 of the Third Geneva Convention

<sup>f</sup> Article 71(2) of the Fourth Geneva Convention

<sup>g</sup> Article 71 of the Fourth Geneva Convention

<sup>a</sup> Article 76 of the Fourth Geneva Convention

<sup>b</sup> Article 75(4)(d) of Protocol I, Article 6(2)(a) of Protocol II

<sup>c</sup> Article 75(4)(f) of Protocol I, Article 6(2)(f) of Protocol II

<sup>d</sup> Article 99 of the Third Geneva Convention

<sup>e</sup> Article 103 of the Third Geneva Convention

<sup>f</sup> Common Article 3, Articles 13 and 14 of the Third Geneva Convention, Articles 27 and 32 of the Fourth Geneva Convention

<sup>g</sup> Article 130 of the Third Geneva Convention

<sup>h</sup> Article 147 of the Fourth Geneva Convention

<sup>i</sup> Article 87 of the Third Geneva Convention

<sup>j</sup> Article 76 of the Fourth Geneva Convention

<sup>k</sup> Article 78 of the Third Geneva Convention

that “[p]rotected persons who are detained shall have the right to be visited by delegates of the Protecting Power and of the International Committee of the Red Cross...”<sup>a</sup>

### 32.2.2 PRESUMPTION OF INNOCENCE

In both international and non-international conflicts, the presumption of innocence must be respected at all stages of proceedings until judgment.<sup>b</sup>

### 32.2.3 RIGHT TO BE FREE FROM COMPULSION TO CONFESS

In both international and non-international conflicts, “no one shall be compelled to testify against himself or to confess guilt”.<sup>c</sup> A prisoner of war has the same right.<sup>d</sup>

## 32.3 RIGHTS IN PRE-TRIAL DETENTION

### Prohibition of arbitrary detention

Under customary international humanitarian law, arbitrary detention is prohibited in both international and non-international armed conflict.<sup>1435</sup>

### Presumption of release before trial

Pre-trial confinement during an international armed conflict of prisoners of war is not permitted “unless a member of the armed forces of the Detaining Power would be so confined if he were accused of a similar offence, or if it is essential to do so in the interests of national security” and “[i]n no circumstances shall this confinement exceed three months”.<sup>e</sup>

### Right to be free from torture and ill-treatment

Under customary international humanitarian law, torture and other ill-treatment are prohibited at all times and civilians and persons *hors de combat* must be treated humanely.<sup>1436</sup> Similarly, customary international humanitarian law prohibits corporal punishment.<sup>1437</sup>

International humanitarian law treaties contain the same prohibitions.<sup>f</sup> It is a grave breach of the Third Geneva Convention to commit any of the following on a prisoner of war: “wilful killing, torture or inhuman treatment, including biological experiments [or] wilfully causing great suffering or serious injury to body or health”.<sup>g</sup> Committing such acts on protected persons, such as civilians in occupied territory, is a grave breach of the Fourth Geneva Convention.<sup>h</sup>

Prisoners of war may not be subjected to “corporal punishments, imprisonment in premises without daylight and, in general, any form of torture or cruelty”.<sup>i</sup>

### Right to medical examination and treatment

Civilians who have been detained on criminal charges by an Occupying Power “shall receive the medical attention required by their state of health”.<sup>j</sup> A similar obligation applies in all armed conflict.<sup>1438</sup>

### Right to make complaints about conditions of detention

During an international armed conflict, prisoners of war have the right to complain to the military authorities of the Detaining Power and to the Protecting Power about their conditions of detention, without suffering any adverse consequences.<sup>k</sup> If the conditions amount to torture or other cruel, inhuman or degrading treatment, the detention itself may be unlawful.

<sup>1435</sup> ICRC *Customary IHL Study*, Rule 99 (Deprivation of Liberty).

<sup>1436</sup> ICRC *Customary IHL Study*: Rule 87 (Humane Treatment), Rule 90 (Torture and Cruel, Inhuman or Degrading Treatment).

<sup>1437</sup> ICRC *Customary IHL Study*, Rule 91 (Corporal Punishment).

<sup>1438</sup> ICRC *Customary IHL Study*, Rule 118 (Persons deprived of their liberty must be provided with adequate food, water, clothing, shelter and medical attention).

## Right of access to family and outside world

In an international armed conflict, prisoners of war have certain limited rights to communicate with the outside world, directly and through the Protecting Power. Article 103 of the Third Geneva Convention provides that certain rights, such as the right to send and receive letters, “shall apply to a prisoner of war whilst in confinement awaiting trial”.<sup>a</sup> Civilian internees also have the right to send and receive correspondence in international armed conflict and during an occupation.<sup>b</sup> In addition, under customary international humanitarian law, civilian internees in international armed conflict and persons deprived of their liberty in connection with a non-international armed conflict must be allowed to receive visitors, especially near relatives, to the degree practicable.<sup>1439</sup>

### 32.3.1 WOMEN IN DETENTION

Under customary international humanitarian law, in both international and non-international armed conflict, “[w]omen who are deprived of their liberty must be held in quarters separate from those of men, except where families are accommodated as family units, and must be under the immediate supervision of women.”<sup>1440</sup>

Women in detention during international armed conflicts are entitled to special protection.<sup>c</sup> Women should generally be held separately from men and should be under the supervision of women, but, where possible, detained families should be held together.<sup>d</sup>

Women prisoners of war during an international armed conflict “undergoing disciplinary punishment shall be confined in separate quarters from male prisoners of war and shall be under the immediate supervision of women”.<sup>e</sup> This provision also applies to women prisoners of war “whilst in confinement awaiting trial”.<sup>f</sup>

Women civilians who have been detained by an Occupying Power “shall be confined in separate quarters and shall be under the direct supervision of women”.<sup>g</sup>

### 32.3.2 CHILDREN IN DETENTION

Children are entitled to special protection during international armed conflicts.<sup>h</sup> In addition, “[p]roper regard shall be paid to the special treatment due to minors” who have been detained by an Occupying Power.<sup>i</sup>

Under customary international humanitarian law, in any conflict “[c]hildren who are deprived of their liberty must be held in quarters separate from those of adults, except where families are accommodated as family units.”<sup>j</sup> <sup>1441</sup> (See **Chapter 27** on additional fair trial rights of children.)

## 32.4 RIGHTS AT TRIAL

### 32.4.1 COMPETENT, INDEPENDENT AND IMPARTIAL TRIBUNAL

The right to trial by a competent, independent and impartial tribunal for people in the power of a party to an international conflict is guaranteed by Protocol I, which requires “an impartial and regularly constituted court”.<sup>k</sup> Courts trying prisoners of war must be independent and impartial and fully respect the fair trial provisions in Articles 82 to 108 of Protocol I. During international

<sup>a</sup> Article 103 of the Third Geneva Convention

<sup>b</sup> Article 112 of the Fourth Geneva Convention

<sup>c</sup> Article 76(1) of Protocol I

<sup>d</sup> Article 75(5) of Protocol I

<sup>e</sup> Article 97 of the Third Geneva Convention

<sup>f</sup> Article 103 of the Third Geneva Convention

<sup>g</sup> Article 76 of the Fourth Geneva Convention

<sup>h</sup> Article 77(1)-(3) and (5) of Protocol I

<sup>i</sup> Article 76 of the Fourth Geneva Convention

<sup>j</sup> Article 77(4) of Protocol I

<sup>k</sup> Article 75(4) of Protocol I

<sup>1439</sup> ICRC *Customary IHL Study*, Rule 126 (Visits to Persons Deprived of Their Liberty).

<sup>1440</sup> ICRC *Customary IHL Study*, Rule 119 (Accommodation for

Women Deprived of Their Liberty).

<sup>1441</sup> ICRC *Customary IHL Study*, Rule 120 (Accommodation for Children Deprived of Their Liberty).

<sup>a</sup> **Articles 84 and 102 of the Third Geneva Convention**

armed conflict, prisoners of war must be tried before the same courts and according to the same procedures as the personnel of the detaining state.<sup>a</sup> If military courts cannot ensure a fair trial, proceedings would then need to be in civilian courts. Amnesty International calls for trials on charges of human rights violations and crimes under international law to take place in ordinary (civilian) – not military – courts.

<sup>b</sup> **Article 64 of the Fourth Geneva Convention**

Indeed, there is a growing acceptance that military courts should not have jurisdiction to try members of military and security forces for human rights violations and crimes under international law, both in peacetime and in armed conflict (see **Chapter 29.4.3**), but only jurisdiction over military discipline offences committed by military personnel (see **Chapter 29.4.2**), and that they should not have jurisdiction over prosecutions of civilians (see **Chapter 29.4.4**).

<sup>c</sup> **Article 54 of the Fourth Geneva Convention**

The guarantees under the Fourth Geneva Convention of competence, independence and impartiality of courts trying civilians in occupied territory are limited, but any gaps would be filled by Article 75 and customary international law. In general, the criminal legislation of the occupied territory is to remain in force and is to be enforced by the courts of the territory, subject to a number of important exceptions. The Fourth Geneva Convention requires the penal laws and tribunals of the occupied territory to be maintained, “with the exception that they may be repealed or suspended by the Occupying Power in cases where they constitute a threat to its security or an obstacle to the application of the present Convention”.<sup>b</sup>

<sup>d</sup> **Article 64 of the Fourth Geneva Convention**

There is some protection for judges against removal from office. The Occupying Power may not penalize or alter the status of public officials or judges in occupied territories if they abstain from fulfilling their functions for reasons of conscience. However, this does not affect the right of the Occupying Power to remove public officials from their posts.<sup>c</sup>

<sup>e</sup> **Article 66 of the Fourth Geneva Convention**

The Occupying Power may enact criminal legislation in occupied territories “to maintain the orderly government of the territory, and to ensure the security of the Occupying Power”.<sup>d</sup> In such cases, it may try the accused before its own “properly constituted, non-political military courts, on condition that the said courts sit in the occupied territory”. Appeal courts should “preferably” sit in the occupied territory.<sup>e</sup>

<sup>f</sup> **Article 6(2) of Protocol II; See common Article 3(1)(d)**

In non-international conflict, “[n]o sentence shall be passed and no penalty shall be executed on a person found guilty of an offence except pursuant to a conviction pronounced by a court offering the essential guarantees of independence and impartiality”.<sup>f</sup>

<sup>g</sup> **Article 103 of the Third Geneva Convention**

### 32.4.2 TRIAL WITHIN A REASONABLE TIME

<sup>h</sup> **Article 71 of the Fourth Geneva Convention**

Prisoners of war are entitled to prompt trials during an international armed conflict and until repatriated. “Judicial investigations relating to a prisoner of war shall be conducted as rapidly as circumstances permit and so that his trial shall take place as soon as possible.”<sup>g</sup> Civilians in occupied territory being prosecuted by the Occupying Power “shall be brought to trial as rapidly as possible”.<sup>h</sup> Protected persons in non-international armed conflict are entitled to trial within a reasonable time.<sup>1442</sup>

#### **Third Geneva Convention, Article 84**

“...In no circumstances whatever shall a prisoner of war be tried by a court of any kind which does not offer the essential guarantees of independence and impartiality as generally recognized....”

<sup>1442</sup> ICRC *Customary IHL Study*, [Rule 100](#) (No one may be convicted or sentenced, except pursuant to a fair trial affording all essential judicial guarantees) (see commentary).

### 32.4.3 DEFENCE RIGHTS

The following defence rights are guaranteed under international humanitarian law treaties. Most of them are also guaranteed under customary international law.<sup>1443</sup>

#### Right to defend oneself

The right to defend oneself is guaranteed by Protocol I (applicable to international conflicts), which requires that “the procedure... shall afford the accused before and during his trial all necessary rights and means of defence”.<sup>a</sup>

“No prisoner of war may be convicted without having had an opportunity to present his defence and the assistance of a qualified advocate or counsel.”<sup>b</sup>

Civilians in occupied territory have “the right to present evidence necessary to their defence”, including the right to call witnesses (see below).<sup>c</sup>

For non-international conflicts, Protocol II provides that the procedure “shall afford the accused before and during his trial all necessary rights and means of defence”.<sup>d</sup>

#### Presence of the accused

In both international and non-international conflicts, “anyone charged with an offence shall have the right to be tried in his presence”.<sup>e</sup>

#### Right to counsel

A prisoner of war facing a criminal charge during an international armed conflict is entitled to assistance by “a qualified advocate or counsel of his own choice”. When a prisoner of war does not choose a counsel, the counsel will be appointed. The advocate or counsel conducting the defence on behalf of the prisoner of war “may, in particular, freely visit the accused and interview him in private”.<sup>f</sup>

In addition, a protected person in occupied territory has the right “to be assisted by a qualified advocate or counsel of their own choice...”.<sup>g</sup>

#### Right to adequate time and facilities to prepare a defence

Counsel for prisoners of war are guaranteed “a period of two weeks at least before the opening of the trial, as well as the necessary facilities to prepare the defence of the accused”, including confidential access to the prisoner of war and access to defence witnesses, and to “have the benefit of these facilities until the term of appeal or petition has expired”.<sup>h</sup>

In addition, a protected person in occupied territory has the right to “the necessary facilities for preparing the defence”.<sup>i</sup>

#### Protocol II, Article 6(2)(a)

(Applicable in non-international armed conflicts)

“the procedure shall provide for an accused to be informed without delay of the particulars of the offence alleged against him and shall afford the accused before and during his trial all necessary rights and means of defence;”

<sup>a</sup> Article 75(4)(a) of Protocol I

<sup>b</sup> Article 99 of the Third Geneva Convention

<sup>c</sup> Article 72 of the Fourth Geneva Convention

<sup>d</sup> Article 6(2)(a) of Protocol II

<sup>e</sup> Article 75(4)(e) of Protocol I, Article 6(2)(e) of Protocol II

<sup>f</sup> Article 105 of the Third Geneva Convention

<sup>g</sup> Article 72 of the Fourth Geneva Convention

<sup>h</sup> Article 105 of the Third Geneva Convention

<sup>i</sup> Article 72 of Fourth Geneva Convention

<sup>a</sup> Article 75(4)(g) of Protocol I

<sup>b</sup> Article 105 of the Third Geneva Convention

<sup>c</sup> Article 105 of the Third Geneva Convention

<sup>d</sup> Article 72 of the Fourth Geneva Convention

<sup>e</sup> Article 75(4)(l) of Protocol I

<sup>f</sup> Article 105 of the Third Geneva Convention

<sup>g</sup> Article 107 of the Third Geneva Convention

<sup>h</sup> Article 73 of the Fourth Geneva Convention

<sup>i</sup> Article 106 of the Third Geneva Convention

<sup>j</sup> Article 75(4)(j) of Protocol I

<sup>k</sup> Article 6(3) of Protocol II

### Right to obtain and examine witnesses

For offences connected to an international conflict, “anyone charged with an offence shall have the right... to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him” and “to examine, or have examined, the witnesses against him”.<sup>a</sup>

In an international armed conflict, a prisoner of war charged with a crime “shall be entitled ... to the calling of witnesses”.<sup>b</sup> As noted above, civilians in occupied territory have the right to present evidence necessary to their defence under Article 72 of the Fourth Geneva Convention.

### Right to interpretation and translation

A prisoner of war “shall be entitled ..., if he deems necessary, to the services of a competent interpreter”.<sup>c</sup>

Protected persons in occupied territory who have been accused of a crime “shall, unless they freely waive such assistance, be aided by an interpreter, both during preliminary investigation and during the hearing in court”.<sup>d</sup>

### Right to public trial and judgment

In international conflict, “anyone prosecuted for an offence shall have the right to have the judgment pronounced publicly”.<sup>e</sup>

The Third Geneva Convention does not expressly provide for a public trial for prisoners of war. However, it does require that representatives of the Protecting Power should be able to attend the trial, unless, exceptionally, proceedings are held behind closed doors in the interest of state security.<sup>f</sup> The judgment and sentence, and information about any right to appeal, must be immediately provided to the prisoner of war, in a language he or she understands, to the prisoner’s representative and to the Protecting Power.<sup>g</sup>

### Right to appeal

One of the “essential judicial guarantees” of the right to fair trial under current customary international humanitarian law, as reflected in the statutes of international and internationalized criminal courts and human rights treaties, is the right to have a conviction and sentence reviewed by a higher court according to law. (See **Chapter 26**, Right to appeal.)

A protected person in occupied territory who has been convicted of a crime “shall have the right of appeal provided for by the laws applied by the court. He shall be fully informed of his right to appeal or petition and of the time limit within which he may do so.”<sup>h</sup>

In particular, prisoners of war during an international armed conflict have the same right of appeal as members of the armed forces of the Detaining Power and they must be informed of that right.<sup>i</sup>

Although Protocol I does not guarantee the right of appeal during an international armed conflict, it does require that “a convicted person shall be advised on conviction of his judicial and other remedies and of the time-limits within which they may be exercised”.<sup>j</sup> For non-international conflicts, Protocol II contains an identically worded guarantee.<sup>k</sup>

### 32.4.4 PROHIBITION OF DOUBLE JEOPARDY

Protocol I (applicable in international conflicts) provides that “no one shall be prosecuted or punished by the same Party for an offence in respect of which a final judgment acquitting or convicting that person has been previously pronounced under the same law and judicial procedure”.<sup>a</sup> Similarly, the Third Geneva Convention provides that “[n]o prisoner of war may be punished more than once for the same act or on the same charge.”<sup>b</sup> Human rights law recognizes that this prohibition is limited to successive trials in the same jurisdiction. (See **Chapter 18.2.**)

### 32.4.5 PROTECTION AGAINST RETROSPECTIVE PROSECUTIONS OR PUNISHMENTS

No one may be convicted during international or non-international armed conflict of conduct that was not criminal under national or international law when it was committed.<sup>1444</sup>

No one in the power of a party to an international conflict “shall be accused or convicted of a criminal offence on account of any act or omission which did not constitute a criminal offence under the national or international law to which he was subject at the time when it was committed...”.<sup>c</sup> In particular, prisoners of war may not be tried for an act which was not criminal under national or international law at the time it was committed.<sup>d</sup>

The Fourth Geneva Convention has a number of safeguards against retrospective criminal law for civilians in occupied territory. “The penal provisions enacted by the Occupying Power shall not come into force before they have been published and brought to the knowledge of the inhabitants in their own language. The effect of these penal provisions shall not be retroactive.”<sup>e</sup>

Courts in occupied territory “shall apply only those provisions of law which were applicable prior to the offence”.<sup>f</sup>

Protocol II (applicable in non-international conflicts) provides that “no one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under the law, at the time when it was committed”.<sup>g</sup>

## 32.5 SENTENCING IN NON-DEATH PENALTY CASES

Prisoners of war in an international armed conflict must not be sentenced “to any penalties except those provided for in respect of members of the armed forces of the [Detaining] Power who have committed the same acts”.<sup>h</sup>

“When fixing the penalty, the courts or authorities of the Detaining Power shall take into consideration, to the widest extent possible, the fact that the accused, not being a national of the Detaining Power, is not bound to it by any duty of allegiance, and that he is in its power as the result of circumstances independent of his own will. The said courts or authorities shall be at liberty to reduce the penalty provided for the violation of which the prisoner of war is accused, and shall therefore not be bound to apply the minimum penalty prescribed.”<sup>i</sup>

“Any period spent by a prisoner of war in confinement awaiting trial shall be deducted from any sentence of imprisonment passed upon him and taken into account in fixing any penalty”.<sup>j</sup>

<sup>a</sup> Article 75(4)(h) of Protocol I

<sup>b</sup> Article 86 of the Third Geneva Convention

<sup>c</sup> Article 75(4)(c) of Protocol I

<sup>d</sup> Article 99 of the Third Geneva Convention

<sup>e</sup> Article 65 of the Fourth Geneva Convention

<sup>f</sup> Article 67 of the Fourth Geneva Convention

<sup>g</sup> Article 6(2)(c) of Protocol II

<sup>h</sup> Article 87 of the Third Geneva Convention

<sup>i</sup> Article 87 of the Third Geneva Convention

<sup>j</sup> Article 103 of the Third Geneva Convention

<sup>1444</sup> ICRC *Customary IHL Study*, Rule 101 (The Principle of Legality); See *Korbely v Hungary* (9174/02), European Court Grand Chamber (2008) §§69-92.

<sup>a</sup> Article 85 of the Third Geneva Convention

<sup>b</sup> Article 88 of the Third Geneva Convention

<sup>c</sup> Article 67 of the Fourth Geneva Convention

<sup>d</sup> Article 76 of the Fourth Geneva Convention

<sup>e</sup> Article 75(4)(c) of Protocol I, Article 6(2)(c) of Protocol II

<sup>f</sup> Article 75(4)(b) of Protocol I, Article 6(2)(b) of Protocol II

<sup>g</sup> Article 87 of the Third Geneva Convention

<sup>h</sup> Article 33 of the Fourth Geneva Convention

Prisoners of war in an international armed conflict who have been prosecuted under the laws of the Detaining Power for offences committed before capture continue to benefit from the protection of the Third Geneva Convention.<sup>a</sup> Those who have served their sentence may not be treated differently from other prisoners of war.<sup>b</sup>

For civilians in occupied territory, courts “shall apply only those provisions of law... which are in accordance with general principles of law, in particular the principle that the penalty shall be proportioned to the offence”.<sup>c</sup> They “shall be detained in the occupied country, and if convicted they shall serve their sentences therein”.<sup>d</sup>

In both international conflicts and non-international conflicts, no heavier penalty may be imposed than that which was applicable at the time when the criminal offence was committed. If, after the commission of the offence, provision is made by law for the imposition of a lighter penalty, the offender should benefit thereby.<sup>e</sup>

Torture and other cruel, inhuman or degrading treatment or punishment are prohibited in both international and non-international armed conflict.<sup>1445</sup>

### 32.5.1 PROHIBITION OF COLLECTIVE PUNISHMENTS

Under customary international humanitarian law applicable in both international and non-international armed conflict, criminal responsibility is individual<sup>1446</sup> and collective punishments are prohibited.<sup>1447</sup>

International humanitarian law treaties contain the same requirements. Both Protocol I (applicable in international armed conflicts) and Protocol II (applicable in non-international armed conflicts) provide that “no one shall be convicted of an offence except on the basis of individual penal responsibility”.<sup>f</sup> The collective punishment of prisoners of war is prohibited.<sup>g</sup>

For civilians in international armed conflict, including those in occupied territories, “[n]o protected person may be punished for an offence he or she has not personally committed. Collective penalties and likewise all measures of intimidation or of terrorism are prohibited.”<sup>h</sup>

## 32.6 DEATH PENALTY CASES

In states which have not yet abolished the death penalty, international humanitarian law strictly limits the circumstances under which a person may be sentenced to death and how the sentence is carried out. In addition to the specific guarantees cited below applicable in international armed conflict, common Article 3, the principles of which are applicable in all armed conflict, expressly prohibits “the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples”. These restrictions are in addition to the other guarantees of the right to fair trial and must be read together with human rights law and standards restricting the use of the death penalty. (See **Chapter 28**, Death penalty cases.)

The instruments establishing international and internationalized criminal courts all exclude the death penalty for genocide, other crimes against humanity and war crimes.

<sup>1445</sup> ICRC *Customary IHL Study*, [Rule 90](#) (Torture and Cruel, Inhuman or Degrading Treatment), [Rule 91](#) (Corporal Punishment).

<sup>1446</sup> ICRC *Customary IHL Study*, [Rule 102](#) (Individual Criminal Responsibility).

<sup>1447</sup> ICRC *Customary IHL Study*, [Rule 103](#) (Collective Punishments).



## Prisoners of war

The Third Geneva Convention restricts the circumstances in which the death penalty may be imposed and carried out on prisoners of war during an international armed conflict.

“Prisoners of war and the Protecting Powers shall be informed, as soon as possible, of the offences which are punishable by the death sentence under the laws of the Detaining Power.”<sup>a</sup> Prisoners of war must be notified immediately after they have been captured, and the death sentence may be applied only as a penalty for acts committed after such notification.

The Detaining Power may not extend the scope of the death penalty without the concurrence of the Protecting Power.<sup>b</sup> Any extension of the scope of the death penalty would be inconsistent with calls by the UN General Assembly and the UN Commission on Human Rights to reduce the scope of the death penalty with a view towards its abolition and with the treaty obligations of states parties to the ICCPR and American Convention. (See **Chapter 28**, Death penalty cases.)

Article 100 of the Third Geneva Convention requires that before a death sentence may be pronounced, a court’s attention must be drawn to the prisoner’s allegiance to another state and their involuntary detention, “[o]therwise, there would be grounds to appeal for the court’s findings to be set aside”.<sup>1448</sup>

No death sentence on a prisoner of war may be carried out within at least six months of notice of the sentence being received by the Protecting Power.<sup>c</sup> Article 107 of the Third Geneva Convention contains detailed requirements concerning notification. One purpose of the six-month delay is to give the Protecting Power time to inform the country of origin so that it can make diplomatic representations with a view to obtaining a reduction of sentence. In addition, it is a safeguard against “a judgment based on the circumstances of the moment, too often affected by emotional considerations”.<sup>1449</sup>

## Prohibition of the death penalty on certain types of people

Protocol I (applicable in international conflicts) provides that “[t]he death penalty for an offence related to the armed conflict shall not be executed on persons who had not attained the age of eighteen years at the time the offence was committed”.<sup>d</sup> Protocol II (applicable in non-international conflicts) has a stronger protection by providing that “[t]he death penalty shall not be pronounced on persons who were under the age of eighteen years at the time of the offence”.<sup>e</sup>

Protocol I, although it does not prohibit issuing death sentences for offences related to the armed conflict on pregnant women or new mothers, prohibits their execution.

“To the maximum extent feasible, the Parties to the conflict shall endeavour to avoid the pronouncement of the death penalty on pregnant women or mothers having dependent infants, for an offence related to the armed conflict. The death penalty for such offences shall not be executed on such women.”<sup>f</sup>

Protocol II provides that “[t]he death penalty shall not be carried out on pregnant women or mothers of young children”.<sup>g</sup> (See **Chapter 28.5.4.**)

<sup>a</sup> Article 100 of the Third Geneva Convention

<sup>b</sup> Article 100 of the Third Geneva Convention

<sup>c</sup> Article 101 of the Third Geneva Convention

<sup>d</sup> Article 77(5) of Protocol I

<sup>e</sup> Article 6(4) of Protocol II

<sup>f</sup> Article 76(3) of Protocol I

<sup>g</sup> Article 6(4) of Protocol II

<sup>1448</sup> ICRC *Commentary on the Third Geneva Convention*, (1960) Article 100, §3 p475.

<sup>1449</sup> ICRC *Commentary on the Third Geneva Convention*, (1960) Article 101, p475.





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# FAIR TRIAL MANUAL

Every criminal trial tests the state's commitment to justice and respect for human rights. Whatever the crime, if people are subjected to unfair trials, justice is not served for the accused, the victim of the crime or the public.

The justice system itself loses credibility when trials are unfair and people are unjustly convicted and punished. Unless human rights are upheld in the police station, the detention centre, the court and the prison cell, the state has failed in its duties and betrayed its responsibilities.

The *Amnesty International Fair Trial Manual* is a practical and authoritative guide to international and regional standards for fair trial. These standards set out minimum guarantees designed to protect the right to a fair trial in criminal proceedings.

The *Manual* explains how fair trial rights have been interpreted by human rights bodies and by international courts. It covers rights before and during trial, and during appeals. It also covers special cases, including death penalty trials, cases brought against children, and fair trial rights during armed conflict. This is the second, updated and revised, edition of the *Manual*.

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Second edition  
Index: POL 30/002/2014

