AMNESTY INTERNATIONAL
FAIR TRIALS MANUAL

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Amnesty International is a worldwide voluntary activist movement working towards the observance of all human rights as enshrined in the Universal Declaration of Human Rights and other international standards.

Amnesty International promotes respect for human rights, which it considers interdependent and indivisible, through campaigning and public awareness activities, as well as through human rights education and pushing for ratification and implementation of human rights treaties.

Amnesty International takes action against some of the gravest violations by governments of people's civil and political rights. The focus of its campaigning against human rights violations is to:

- free all prisoners of conscience. These are people detained for their political, religious or other conscientiously held beliefs or because of their ethnic origin, sex, colour, language, national or social origin, economic status, birth or other status – who have not used or advocated violence;
- ensure fair and prompt trials for all political prisoners;
- abolish the death penalty, torture and other ill-treatment of prisoners;
- end political killings and "disappearances";

Amnesty International seeks to support the protection of human rights by other activities, including its work with the United Nations and regional intergovernmental organizations, for refugees, on international military, security and police relations, and on economic and cultural relations.

Amnesty International also calls on armed political groups to respect human rights and to halt abuses such as the detention of prisoners of conscience, hostage-taking, torture and unlawful killings.

Amnesty International is independent of any government, political persuasion or religious creed. It does not support or oppose any government or political system, nor does it support or oppose the views of the victims whose rights it seeks to protect. It is concerned solely with the impartial protection of human rights.

Amnesty International seeks to disclose the reality about human rights violations anywhere in the world and to respond quickly and persistently. The organization systematically and impartially uncovers the facts about individual cases and patterns of human rights abuses. The findings are publicized and members, supporters and staff around the world mobilize public pressure on governments and others with influence to stop the abuses. Activities range from public demonstrations to letter-writing, from human rights education to fundraising concerts, from targeted appeals on a single individual to global campaigns on a specific issue, from approaches to local authorities to presentations at intergovernmental organizations.

Amnesty International is an international movement with around one million members and supporters in more than 150 countries spread over all regions of the world. To ensure the organization's impartiality and objectivity, Amnesty International members work on specific cases of human rights violations in countries other than their own.

Amnesty International is a democratic, self-governing movement. It is funded largely by its worldwide membership and by donations from the public. No funds are sought or accepted from governments for Amnesty International's work in documenting and campaigning against human rights violations.Amnesty International Fair Trials Manual

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Preface

by David Weissbrodt
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When a government charges a person with having committed or having been implicated in a criminal offence, the individual is placed at risk of deprivation of liberty or other sanction. The right to a fair trial is a fundamental safeguard to assure that individuals are not unjustly punished. It is indispensable for the protection of other human rights of particular concern to Amnesty International, such as the right to freedom from torture and the right to life, and, especially in political cases, the right to freedom of expression.

The monitoring of trials is therefore an important part of the international effort to protect human rights. The right to observe a trial follows on from the right to a fair and public trial. The right to a public trial is an established principle, enshrined in numerous international and regional human rights instruments. The Universal Declaration of Human Rights provides that "[e]veryone is entitled in full equality to a fair and public hearing... of any criminal charge" and "[e]veryone charged with a penal offence has the right to be presumed innocent until proven guilty according to law in a public trial."

The right to a public trial is primarily intended to help ensure a fair trial and protect the accused from abuse of criminal process. A public trial also helps ensure the integrity of the judicial process. Public monitoring influences both judge and prosecutor to carry out their duties with impartiality and professionalism. A public trial may facilitate accurate fact-finding -- encouraging witnesses to tell the truth. In addition, there is a public interest in an open trial beyond the rights of the accused. The public has a right to know how justice is administered, and what decisions are reached by the judicial system.

Amnesty International and other human rights organizations have for many years sent observers to significant political trials. The acceptance of international trial observers (whether sent by foreign governments or by non-governmental organizations) has arguably become an international legal norm. The practice is well established and accepted within the international community.

Whether assessing a trial after direct observation of the proceedings, or on the basis of written transcripts or other reports, the standards of fairness by which the trial may be judged are numerous.

The assessment seeks to establish whether the practice in the particular case is consistent with the laws of the country where the trial is held, and whether those laws and the practice in the case conform to international standards, enshrined in treaties to which the state is a party and other non-treaty standards.

This Fair Trials Manual provides a guide to international and regional standards for fair trial which are incorporated in human rights treaties and non-treaty standards. It will assist Amnesty International's staff and other human rights defenders around the world seeking to protect the right to a fair trial. It will also help lawyers, judges, and others to understand international standards for the protection of the right to a fair trial.

Introduction

"Injustice anywhere is a threat to justice everywhere."
Martin Luther King

Justice is based on respect for the 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 whole machinery of the state. How the person is treated when accused of a crime provides a concrete demonstration of how far that state respects individual human rights. Every criminal trial tests the state's commitment to respect for human rights; the test is even more severe when the accused is a political prisoner – when the authorities suspect the person of being a threat to those in power.

Every government has the duty to bring to justice those responsible for crimes. However, when people are subjected to unfair trials, justice cannot be served. When people are tortured or ill-treated by law enforcement officials, when innocent individuals are convicted, or when trials are manifestly unfair or are perceived to be unfair, the justice system itself loses credibility. Unless human rights are upheld in the police station, the interrogation room, the detention centre, the court and the prison cell, the government has failed in its duties and betrayed its responsibilities.

The risk of human rights abuse starts at the first moment that officials raise suspicions against a person, through the moment of arrest, in pre-trial detention, during the trial, during all appeals, right through to the imposition of any punishment. The international community has developed fair trial standards which are designed to define and protect people's rights through all these stages.

The right to a fair trial is a basic human right. It is one of the universally applicable principles recognized in the Universal Declaration of Human Rights, adopted 50 years ago by the world's governments and still the cornerstone of the international human rights system. In the years since 1948, the right to fair trial recognized in the Universal Declaration of Human Rights has become legally binding on all states as part of customary international law.

The right to fair trial has been reaffirmed and elaborated since 1948 in legally binding treaties such as the International Covenant on Civil and Political Rights, adopted by the United Nations (UN) General Assembly in 1966. It has been recognized and specified in numerous other international and regional treaties and non-treaty standards, adopted by the UN and by regional intergovernmental bodies. These human rights standards were drafted to apply to all legal systems in the world and take into account

the rich diversity of legal procedures -- they set out the minimum guarantees that all systems should provide.

These international human rights standards on fair trial constitute a collective agreement by the community of nations on the criteria for assessing how governments treat people accused of crimes. This manual is a guide to these standards.

Amnesty International's work for fair trials

Amnesty International is a worldwide voluntary movement that works to promote all the human rights enshrined in the Universal Declaration of Human Rights and other international standards, including the right to a fair trial. It intervenes in trials of political prisoners or where a death penalty may be imposed.

Article 1(b) of the Statute of Amnesty International calls upon the organization to work for prompt and fair trials for political prisoners under "internationally recognized norms". Amnesty International has pursued this goal by sending trial observers to many countries in every region of the world, preparing reports on fair trial problems in particular countries, and mobilizing its membership to seek prompt and fair trials for political prisoners. Amnesty International has also raised particular concerns about unfair trials for prisoners of conscience and people facing charges punishable by the death penalty. It has submitted cases in which it has had fair trial concerns to the UN Working Group on Arbitrary Detention and to the UN Special Rapporteur on extrajudicial, summary and arbitrary executions. The organization has also campaigned for the highest possible fair trial standards for the International Criminal Tribunals for the former Yugoslavia and Rwanda as well as for the International Criminal Court.

In the course of its work, Amnesty International has developed a 12-point Program for the Prevention of Torture, a 14-point Program for the Prevention of "Disappearances" and a 14-point Program for the Prevention of Extrajudicial Executions. These programs are based on Amnesty International's many years of practical experience in countries around the world. They summarize many of the rights relevant to the protection of the individual during the criminal justice process and represent Amnesty Inter-national's view on the standards that should be adopted by all governments.

The purpose of this manual

This manual seeks to provide a guide to the relevant human rights standards for anyone involved in examining how far 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, and for anyone seeking to evaluate whether a country's criminal justice system guarantees respect for international standards of fair trial.

Assessing the fairness of a criminal trial 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 guarantees of fairness, and whether the manner in which those laws are implemented are consistent with international standards. Sometimes a trial is flawed in one aspect alone, but often trials fail to meet international standards in several ways.

The international standards against which the fairness of a trial is judged are numerous, are found in many different instruments and are constantly evolving. This manual sets out the international and

regional human rights standards for the various stages of the criminal trial process. While some standards apply to all forms of detention (including administrative detention) and trials of any nature, including non-criminal (civil) cases, this manual focuses on standards applicable to criminal proceedings. In order to assist in clarifying what the standards require in practice, the manual includes interpretations of particular standards by authoritative UN and regional bodies. (See International human rights standards and bodies).

This is Amnesty International's first handbook on fair trials, and we would welcome any suggestions or comments on its content. Please send any such comments to the Legal and International Organizations Program, Amnesty International, International Secretariat, 1 Easton Street, London WC1X 8DJ, United Kingdom.

How this manual is organized
The manual is divided into three parts: introductions, main text and appendices.

The introductory section includes a detailed table of contents; a brief explanation of relevant international and regional human rights standards and bodies; a list of the standards and bodies cited in the manual; a note on the use of terms; and a list of abbreviations used in citing standards, bodies, and cases.

The main text of the manual is arranged in three sections. Section A covers pre-trial rights, including the rights of detainees. Section B covers rights at trial, including judgment, appeal, sentencing and punishment. Section C deals with fair trial issues in death penalty cases, in proceedings involving juveniles, and during states of emergency and armed conflict.

There are two appendices. One contains selected excerpts from the General Comments adopted by the Human Rights Committee, which provide authoritative guidance on interpreting the ICCPR.The second contains the African Commission Resolution on the Right to Recourse Procedure and Fair Trial. These two documents have been reproduced because they may not be as readily accessible as other standards.

The manual has been constrained by the limited space available: cross-references have been used rather than repeating sections, and selected articles from standards have been reproduced, rather than the full texts.

How to obtain copies of the standards
You can obtain copies of UN treaty and non-treaty standards from:
bookshops, the UN Information Office in your country, or by writing to:
Office of the UN High Commissioner for Human Rights, United Nations,
New York, NY 10017, USA;
or
Office of the UN High Commissioner for Human Rights, United Nations Office at Geneva, 8-14 avenue de la Paix, 1211 Geneva 10, Switzerland;
http://www.unhchr.ch

There is a guide to finding human rights information on the Internet and elsewhere at
http://www.derechos.org/human-rights/manual.htm
or by e-mail: the autoresponder at manual@desaparecidos.org

You can obtain copies of regional standards from:
Organization of African Unity, POB 3243, Addis Ababa, Ethiopia

Organization of American States, Instituto Interamericano de Derechos Humanos, Apartado Postal 10081- 1000, San José, Costa Rica; http://www.oas.org

Council of Europe, F-67075, Strasbourg cedex, France; http://stars.coe.fr

Further information
The following texts may be of particular assistance to those seeking additional information on fair trial guarantees enshrined in international standards:

A study on the right to a fair trial for the UN Sub-Commission on Prevention of Discrimination and Protection of Minorities, prepared by Stanislav Chernichenko, William Treat and David Weissbrodt. (UN Doc. E/CN.4/Sub.2/1990/34, 1990; E/CN.4/Sub.2/1991/29, 1991; E/CN.4/Sub.2/1992/24 & Add.1-3, 1992; E/CN.4/Sub.2/1993/24 & Add.2, 1993; E/CN.4/Sub.2/1994/24, 1994)

UN Centre for Human Rights, Crime Prevention and Criminal Justice Branch, Human Rights and Pre-Trial Detention, 1994. (UN Sales No. E.94.XIV.6)

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D.J. Harris, M. O'Boyle, C. Warbrick, Law of the European Convention on Human Rights, Butterworths, 1995.

Nigel S. Rodley, The Treatment of Prisoners Under International Law, Clarendon Press, Oxford, 1987, (new edition forthcoming).

David Weissbrodt, "International Trial Observers", Stanford Journal of International Law, Volume 18, Issue 1, Spring 1982.

David Weissbrodt and Rüdiger Wolfrum (eds), The Right to a Fair Trial, Beiträge zum Ausländischen Recht öffentichen und Völkerrecht, Vol. 129, Springer, Berlin 1998.

Lawyers Committee for Human Rights, What is a Fair Trial? A Basic Guide to Legal Standards and Practice, 1995.

Norwegian Institute of Human Rights, Manual for Trial Observation, March 1996.

William A. Schabas, The Abolition of the Death Penalty in International Law, second edition, Cambridge, UK, Cambridge University Press, 1997.

Amnesty International, International standards on the death penalty, AI Index: ACT 50/06/97, 1997.

Daniel O'Donnell, *Protectión internacional de los derechos humanos*, Comisión Andina de Juristas, Lima 1988.

Comision Interamericana de Derechos Humanos - Diez años de actividad 1971 - 1981, Secretaría General de la Organización ede los Estados Americanos, Washington D.C., 1982.

Thomas Buergenthal, Dinah Shelton, *Protecting Human Rights in the Americas, Cases and Materials*, N.P. Engel, Publisher, Kehl, Strasbourg, Arlington, 1995.

Alto Comisionado para los Derechos Humanos, Centro de Derechos Humanos, *Derechos Humanos y aplicación de la ley*, Serie de capacitación profesional No. 5, Naciones Unidas, Ginebra, 1997.

Alto Comisionado para los Derechos Humanos, Centro de Derechos Humanos, *Derechos Humanos y la detención provisional*, Serie de capacitación profesional No. 3, Naciones Unidas, Ginebra, 1994.

Comité de Derechos Humanos, *Selección de decisiones adoptadas con arreglo al Protocolo Facultativo*, Naciones Unidas, Volumen 1, CCPR/C/OP/1, Nueva York, 1988.

Comité de Derechos Humanos, *Selección de decisiones adoptadas con arreglo al Protocolo Facultativo*, Naciones Unidas, Volumen 2, CCPR/C/OP/2, Nueva York, 1992.

Centro para la Independencia de Jueces y Abogados, CIJA, *La independencia de Jueces y Abogados: una compilación de normas ionternacionales*, Boletín del CIJA, Numero 25-26, Ginebra 1990.

Acknowledgements
This manual could not have been produced without the support of many people who gave freely of their time and expertise to help Amnesty International in its preparation. Jill Heine, a staff member at the International Secretariat of Amnesty International, prepared, organized and drafted the manual. Many other members of staff (including Christopher Hall, who wrote the chapter on fair trial rights in armed conflict) provided guidance, expert comment and assisted in its production. Special thanks are due to the staff of the Legal and International Organizations Program, the Publications Program, Mervat Rishmawi and Josef Szwarc. Among the non-staff members who participated in this project, Amnesty International would especially like to thank Miyako Abiko, Jelena Pejic, Lina Philipson and David Weissbrodt for their invaluable assistance.

International human rights standards and bodies

This section explains 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 the standards.

6. International criminal tribunals

1. Human rights standards

The standards cited in this manual have differing legal status. Some are treaties which are legally binding on those states which have agreed to be bound by them. Others (non-treaty standards) represent the consensus of the international community on standards to which states should aspire. Together they constitute an international framework of fundamental safeguards against unfair trials. They have been developed over the second half of the twentieth century as a common standard of achievement for all peoples and all nations.

Amnesty International, as a human rights organization, cites the most protective standards that apply to a state. Generally, it will cite the relevant part of a treaty which sets out a right which the state is obliged to guarantee. However, 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 all cases, Amnesty International promotes adherence to internationally recognized and agreed norms.

1.1 Treaties

The standards called Covenants, Conventions, Charters and Protocols are reaties which are legally binding on the states that have agreed to be bound by them. Some treaties, such as the International Covenant on Civil and Political Rights and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment are open to ratification by countries all over the world. Other treaties are open only to states that belong to a particular regional organization.1

Footnotes
1. These include the African Charter on Human and Peoples' Rights, the American Convention on Human Rights and the (European) Convention for the Protection of Human Rights and Fundamental Freedoms

States can agree to be bound by these treaties in one of two ways. They can use the two-step process of signature and ratification, or they can take the single step of accession. When a state signs a treaty, it formally declares its intention to ratify that treaty in the future. Once it has signed, the state may not engage in acts inconsistent with the object and purpose of the treaty. When it ratifies or accedes to the treaty, the state becomes a party to that treaty. A state party to a treaty promises to abide by all the provisions contained in the treaty and to fulfil its obligations under the treaty.

A protocol is a treaty attached to another treaty as an addendum. It generally adds extra provisions to the original treaty, extends its scope of application or establishes a complaints mechanism. A protocol becomes legally binding on a state when it has ratified or acceded to it.

Guidance to interpreting the provisions contained in international treaties is provided by the comments, decisions and findings of treaty monitoring bodies and human rights courts. These are bodies established by the treaties or by the UN or regional bodies to monitor implementation of the treaty and to investigate complaints that the provisions of the treaty have been violated. Interpretations by other intergovernmental bodies such as the UN Working Group on Arbitrary Detention, and special rapporteurs of the UN Commission on Human Rights (see UN thematic mechanisms, below), also provide authoritative guidance.2

Footnotes
2. Also relevant are decisions of national courts, commentaries by legal scholars and non-governmental organizations such as the International Committee of the Red Cross.

1.2 Non-treaty standards

There are many human rights standards relevant to fair trials which are contained in non-treaty standards. Non-treaty standards are usually called Declarations, Principles, Rules 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 standards which set out important fair trial guarantees. Although they do not technically have the legal power of treaties, they have the persuasive force of having been negotiated by governments over many years, and of having been adopted by political bodies such as the UN General Assembly, usually by consensus. Because of this political force they are often considered to be as binding on states as treaties. Non-treaty standards sometimes reaffirm principles that are already considered to be legally binding on all states under customary international law.

2. International treaty standards

The following international treaties, which are legally binding on states parties, contain 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 140 states parties as of October 1998. The ICCPR codifies civil and political rights in a treaty which is binding on states which ratify or accede to it, expanding upon the civil and political rights recognized in the Universal Declaration of Human Rights. The ICCPR protects fundamental rights including those precepts at the core of Amnesty International's work: the right to life; the right to freedom of expression, of conscience, and of assembly and association; the right to be free from arbitrary arrest or detention; the right to freedom from torture and ill-treatment; and the right to a fair trial.

The ICCPR establishes a monitoring body of 18 experts -- the Human Rights Committee. The General Comments of the Human Rights Committee provide authoritative guidance on interpretation of the ICCPR. Some are cited in this manual and reproduced in Appendix I. The Human Rights Committee monitors the implementation of the ICCPR and its two optional protocols (see below). States parties are required under Article 40 of the ICCPR to submit periodic reports to the Human Rights Committee on their implementation of the ICCPR, as well as special reports on request.

The Human Rights Committee may review complaints made by one state party against another, provided that the state parties concerned have officially recognized the competence of the Committee to do so, by making a declaration under Article 41 of the ICCPR. (States have very rarely used such a procedure to complain about other states, found in many UN and regional human rights treaties.)

The (first) Optional Protocol to the International Covenant on Civil and Political Rights, 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. There were 92 states parties as of October 1998. The views of the

Human Rights Committee on some individual cases submitted pursuant to the Optional Protocol are cited in this manual.

The Second Optional Protocol to the International Covenant on Civil and Political Rights, aiming at the abolition of the death penalty (Second Optional Protocol to the ICCPR) was adopted by the UN General Assembly in 1989 and entered into force in 1991. States parties to this protocol agree to make sure that nobody is executed within their jurisdiction in peacetime and that they will take all necessary measures to abolish the death penalty. There were 33 states parties as of October 1998.

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 October 1998, there were 109 states parties. States parties to the Convention are obliged to stop and prevent torture in their jurisdictions, to make it a criminal offence, to investigate all allegations of torture and bring to justice suspected torturers while ensuring that anyone suspected of torture receives fair treatment throughout proceedings, to exclude evidence obtained through torture as evidence in trials and to ensure redress for victims. The Committee against Torture monitors the implementation of the Convention, by, among other things, considering periodic reports by states parties on their implementation of the Convention, by making inquiries and issuing findings, and, when its competence to do so has been recognized, by considering individual cases.

The Convention on the Rights of the Child was adopted by the UN General Assembly in 1989 and entered into force in 1990.3 By October 1998, 191 states – all UN member states except Somalia and the USA – were states parties. 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, which examines the progress of states parties in fulfilling their obligations under the Convention. States are required to submit periodic reports to the Committee.

Footnotes
3 See Amnesty International, The Convention on the Rights of the Child, AI Index: IOR 51/09/94, October 1994, for a discussion of the Convention.

The Convention on the Elimination of All Forms of Discrimination against Women (Women's Convention) was adopted by the UN General Assembly in 1979 and entered into force in 1981. As of October 1998, there were 162 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, established by Article 17, monitors implementation of the Convention, by, among other things, considering periodic reports of states parties.

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 October 1998, there were 151 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 monitors implementation of this treaty.

2.3 Laws 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 188 states parties as of February 1998. The Conventions have been supplemented by Additional Protocol I (150 states parties) which increases the scope of protection for civilians and others during international armed conflict, and Additional Protocol II (142 states parties) which protects civilians and others during internal armed conflicts.

3. International non-treaty standards

Some international non-treaty standards relevant to fair trials are described below. All the non-treaty standards cited in this manual are included in Standards and bodies cited in this manual.

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 which should regulate the conduct of all states. Several articles, including Articles 10 and 11, spell out rights related to a fair trial. The right to fair trial as recognized in the Universal Declaration has been widely accepted as being part of international customary law or general principles of law found in most states, and therefore legally binding on all states. The principles in the Universal Declaration have inspired numerous treaties and standards at the international and regional level.

The Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment (Body of Principles), adopted by consensus 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 forth basic legal and humanitarian concepts and serve as a guide for shaping national legislation.

The Standard Minimum Rules for the Treatment of Prisoners (Standard Minimum Rules), adopted in 1955 by the First UN Congress on the Prevention of Crime and the Treatment of Offenders and approved by the UN Economic and Social Council, set out what is “generally accepted as being good principle and practice” in the treatment of prisoners. In 1971 the UN General Assembly called on member states to implement these rules and to incorporate them in national legislation.

The Basic Principles on the Role of Lawyers were adopted by consensus at the Eighth UN Congress on the Prevention of Crime and the Treatment of Offenders in 1990 and welcomed by the UN General Assembly. The UN Crime Congress explained that “the adequate protection of the human rights and fundamental freedoms to which all persons are entitled requires that all persons have effective access to legal services provided by an independent legal profession”.

The Guidelines on the Role of Prosecutors were adopted by consensus at the Eighth UN Congress on the Prevention of Crime and the Treatment of Offenders in 1990 and welcomed by the UN General Assembly. The Guidelines were adopted in an effort to assist governments in “securing and promoting the effectiveness, impartiality and fairness of prosecutors in criminal proceedings”.

The Basic Principles on the Independence of the Judiciary were adopted by the Seventh UN Congress on the Prevention of Crime and the Treatment of Offenders and endorsed by the UN General Assembly in 1985. The principles, which apply to professional judges and lay judges as appropriate, were formulated to assist governments in securing and promoting the independence of the judiciary. They “should be taken into account and respected by Governments within the framework of

their national legislation and practice and be brought to the attention of judges, lawyers, members of the executive and the legislature and the public in general".

The United Nations Safeguards guaranteeing protection of the rights of those facing the death penalty, adopted by the UN Economic and Social Council and endorsed by the UN General Assembly in 1984, restrict the use of the death penalty in countries which have not yet abolished it. Among other protective measures, they provide that capital punishment may only be carried out after a legal process which gives all possible safeguards to ensure a fair trial, at least equal to those contained in Article 14 of the ICCPR, 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.

4. Regional treaty standards

Regional intergovernmental bodies have developed regional declarations and treaties for the protection of human rights. These standards are generally applicable to states that belong to the particular regional organization. The regional bodies cited in this manual are the Organization of African Unity , the Organization of American States and the Council of Europe. There are other regional standards which have a bearing on the right to fair trial which are not addressed in this manual.4

Footnotes

4. For example, the League of Arab States has adopted the Arab Charter of Human Rights (not yet entered into force):The Arab Charter of Human Rights, adopted 15 September 1994, 18 Human Rights Law Journal (1997), p. 151 (English translation). For a commentary on the Arab Charter of Human Rights, see Mona Rishmawi, "The Arab Charter on Human Rights: A Comment", 10 Interights Bulletin (1996) p.8; ICJ Review 56, June 1996.

5. See Amnesty International, Amnesty International's observations on possible reform of the African Charter on Human and Peoples' Rights, AI Index: IOR 63/03/93, 1993, for a discussion of the Charter.

4.1 Africa

The African Charter on Human and Peoples' Rights (African Charter) was adopted in 1981 by the Organization of African Unity (OAU) and entered into force in 1986. As of October 1998, all of the 52 member states of the OAU, except Eritrea, were parties to the African Charter. Basic fair trial guarantees are contained in the Charter as part of the right to have one's cause heard.5

The African Commission on Human and Peoples' Rights (African Commission), monitors the implementation of the African Charter. It has 11 members, nominated by states parties and elected by the OAU Assembly of Heads of State and Government to serve in their personal capacities. The African Commission is mandated to promote awareness of human rights within the region and to examine communications from one state party alleging that another state party has breached the provisions of the African Charter. The Commission has the authority to decide to examine communications from parties other than states, including individuals.

The African Commission also has a mandate to "formulate and lay down, principles and rules aimed at solving legal problems relating to human and peoples' rights and fundamental freedoms upon which African Governments may base their legislations" (Article 45 (1) (b) of the African Charter). In 1992

the Commission passed a Resolution on the Right to Recourse Procedure and Fair Trial (African Commission Resolution) which expands upon and strengthens fair trial guarantees in the African Charter.

At its meeting in February 1998, the OAU Council of Ministers adopted a Protocol to the African Charter creating an African Court on Human and Peoples' Rights (African Court). The mandate of the African Court, once established, will be to complement the protective mandate of the African Commission. It will also be able to give advisory opinions upon the request of states parties to the African Charter, the African Commission and bodies of the OAU. As of October 1998, 30 states had signed the Protocol and one had ratified it. The Court will be established once 15 states have ratified the Protocol.

4.2 Americas

The American Declaration of the Rights and Duties of Man (American Declaration) was adopted in 1948 by the Ninth Inter-American Conference, which also adopted the Charter of the Organization of American States (OAS). It is the cornerstone of the inter-American system for human rights protection and all member states of the OAS are obliged to observe the rights it enshrines. The right to due process of law is set out in Article XXVI of the Declaration.

The American Convention on Human Rights (American Convention), ("Pact of San José, Costa Rica"), was adopted in 1969 and entered into force in July 1978. It is open for ratification or accession by all member states of the OAS and as of July 1998, 25 of the 35 member states were parties to the Convention. Article 8 refers to the right to a fair trial. The Convention provides for the Inter-American Commission on Human Rights and the Inter-American Court of Human Rights (see below) to have competence as regards states parties' fulfilment of their obligations under the Convention. The Commission's competence in this regard is automatically accepted by states on ratification of the Convention. States parties must declare under Article 62, however, that they recognize the jurisdiction of the Court. As of July 1998, 17 states parties had accepted the Court's jurisdiction.

The Protocol to the American Convention on Human Rights to Abolish the Death Penalty was adopted by the General Assembly of the OAS in 1990. It prohibits states parties to the Protocol from applying the death penalty in their territories in peacetime. As of July 1998, four states had ratified the Protocol and a further three had signed.

The Inter-American Convention to Prevent and Punish Torture (Inter-American Convention on Torture) was adopted by the General Assembly of the OAS in 1985 and entered into force in February 1987. States parties are obliged to submit periodic reports to the Inter-American Commission on Human Rights on measures they have taken to implement the provisions of this Convention in national legislation. As of July 1998, 13 members states of the OAS were states parties.

The Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women ("Convention of Belem do Para") was adopted by the General Assembly in June 1994 and entered into force in March 1995. To date it is the most widely ratified treaty of the inter-American system, with 27 states parties as of July 1998.

The Inter-American Convention on Forced Disappearance of Persons (Inter-American Convention on Disappearance) was adopted by the OAS in 1994 and entered into force in 1996. It is aimed at preventing, punishing and eliminating "disappearances" in the region. In contrast to most regional

treaties which are open to ratification or accession only to members states of the regional body, this Convention is open for accession by all states. As of July 1998, five states had ratified the Convention and a further eight had signed.

The Inter-American Commission on Human Rights (Inter-American Commission) was created to promote the observance and defence of human rights and to serve as a consultative organ for the OAS member states in these matters. Among other things, the Commission can carry out on-site visits at the request or consent of member states, prepare special studies, make recommendations to governments on the adoption of measures to promote and protect human rights and request 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 case of states parties, the American Convention. In urgent cases, the Commission may request precautionary measures to protect people from harm. In addition, the Commission may ask the Inter-American Court of Human Rights to order provisional measures in serious and urgent cases not yet submitted to it, when this is necessary to prevent irreparable harm.

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, and based in San José, Costa Rica. Its purpose is the interpretation and application of 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 has broad consultative role and can be requested to issue advisory opinions on the interpretation of articles of the Convention. The 15 advisory opinions published by the Court as of July 1998 make up an important body of jurisprudence of the inter-American system.

4.3 Europe

The (European) Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention) entered into force in 1953. Ratification of or accession to the European Convention is a condition of joining the Council of Europe. As of September 1998, all 40 member states of the Council of Europe were states parties. The Convention sets out important fair trial guarantees, including in Articles 3, 5, 6 and 7.

Protocol No.6 to the Convention for the Protection of Human Rights and Fundamental Freedoms concerning the abolition of the death penalty (Protocol 6 to the European Convention) entered into force in 1985. The Protocol prohibits the use of the death penalty in peacetime. As of September 1998, 28 states had ratified this Protocol.

Protocol No. 7 to the Convention for the Protection of Human Rights and Fundamental Freedoms (Protocol 7 to the European Convention) entered into force in 1988. It contains provisions to protect aliens, as well as the right to have a conviction for a criminal offence reviewed by a higher tribunal. It secures the right not to be tried or punished more than once for the same offence in the same jurisdiction. It sets forth the right to compensation for miscarriages of justice. As of September 1998, 26 states had ratfied this Protocol.

The European Commission of Human Rights (European Commission) monitors the implementation of the European Convention. It considers complaints from one state party alleging a breach of the Convention by another state party if each has ratified the Convention. It may also consider complaints from individuals, groups of individuals or non-governmental organizations, provided that the state party alleged to have breached the Convention has recognized the competence of the Commission to receive such complaints.

The European Court of Human Rights (European Court) has as many judges as there are member states of the Council of Europe, regardless of whether member states have ratified the European Convention. States parties to the European Convention, and the European Commission, are entitled to bring cases before the European Court, which has jurisdiction over cases concerning the application and interpretation of the Convention. The decisions of the European Court are binding on states parties to the European Convention.

These two bodies merged on 1 November 1998 into a single new institution, the European Court of Human Rights, pursuant to Protocol 11. Individuals are able to file complaints directly with the Court. All 40 member states of the Council of Europe are parties to Protocol 11.

The European Prison Rules were adopted by the European Council of Ministers in 1973 and revised in 1987. Although not a legally binding treaty, they serve as guidelines for the treatment of detainees and prisoners. They prohibit torture and ill-treatment and safeguard the principle that different categories of prisoners, such as untried prisoners and convicted prisoners, should be held separately.

The Organization for Security and Cooperation in Europe (OSCE) encompasses all European states, including the central Asian republics, which are not members of the Council of Europe, as well as Canada and the United States of America. At meetings in Copenhagen (1990) and Moscow (1991), the OSCE adopted detailed, politically binding human rights commitments, including fair trial guarantees that largely reiterate UN standards and provisions in the European Convention.

5. UN thematic mechanisms

In addition to the UN treaty monitoring bodies (see above), guidance on the application of human rights standards is provided by experts (working groups and special rapporteurs) appointed by the UN Commission on Human Rights to work on different themes. These are known as UN thematic mechanisms. They are generally mandated to investigate complaints of a particular type of human rights violation in all countries, whether or not the state is bound by international human rights treaties. 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 Commission on Human Rights. Several UN thematic mechanisms are directly concerned with issues pertinent to fair trials.
The Working Group on Arbitrary Detention was established in 1991. It is mandated to investigate cases of detention imposed arbitrarily or otherwise inconsistent with international standards. It covers both pre-trial detention and post-trial imprisonment.

The Working Group on Enforced or Involuntary Disappearances was established in 1980. It examines matters related to enforced or involuntary disappearances and acts as a channel between the families of “disappeared” people and governments, with a view to ensuring that cases are investigated and that the fate and whereabouts of the “disappeared” person is clarified. It monitors states’ compliance with

their obligations deriving from the Declaration on the Protection of All Persons from Enforced Disappearance.

The post of 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 Special Rapporteur is also mandated to pay particular attention to extrajudicial, summary or arbitrary executions of certain groups such as children, women, national or ethnic, religious and linguistic minorities.

The post of Special Rapporteur on torture was established in 1985. The Special Rapporteur is mandated to examine questions relevant to torture and to promote the full implementation of international and national laws prohibiting the practice of torture.

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 investigate and make recommendations on measures to protect the independence of the judiciary.

6. International criminal tribunals

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, other 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) are important international standards. They represent contemporary fair trial guarantees, and, in some respects, they are an advance in the protection of rights of suspects and accused, for example as regards access to a lawyer and the right to silence. The tribunals do not allow the death penalty as a punishment.

Many of these standards have been incorporated into the Statute of the International Criminal Court, which was adopted on 17 July 1998 by a diplomatic conference in Rome. The Statute, which was adopted by a vote of 120 states to seven, with 21 abstentions, enters into force after 60 ratifications. The Statute excludes the death penalty and contains many of the fair trial guarantees set out in the Statutes and Rules of the two tribunals.

Standards and bodies cited in this manual

The following human rights standards and bodies are cited in this manual. The short form (in brackets) is generally used.

African Charter on Human and Peoples' Rights (African Charter)

African Commission on Human and Peoples' Rights (African Commission)

African Commission Resolution on the Right to Recourse Procedure and Fair Trial (African Commission Resolution)

African Court on Human and Peoples' Rights (African Court)

American Convention on Human Rights (American Convention)

American Declaration of the Rights and Duties of Man (American Declaration)

Basic Principles on the Independence of the Judiciary

Basic Principles on the Role of Lawyers

Basic Principles for the Treatment of Prisoners

Basic Principles on the Use of Force and Firearms by Law Enforcement Officials

Beijing Declaration and Platform for Action

Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment (Body of Principles)

Code of Conduct for Law Enforcement Officials

Committee against Torture

Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Convention against Torture)

Convention on the Elimination of All Forms of Discrimination against Women (Women's Convention)

Convention on the Prevention and Punishment of the Crime of Genocide

Convention on the Rights of the Child

Declaration of the Rights of the Child
Declaration on the Elimination of Violence against Women

Declaration on the Human Rights of Individuals Who are not Nationals of the Country in which They Live

Declaration on the Protection of All Persons From Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Declaration against Torture)

Declaration on the Protection of All Persons from Enforced Disappearance (Declaration on Disappearance)

European Commission of Human Rights (European Commission)

(European) Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention)

European Court of Human Rights (European Court)

European Prison Rules

Geneva Conventions of August 12, 1949 (Geneva Conventions)

Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (First Geneva Convention)

Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (Second Geneva Convention)

Geneva Convention relative to the Treatment of Prisoners of War (Third Geneva Convention)

Geneva Convention relative to the Protection of Civilian Persons in Time of War (Fourth Geneva Convention)

Guidelines on the Role of Prosecutors

Human Rights Committee
Inter-American Commission on Human Rights (Inter-American Commission)

Inter-American Court of Human Rights (Inter-American Court)

Inter-American Convention on Forced Disappearance of Persons (Inter-American Convention on Disappearance)

Inter-American Convention to Prevent and Punish Torture (Inter-American Convention on Torture)

International Convention on the Elimination of All Forms of Racial Dis-crimination (Convention against Racism)

International Covenant on Civil and Political Rights (ICCPR)

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 (Principles of Medical Ethics)

Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Additional Protocol I)

Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Additional Protocol II)

Protocol No. 6 to the Convention for the Protection of Human Rights and Fundamental Freedoms concerning the abolition of the death penalty (Protocol 6 to the European Convention)

Protocol No. 7 to the Convention for the Protection of Human Rights and Fundamental Freedoms (Protocol 7 to the European Convention)

Protocol to the American Convention on Human Rights to Abolish the Death Penalty

Resolution on the Right to Recourse Procedure and Fair Trial of The African Commission on Human and Peoples' Rights (African Commission Resolution)

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)
Rules of Procedure and Evidence, International Tribunal for Rwanda (Rwanda Rules)

Safeguards guaranteeing protection of the rights of those facing the death penalty (Death Penalty Safeguards)

Second Optional Protocol to the International Covenant on Civil and political Rights, aiming at the abolition of the death penalty (Second Optional Protocol to the ICCPR)

Special Rapporteur on extrajudicial, summary or arbitrary executions

Special Rapporteur on the independence of judges and lawyers

Special Rapporteur on torture

Standard Minimum Rules for the Treatment of Prisoners (Standard Minimum Rules)

Statute of the International Criminal Court (ICC Statute)

Statute of the International Criminal Tribunal for the former Yugoslavia (Yugoslavia Statute)

Statute of the International Criminal Tribunal for Rwanda (Rwanda Statute)

United Nations Guidelines for the Prevention of Juvenile Delinquency (The Riyadh Guidelines)

United Nations Rules for the Protection of Juveniles Deprived of their Liberty

United Nations Standard Minimum Rules for Non-custodial Measures (The Tokyo Rules)

United Nations Standard Minimum Rules for the Administration of Juvenile Justice (The Beijing Rules)

Universal Declaration of Human Rights (Universal Declaration)

Vienna Convention on Consular Relations

Working Group on Arbitrary Detention

Working Group on Enforced or Involuntary Disappearances

Use of terms

Different national legal systems and international standards define terms related to fair trials in different ways. The following definitions seek to clarify the meanings of some terms as used in this manual and by Amnesty International. These definitions are not always the same as those used in international standards or national laws.

Detention and imprisonment
The term detention is used when a person has been deprived of his or her liberty for any reason other than as a result of being convicted of an offence. 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.1

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".2

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.3

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 degree of severity of the possible penalty.4 While the classification of an act under national law is a consideration, it is not decisive, so that states cannot avoid applying the standards by failing to classify offences as criminal or by transferring jurisdiction from courts to administrative authorities.

Torture
Torture is defined in the Convention against Torture as "any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from 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." 5 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".6

Cruel, inhuman or degrading treatment or punishment
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".7

Courts and tribunals

Courts and tribunals are bodies which 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.8

Footnotes

1. Body of Principles, Use of Terms
2. Human Rights and Pre-trial Detention, UN Centre for Human Rights, 1994, UN Doc: E.94.XIV.6 . The Body of Principles, Use of Terms, states: "'Arrest' means the act of apprehending a person for the alleged commission of an offence or by the action of an authority".
3. Eckle Case, The European Court of Human Rights, 51 Series A, 15 July 1982
4. European Court, Engel and others v. The Netherlands, European Court, 22 Series A, 8 June 1976
5. Convention against Torture, Article 1(1)
6. Declaration against Torture, Article 1(2)
7. Body of Principles, footnote to Principle 6
8. European Court of Human Rights. See Sramek Case, 84 Series A 17, para. 36, 22 October 1984; Le Compte, Van Leuven and De Meyere Case, 43 Series A 24, para. 55, 23 June 1981

Abbreviations

The following abbreviations have been used in this manual. First the short forms of human rights standards and bodies are listed, then the abbreviations used in citations of cases.

Standards and bodies

Additional Protocol I
Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts

Additional Protocol II
Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts

African Charter
African Charter on Human and Peoples' Rights

African Commission
African Commission on Human and Peoples' Rights

African Commission Resolution
Resolution on the Right to Recourse Procedure and Fair Trial of the African Commission on Human and Peoples' Rights

African Court
African Court in Human and Peoples' Rights

American Convention
American Convention on Human Rights

American Declaration
American Declaration of the Rights and Duties of Man

Body of Principles
Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment

Convention against Racism
Interantional Convention on the Elimination of All Forms of Racial Discrimination

Convention against Torture
Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment

Death Penalty Safeguards
Safeguards guaranteeing protection of the rights of those facing the death penalty

Declaration against Torture
Declaration on the Protection of All Persons From Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment

Declaration on Disappearance
Declaration on the Protection of All Persons from Enforced Disappearance

European Commission
European Commission of Human Rights

European Convention
(European) Convention for the Protection of Human Rights and Fundamental Freedoms

European Court
European Court of Human Rights

Fourth Geneva Convention
Geneva Convention relative to the Protection of Civilian Persons in Time of War

Geneva Conventions
Geneva Conventions of August 12, 1949

ICCPR
International Covenant on Civil and Political Rights

ICC Statute
Statute of the International Criminal Court

Inter-American Commission
Inter-American Commission on Human Rights

Inter-American Convention on Disappearance
Inter-American Convention on Forced Disappearance of Persons

Inter-American Convention on Torture
Inter-American Convention to Prevent and Punish Torture

Inter-American Court
Inter-American Court of Human Rights

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 7 to the European Convention
Protocol No. 7 to the European Convention for the Protection of Human Rights and Fundamental Freedoms

The Riyadh Guidelines
United Nations Guidelines for the Prevention of Juvenile Delinquency
Rwanda Rules
Rules of Procedure and Evidence, International Tribunal for Rwanda
Rwanda Statute
Statute of the International Criminal Tribunal for Rwanda

Second Optional Protocol to the ICCPR
Second Optional Protocol to the Internaitonal Covenant on Civil and Political Rights, aiming at the abolition of the death penalty

Standard Minimum Rules
Standard Minimum Rules for the Treatment of Prisoners

The Beijing Rules
United Nations Standard Minimum Rules for the Administration of Juvenile Justice

The Tokyo Rules
United Nations Standard Minimum Rules for Non-custodial Measures
Third Geneva Convention
Geneva Convention relative to the Treatment of Prisoners of War

Universal Declaration
Universal Declaration of Human Rights

Women's Convention
Convention on the Elimination of All Forms of Discrimination against Women

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 Statute

Statute of the International Criminal Tribunal for the former Yugoslavia

Citations

Human Rights Committee
Report of the HRC(A/-/40): Report of the Human Rights Committee, (United Nations) General Assembly Official Records; -th Session, Supplement No. 40, (A/-/40)

Sel.Dec.: Selected Decisions of the Human Rights Committee under the Optional Protocol

Fin.Dec.: Human Rights Committee; Final Decisions

General Comment (number): General Comment (number) adopted by the Human Rights Committee under Article 40, paragraph 4 of the International Covenant on Civil and Political Rights

Human Rights Committee Cases
--- v country, (-/-), (Views adopted on) Day Month Year,
Report of the HRC, vol.x, (A/-/40), Year, at (page number)
(volume 1 or 2)Sel.Dec.(page number)
Fin.Dec. UN Doc. CCPR/C/-/-, Year, at (page number)
UN Doc.CCPR/C/-/D/-/-, at (page number)

African Commission
Annual Report of the African Commission: -th Annual Activity Report of the African Commission on Human and Peoples' Rights

Inter-American Court and Commission
Annual Report of the Inter-American Court: Annual Report of the Inter-American Court of Human Rights

Annual Report of the Inter-American Commission: Annual Report of the Inter-American Commission on Human Rights

Inter-American Court Cases
--- Case, Day Month Year,
Annual Report of the I-A Court (Year), OAS/Ser.L/V/-.- doc.-, Year, at (page)

Inter-American Commission Cases
Case (number), country, Day Month Year,
Annual Report of the I-A Commission (Year), OEA/Ser.L/V/-.- doc.- rev.-, Year, at (page)

European Court and Commission
Ser. A - Series A: Judgments and Decisions (of the European Court of Human Rights)

DR: Decisions and Reports (of the European Commission of Human Rights)

Yearbook: Yearbook of the European Convention on Human Rights

Coll.Dec.: Collection of Decisions of the European Commission of Human Rights

Digest: Digest of Strasbourg Case-Law relating to the European Convention on Human Rights

European Court Cases
---Case, Day Month Year, (volume number) Ser. A (page number) or Ser. A Vol. (volume number)
---Case, (-/-/-/-), Day Month Year

European Commission Cases
--- v country, (-/-), Day Month Year
(volume number) DR (page number)
(volume number) Yearbook (page number)
(volume number) Coll.Dec. (page number)
(volume number) Digest (page number)

SECTION A: Pre-trial rights

Chapter 1 The right to liberty
Everyone has the right to personal liberty. An arrest or detention is permissible only if carried out in accordance with the law. It must not be arbitrary and can only be carried out by authorized personnel. People charged with a criminal offence should not normally be held in detention pending trial.

1.1 The right to liberty

Everyone has the right to personal liberty. Article 3 of the Universal Declaration, Article 9 of the ICCPR, Article 6 of the African Charter, Article 1 of the American Declaration, Article 7 of the American Convention, Article 5 of the European Convention. This is a fundamental human right.

BOX:
Article 3 of the Universal Declaration:
"Everyone has the right to life, liberty and security of person."

Article 9(1) of the ICCPR:
"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."
END BOX

Governments may deprive people of their liberty in certain prescribed circumstances. International human rights standards provide a series of protective measures both to ensure that individuals are not deprived of their liberty unlawfully or arbitrarily, and to establish safeguards against other forms of abuse of detainees. Some of these standards apply to *all* people deprived of their liberty, whether or not in connection with a criminal offence, others *only* to people held in connection with criminal charges, and others only to particular types of people, such as foreign nationals or children. Although this manual covers many of the rights which apply to all people deprived of their liberty, including those held in administrative detention, it focuses on the rights which apply to people charged with criminal offences. [For more information on administrative detention see *Preventive Detention, A Comparative and International Law Perspective*, eds S. Frankowski, D. Shelton, Martinus Nijhoff, Dordrecht, 1992]

The essential corollary to the right to liberty is protection against arbitrary or unlawful detention. In order to protect the right to liberty, international standards including Article 9 of the Universal Declaration declare that: "No one shall be subjected to arbitrary arrest [or] detention". This basic guarantee applies to everyone, whether held in connection with criminal charges or, for example, in connection with mental illness, vagrancy or immigration control. [Human Rights Committee General Comment 8, para.1]

International standards provide not only that arrest and detention must not be arbitrary, but also that they must be on grounds and according to procedures established by law.

> The African Commission ruled that the arrest and detention of a political figure who was detained "at the pleasure of the Head of State" without charge or trial for 12 years violated the right to liberty set out in Article 6 of the African Charter. [*Krischna Achutan (on behalf of Aleke Banda), Amnesty International on behalf of Orton and Vera Chirwa, Amnesty International on behalf of Orton and Vera Chirwa v. Malawi,* (64/92, 68/92, 78/92 respectively), 8th Annual Report of the African Commission, 1994-1995, ACHPR/RPT/8th/Rev.I]

> The Inter-American Commission considered that in certain circumstances house arrest, internal exile, and banishment (forced relocation) could violate the right to personal liberty guaranteed by Article 7 of the American Convention. [Inter-American Commission, Report on the Situation of Human Rights in Argentina, 1980, OEA/Ser.L/V/II.49, doc.19, at 189,193,291; Inter-American Commission, Report on the Situation of Human Rights in Chile, 1985, OAS/Ser.L/V/II.66, doc.17, at 134,139; Inter-American Commission, Report on the Situation of Human Rights in Nicaragua, 1981, OEA/Ser.L/V/II.53, at 65]

> The Inter-American Court has stated that the presumption of innocence (see **Chapter 15, The presumption of Innocence**) set out in Article 8(2) of the American Convention requires that any restrictions on a person's liberty must be limited to those which are strictly necessary. [*Suárez Rosero Case*, Ecuador, Sentence of 12 November 1992]

1.2 When is an arrest or detention lawful?

An individual may only be deprived of his or her liberty on grounds and according to procedures established by law. Article 9(1) of the ICCPR, Article 6 of the African Charter; Article XXV of the American Declaration, Articles 7(2) and 7(3) of the American Convention, Article 5(1) of the European Convention.

These procedures must conform not only to domestic law, but also to international standards.

> The European Court has stated that the phrase "in accordance with a procedure prescribed by law" in Article 5(1) of the European Convention refers to domestic law, but that the domestic law itself "must be in conformity with the principles expressed or implied in the [European] Convention". [*Kenmache v. France* (No. 3), (45/1993/440/519), 24 November 1994]

1.2.1 European Convention

Article 5(1) of the European Convention sets out the only permissible circumstances in which people may be deprived of their liberty. One situation justifying arrest is in order to bring someone before the authorities "on reasonable suspicion of having committed an offence".

> 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". [*Fox, Campbell and Hartley*, (18/1989/178/234-236), 30 August 1990, para. 32]

BOX
European Convention, Article 5(1):
"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."
END BOX

1.3 When is an arrest or detention arbitrary?
No one may be subjected to arbitrary arrest, detention or imprisonment. Article 9 of the Universal Declaration, Article 9(1) of the ICCPR, Article 6 of the African Charter; Article XXV of the American Declaration, Articles 7(2) and 7(3) of the American Convention, Article 5(1) of the European Convention, Article 55(1)(d) of the ICC Statute.

An arrest or detention which is lawful may nonetheless be arbitrary under international standards, for example if the law under which the person is detained is vague, over-broad, or is in violation of other fundamental standards such as the right to freedom of expression. In addition, detainees who were initially arrested lawfully, but who are held after their release has been ordered by a judicial authority, are arbitrarily detained.

> The Human Rights Committee has explained that the term "arbitrary" in Article 9(1) of the ICCPR is not only to be equated with detention which is "against the law", but is to be interpreted more broadly to include elements of inappropriateness, injustice and lack of predictability. [*Albert Womah Mukong v. Cameroon*, (458/1991), 21 July 1994, UN Doc. CCPR/C/51/D/458/1991, p. 12]
>
> The African Commission has held that mass arrests and detentions of office workers in Malawi on suspicion that they had used office equipment such as fax machines and photocopiers for subversive ends were arbitrary, in violation of Article 6 of the African Charter. [*Krischna Achutan (on behalf of Aleke Banda), Amnesty International on behalf of Orton and Vera Chirwa, Amnesty International on behalf of Orton and Vera Chirwa v. Malawi,* (64/92, 68/92, 78/92 respectively), 8th Annual Report of the African Commission, 1994-1995, ACHPR/RPT/8th/Rev.I] It also held that the detention of a person beyond the expiry of the sentence constitutes a violation of Article 6 of the African Charter, which prohibits arbitrary detention. *[Annette Pagnoulle (on behalf of Abdoulaye Mezou) v. Cameroon*, (39/90), 10th Annual Report of the African Commission, 1996 -1997, ACHPR/RPT/10th]

In examining the lawfulness of a detention, the European Court examines whether the detention in question conforms to the substantive and procedural rules of domestic law **and** whether the detention was arbitrary. [*Kemmache v. France* (No.3), (45/1993/440/519), 24 November 1994]

The Inter-American Commission identified three forms of arbitrary detention: extra-legal detention (detention which has no legal basis, including detention ordered by the executive or detention by paramilitary groups with the consent or acquiescence of the security forces)[Inter-American Commission, Report on the Situation of Human Rights in Argentina, 1980, OEA/Ser.L/V/II.49, doc. 19, at 140: indefinite detention ordered by the executive; Annual Report of the Inter-American Commission, 1980-1981, OEA/Ser.L/V/II.49, doc. 9 rev. 1, 1981, p. 117 and Annual Report of the Inter-American Commission, 1981-1982, OEA/Ser.L/V/II.57, 1982, Bolivia: detention by paramilitaries linked to the security forces]; detention which violates the law; and detention which, although carried out in conformity with the law, constitutes an abuse of power. [Inter-American Commission, Report No. 13/96, Case 11.430, Mexico, 15 October 1996: an army General faced 16 preliminary inquiries and eight criminal actions over seven years, which were all closed or dismissed, in what the Commission described as "an unreasonable succession of cases, which taken together constitute an "abuse of power".]

1.4 Who can lawfully deprive a person of their liberty?

Arrest, detention or imprisonment may only be carried out by people authorized for that purpose. Principle 2 of the Body of Principles. This expressly prohibits a common practice in some countries where branches of the security forces carry out arrests and detentions although they have no power in law to do so.

The authorities which 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. Principle 9 of the Body of Principles.

BOX:
Principle 2 of the Body of Principles:
"Arrest, detention or imprisonment shall only be carried out strictly in accordance with the provisions of the law and by competent officials or persons authorized for that purpose."

Principle 9 of the Body of Principles
"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."
END BOX

States should establish rules under their national law indicating which officials are authorized to order deprivation of a person's liberty. States should establish the conditions under which such orders may be given and ensure strict supervision, including a clear chain of command, of all law enforcement officials responsible for arrests, detentions, custody, transfers and imprisonment. Article 12 of the Declaration on Disappearance.

1.5 The right to presumption of release pending trial

People awaiting trial on criminal charges should not, as a general rule, be held in custody. In accordance with the right to liberty and the presumption of innocence (see **Chapter 15, The presumption of innocence**), there is a presumption that people charged with a criminal offence will not be detained before their trials. International standards explicitly recognize that there are, however, circumstances in which the authorities may impose conditions on a person's liberty or detain an individual pending trial. Article 9(3) of the ICCPR, Principle 39 of the Body of Principles, Principle 6 of the Tokyo Rules; see also Article 7(5) of the American Convention, Article 5(3) of the European Convention. Such circumstances include when it is deemed necessary to prevent the suspect from fleeing, interfering with witnesses or when the suspect poses a clear and serious risk to others which cannot be contained by less restrictive means.

BOX:
Article 9(3) of the ICCPR:
"...It shall not be the general rule that persons awaiting trial shall be detained in custody, but release may be subject to guarantees to appear for trial, at any other stage of the judicial proceedings, and, should occasion arise, for execution of the judgement."

Principle 39 of the Body of Principles:
"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."

Principle 6 of the Tokyo Rules
"6.1 Pre-trial detention shall be used as a means of last resort in criminal proceedings, with due regard for the investigation of the alleged offence and for the protection of society and the victim.
6.2 Alternatives to pre-trial detention shall be employed at as early a stage as possible...."

END BOX

The Human Rights Committee has stated that "[p]re-trial detention should be an exception and as short as possible". [Human Rights Committee General Comment 8, para.3]

> The Human Rights Committee has stated that pre-trial detention must not only be lawful, but must also be necessary and reasonable in the circumstances. It has recognized that the ICCPR permits authorities to hold people in custody as an exceptional measure if it is necessary to ensure that the person appears for trial, but it has interpreted the "necessity" requirement narrowly. It has held that suspicion that a person has committed a crime is not sufficient to justify detention pending investigation and indictment. However, it has held that custody may be necessary to prevent flight, avert interference with witnesses and other evidence, or prevent the commission of other offences. The Committee has also held that a person may be detained when they constitute a clear and serious threat to society which cannot be contained by any other manner.[See *Van Alphen v. the Netherlands*, (305/1988), 23 July 1990, Report of the HRC Vol II, (A/45/40), 1990, at 115]
>
> The European Court has held that continued pre-trial detention can only be justified "if there are specific indications of a genuine requirement of public interest which, notwithstanding the

> presumption of innocence, outweighs the rule of respect for individual liberty." [*Van der Tang v. Spain*, (26/1994/473/554), 13 July 1993, para. 55]

If a person is held in detention pending trial, the authorities must keep the necessity of continuing such detention under regular review. Principle 39 of the Body of Principles.

See also **Chapter 5, The right to be brought promptly before a judge or other officer**, **Chapter 6, The right to challenge the lawfulness of detention**, and **Chapter 7, The right to trial within a reasonable time or to release from detention.**

Chapter 2 The rights of people in custody to information

Anyone arrested or detained must be notified at once 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 the preparation of their defence.

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

Anyone who is arrested or detained must be informed immediately of the reasons why they are being deprived of their liberty. Article 9(2) of the ICCPR, Paragraph 2(B) of the African Commission Resolution, Principle 10 of the Body of Principles; see Article 7(4) of the American Convention, Article 5(2) of the European Convention, Principle 11(2) of the Body of Principles;

BOX:

Article 9(2) of the ICCPR:
"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."

Principle 10 of the Body of Principles:
"Anyone who is arrested shall be informed at the time of his arrest of the reason for his arrest and shall be promptly informed of any charges against him."

Principle 11(2) of the Body of Principles:
"A detained person and his counsel, if any, shall receive prompt and full communication of any order of detention, together with the reasons therefor."

END BOX

A key purpose of the requirement for information about the reasons for arrest or detention is to allow detainees to challenge the legality of their detention. (See **Chapter 6, The right to challenge the lawfulness of detention**.) Therefore the reasons given must be specific. They must include a clear explanation of the legal and factual basis for the arrest or detention.

> For example, the Human Rights Committee has held that "it was not sufficient simply to inform [the detainee] that he was being arrested under the prompt security measures without any indication of the substance of the complaint against him." [*Drescher Caldas v. Uruguay* (43/1979), 21 July 1983, 2 Sel. Dec. 80]
>
> Similarly, the Human Rights Committee expressed concern about detentions in Sudan on grounds of "national security". The Committee recommended that the concept of national security be defined by law and that police and security officials be required to provide written

> reasons for a person's arrest, which should be made public and subject to review by the courts. [Concluding Observations of the HRC: Sudan, UN Doc. CCPR/C/79/Add.85, 19 November 1997, para.13]
>
> The Human Rights Committee also considered that there was a violation of Article 9(2) of the ICCPR in a case where an accused was informed at the time of his arrest only that he was wanted in connection with a murder investigation. For several weeks he was not informed in detail of the reasons for his arrest, the facts of the crime for which he was arrested nor the identity of the victim. [*Kelly v. Jamaica*, (253/1987), 8 April 1991, Report of the HRC, (A/46/40), 1991, para. 5]
>
> Similarly, the European Court has explained that Article 5(2) of the European Convention 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, so as to be able, if he sees fit, to apply to a court to challenge its lawfulness..." However, the Court stated that this does not require a complete description of all the charges at the moment of arrest. In the case examined, the arresting officer cited the law under which each person was being arrested at the time of arrest. Within a few hours, each was interrogated by police and the reason why they were suspected of belonging to banned organizations was brought to their attention. The Court held that there were no grounds to hold that they did not have enough information to understand why they had been arrested. [*Fox, Campbell and Hartley*, (18/1989/178/234-236), 30 August 1990, paras. 40, 41]

Article 9(2) of the ICCPR, Principle 10 of the Body of Principles, and Paragraph 2 (B) of the African Commission Resolution require that notification of the reasons for arrest must take place **at the time of the arrest.**

> The Human Rights Committee found that there was a violation of Article 9(2) of the ICCPR, in a case in which a lawyer for a local human rights organization was held for 50 hours without being informed of the reasons for his arrest. [*Portorreal v. Dominican Republic*, (188/1984), 2 Sel. Dec. 214]

However, some latitude will be given if it is considered that, given the circumstances, the person arrested is sufficiently aware of the reasons for arrest.

> In a case where a person arrested after drugs were found in his vehicle was only informed of the charges against him through an interpreter the morning after his arrest, the Human Rights Committee held that it would be wholly unreasonable under these circumstances to argue that the person was unaware of the reasons for his arrest. [*Griffin v. Spain*, (493/1992), Views adopted on 4 April 1995, Fin. Dec. UN Doc. CCPR/C/57/1, 23 August 1996]

Article 5(2) of the European Convention requires that the arrested person be informed "**promptly**" of the reasons for arrest. The term "promptly" in this context is generally strictly construed, although some unavoidable delay may be tolerated, for example to find an interpreter.

> The European Court has stated that "intervals of a few hours" between the time of arrest and interrogation – which would lead the detainee to understand the reasons for the arrest – "cannot be regarded as falling outside the constraints of time imposed by the notion of

promptness in Article 5(2)." [*Fox, Campbell and Hartley,* (18/1989/178/234-236), 30 August 1990, para. 42]

2.2 Right to notification of rights

In order to exercise one's rights, one must know that they exist. Everyone arrested or detained has the right to be informed of their rights and an explanation of how to avail themselves of such rights. Principles 13 and 14 of the Body of Principles, Rule 42 of the Yugoslavia Rules, Rwanda Rules 42. [The Yugoslavia and Rwanda Rules require that suspects questioned by the Prosecutor, whether or not in custody, be informed of their rights to counsel of their choice or free legal assistance, free interpretation and to silence.]

BOX

Principle 13 of the Body of Principles:

" 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."

End BOX

2.2.1 Notification of the right to legal counsel

One of the most important rights which all arrested or detained people need to know is that they are entitled to the help of a lawyer. See **Chapter 3, The right to legal counsel before trial.** Every person who is arrested, detained or charged must be informed of their right to have the assistance of legal counsel. Principle 5 of the Basic Principles on the Role of Lawyers, Principle 17(1) of the Body of Principles.

This information should be provided **immediately** upon arrest or detention or when charged with a criminal offence, according to Principle 5 of the Basic Principles on the Role of Lawyers. Principle 17(1) of the earlier Body of Principles provides that this information should be given **promptly** after arrest. The Yugoslavia and Rwanda Rules require that notice of the right to legal counsel be given to all suspects questioned by the Prosecutor, whether they are detained or not.

BOX:

Principle 5 of the Basic Principles on the Role of Lawyers:

"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."

END BOX

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. Articles 9(2) and 14(3)(a) of the ICCPR, Articles 7(4) and 8(2)(b) of the American Convention, Article 5(2) and 6(3)(a) of the European Convention, Principle 10 of the Body of Principles, Paragraph 2(B) of the African Commission Resolution, Articles 20(2) and 21(4)(a) of the Yugoslavia Statute, Rwanda Statute Articles 20(2) and 21(4)(a) .

The European Commission has stated that Article 5(2) of the European Convention requires that everyone arrested be "informed sufficiently about the facts and the evidence which are proposed to be the foundation of a decision to detain him. In particular, he should be enabled

> to state whether he admits or denies the alleged offence." [*X v. Federal Republic of Germany*, (8098/77), 13 December 1978, 16 DR 111 at 114]

The requirement to give prompt information about criminal charges serves two fundamental purposes. It provides all people arrested or detained with information to challenge the lawfulness of their detention – the main purpose of the safeguard set out in Article 9(2) of the ICCPR and parallel provisions of regional treaties. It also permits anyone facing trial on criminal charges, whether or not in custody, to begin the preparation of their defence – the main purpose of safeguards elaborated in Article 14(3)(a) of the ICCPR, Article 8(2)(b) of the American Convention and Article 6(3)(a) of the European Convention. The information to be given promptly after arrest is not required to be as specific as the information given in order to prepare the defence. See **Chapter 8.4, Right to information about charges,** in **Chapter 8, The right to adequate time and facilities to prepare a defence**.

2.4 Notification in a language the person understands

To be effective, information must be communicated in a language the person understands. Anyone who has been arrested, charged or detained, who does not adequately understand or speak the language used by the authorities, has the right to be notified in a language they understand what their rights are and how to exercise them, why they have been arrested or detained, and any charges against them. They are also entitled to receive a written record of: the reason for arrest; the time of arrest and transfer to a place of detention; the date and time that they will brought before a judge or other authority; who arrested or detained them; and where they are being held. Principle 14 of the Body of Principles.

They are also entitled to have an interpreter to help them with the legal proceedings after arrest, free of charge if necessary. Principle 14 of the Body of Principles, Article 21(4)(a) of the Yugoslavia Statute, Rwanda Statute Article 20(4)(a).

BOX:

Principle 14 of the Body of Principles:

"A person who does not adequately understand or speak the language used by the authorities responsible for his arrest, detention or imprisonment is entitled to receive promptly in a language which he understands the information referred to in principle 10, principle 11, paragraph 2, principle 12, paragraph 1, and principle 13 and to have the assistance, free of charge, if necessary, of an interpreter in connection with legal proceedings subsequent to his arrest."

END BOX

The European Convention is the only treaty which expressly requires that notification of the reasons for arrest (as opposed to information about charges) must be given in a language that the person understands. Article 5(2) of the European Convention. However, the Human Rights Committee has clarified its view that this should be the case, [Human Rights Committee General Comment 13, para. 8] and paragraph 2(B) of the African Commission Resolution and Principle 14 of the Body of Principles specifically provide for this.

See **Chapter 23, The right to an interpreter and to translation**.

2.5 Foreign nationals

If the person detained or arrested is a foreign national, they must, in addition, 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 the appropriate international organization. Article 36 of the Vienna Convention on Consular Relations, Principle 16(2) of the Body of Principles.

The Vienna Convention on Consular Relations requires that an arrested, detained or imprisoned person be informed of this right **without delay**; the Body of Principles requires that this information be provided **promptly**.

BOX:

Principle 16(2) of the Body of Principles:

"If a detained or imprisoned person is a foreigner, he shall also be promptly informed of his right to communicate by appropriate means with a consular post or the diplomatic mission of the State of which he is a national or which is otherwise entitled to receive such communication in accordance with international law or with the representative of the competent international organization, if he is a refugee or is otherwise under the protection of an intergovernmental organization."

Article 36 of the Vienna Convention on Consular Relations:

"b. If he so requests, the competent authorities of the receiving State shall without delay inform the consular post of the sending State if, within its consular district, a national of that State is arrested or committed to prison or to custody pending trial or is detained in any other manner. Any communication addressed to the consular post by the person arrested, in prison, custody or detention shall also be forwarded by the said authorities without delay. The said authorities shall inform the person concerned without delay of his rights under this sub-paragraph;"

END BOX

Chapter 3 The right to legal counsel before trial

Everyone in detention or facing a possible criminal charge has the right to the assistance of a lawyer of their choice to protect their rights and to assist in their defence. If the person cannot afford to hire a lawyer, effective, qualified counsel should be assigned. The person must be given adequate time and facilities to communicate with their lawyer. Access to counsel should be immediate.

3.1 Right to the assistance of a lawyer

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. Principle 1 of the Basic Principles on the Role of Lawyers, Principle 17(1) of the Body of Principles, Rule 93 of the European Prison Rules, Article 21(4)(d) of the Yugoslavia Statute, Rwanda Statute 20(4)(d). See also Article 55(2)(c) of the ICC Statute.

See also **Chapter 20.3, The right to be defended by counsel.**

BOX:
Principle 1 of the Basic Principles on the Role of Lawyers:
"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."

Principle 17(1) of the Body of Principles:
"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."

Rule 93 of the European Prison Rules:
"Untried prisoners shall be entitled, as soon as imprisoned, to choose a legal representative, or shall be allowed to apply for free legal aid where such aid is available and to receive visits from that legal adviser with a view to their defence and to prepare and hand to the legal adviser and to receive, confidential instructions...."
END BOX

3.1.1 The right to a lawyer in pre-trial stages

Principle 1 of the Basic Principles on the Role of Lawyers establishes the right to assistance at **all** stages of criminal proceedings, including interrogations. (See also Principle 17 of the Body of Principles, which applies to all people who are detained.)

A person's right to the help of a lawyer in pre-trial proceedings is not expressly set out in the ICCPR, the American Convention, the African Charter or the European Convention. However, the Human Rights Committee, the Inter-American Commission and the European Court have all recognized that the right to a fair trial requires access to a lawyer during detention, interrogation and preliminary investigations.

> The Human Rights Committee has stated that "all persons arrested must have immediate access to counsel". [Concluding Observations of the HRC: Georgia, UN Doc. CCPR/C/79/Add.74, 9 April 1997, para. 28]
>
> The Inter-American Commission has stated that the right to defend oneself requires that an accused person be permitted to obtain legal assistance when first detained. It concluded that a law which prohibited a detainee from access to counsel during detention and investigation could seriously impinge upon defence rights. [Annual Report of the Inter-American Commission, 1985-1986, OEA/Ser.L/V/II.68, doc. 8 rev. 1, 1986, p. 154, El Salvador]
>
> Similarly, the European Court has acknowledged that the right to a fair trial normally requires an accused person to be allowed legal counsel during the initial stages of police investigation. The court examined a case in which a person was denied access to counsel during the first 48 hours of his detention, when he had to decide whether to exercise his right of silence. This decision could affect whether or not he was charged, and under national law adverse inferences could be drawn at trial from his silence during police questioning. The court found that the failure to grant him access to counsel during the first 48 hours after his arrest was a violation of Article 6 of the European Convention. [*Murray v. United Kingdom,* (41/1994/488/570), 8 February 1996]
>
> The Yugoslavia Rules, the Rwanda Rules and the ICC Statute provide that suspects have the right to counsel when questioned by the Prosecutor. Rule 42 of the Yugoslavia Rules, Rwanda Rules 42, Article 55(2)(d) of the ICC Statute.

3.2 Right to choose a lawyer

The right to a lawyer generally means that a person has the right to legal counsel of their choice. Principles 1 and 5 of the Basic Principles on the Role of Lawyers, Rule 93 of the European Prison Rules, Article 55(2)(c) of the ICC Statute. See also **Chapter 20.3, The right to be defended by counsel.**

3.3 Right to have a lawyer assigned free of charge

If a person who is arrested, charged or detained does not have legal counsel of their own choice, they are entitled to have a lawyer assigned by a judge or judicial authority, whenever the interests of justice require it. If the person cannot afford to pay, assigned counsel must be provided free of charge. Principle 17(2) of the Body of Principles, Principle 6 of the Basic Principles on the Role of Lawyers, Rule 42(A)(i) of the Yugoslavia Rules, Rwanda Rules 42(A)(i), Article 21(4)(d) of the Yugoslavia Statute, Rwanda Statute 20(4)(d), Article 55(2)(c) of the ICC Statute.

The determination of whether the interests of justice require appointment of counsel depends primarily on the seriousness of the offence and the severity of the potential penalty (see **Chapter 20.3.3, Right to have defence counsel assigned; the right to free legal assistance**).

Principle 3 of the Basic Principles on the Role of Lawyers requires governments to provide sufficient funding and other resources to provide legal counsel for the poor and other disadvantaged people.

BOX:
Principle 17(2) of the Body of Principles:
"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."

Principle 6 of the Basic Principles on the Roles of Lawyers:
"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."
END BOX

3.3.1 Right to competent and effective assigned counsel

The right to counsel means the right to competent counsel. All states must ensure that assigned counsel provide effective representation for suspects and accused. Any person arrested, detained or charged with a criminal offence is 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. Principle 6 of the Basic Principles on the Role of Lawyers. See **Chapter 20.5, Right to experienced, competent and effective defence counsel**.

3.4 Right of detainees to have access to counsel

Everyone in detention, whether or not in connection with a criminal offence, has the right of access to their lawyer. Principle 18(1) of the Body of Principles, Principles 1 and 7 of the Basic Principles on the Role of Lawyers. It has been widely recognized that prompt and regular access to a lawyer for a detainee is an important safeguard against torture, ill-treatment, coerced confessions and other abuses. [Human Rights Committee General Comment 20, para. 11*;* Report of the UN Special Rapporteur on torture, (E/CN.4/1992/17), 17 December 1991, para.284]

BOX
Principle 18(1) of the Body of Principles
"A detained or imprisoned person shall be entitled to communicate and consult with his legal counsel."
END BOX

3.4.1 When does a detainee have the right of access to counsel?

Ensuring that a detained person has access to counsel is an important safeguard to the protection of rights, so international standards favour giving detainees access to counsel without delay after arrest.

> The Human Rights Committee has stressed that "all persons arrested must have immediate access to counsel". [Concluding Observations of the HRC: Georgia, UN Doc. CCPR/C/79/Add.74, 9 April 1997, para. 28]
>
> The Inter-American Commission concluded that the right to counsel set out in Article 8(2) of the American Convention applied on the first interrogation. [Report on the Situation of Human Rights of a Segment of the Nicaraguan Population of Miskito Origin, OEA Ser.L/V/11.62, doc.10, rev. 3, 1983]

Principle 7 of the Basic Principles on the Role of Lawyers states that access to a lawyer must be granted "promptly".[Less than 48 hours from the time of arrest or detention]

BOX
Principle 7 of the Basic Principles on the Role of Lawyers
"Governments shall further ensure that all persons arrested or detained, with or without criminal charge, shall have prompt access to a lawyer, and in any case not later than forty-eight hours from the time of arrest or detention.
END BOX

Access to counsel may be delayed only in exceptional circumstances as prescribed by law.

A detainee's access to a lawyer may be restricted or suspended "in exceptional circumstances, to be specified by law or lawful regulations, when it is considered indispensable by a judicial or other authority in order to maintain security and good order". Principle 18(3) of the Body of Principles.

Even in these exceptional circumstances, access may not be denied for long.

> The UN 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". [Report of the UN Special Rapporteur on torture, UN Doc. E/CN.4/1990/17, 18 December 1989, para.272; see also UN Doc. E/CN.4/1995/34, 12 January 1995, para. 926]

In no case should access begin later than 48 hours from the time of arrest or detention. Principle 7 of the Basic Principles on the Role of Lawyers.

Principle 15 of the Body of Principles states that detainees should not be denied access to counsel, in any circumstances, "for more than a matter of days". Principle 15 of the Body of Principles.

3.5 Right to time and facilities to communicate with counsel
The right of a person charged with a criminal offence to adequate time and facilities to prepare a defence (see **Chapter 8**) requires that the accused is given opportunities to communicate in confidence with his or her counsel. Principle 8 of the Basic Principles on the Role of Lawyers, Principle 18(2) of the Body of Principles,Rule 93 of the Standard Minimum Rules, Article 14(3)(b) of the ICCPR, Articles 8(2)(c) and 8(2)(d) of the American Convention, Paragraph 2(E)(1) of the African Commission Resolution, Article 21(4)(b) of the Yugoslavia Statute, Rwanda Statute 20(4)(b), Article 67(1)(b) of the ICC Statute. [Human Rights Committee General Comment 13, para.9] This right applies at all stages of the proceedings and is particularly relevant to people held in pre-trial detention.

BOX
Article 14(3)(b) of the ICCPR:
"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;"
END BOX

Governments must ensure that detainees have opportunities to consult and communicate with counsel without delay, interception or censorship. Principle 8 of the Basic Principles on the Role of Lawyers, Principle 18(3) of the Body of Principles, Rule 93 of the Standard Minimum Rules, Rule 93 of the European Prison Rules.

BOX
Principle 8 of the Basic Principles on the Role of Lawyers
"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."
END BOX

> Although the right of an accused to communicate with counsel is not expressly guaranteed by Article 6 of the European Convention, the European Commission has stated that the right may be inferred, as the accused's communication with his or her counsel is a fundamental part of the preparation of his or her defence. [*Kröcher and Möller v. Switzerland,* (8463/78), 9 July 1981, 26 DR 52]

The authorities must ensure that lawyers advise and represent their clients in accordance with professional standards, free from intimidation, hindrance, harassment, or improper interference from any quarter. Principle 16 of the Basic Principles on the Role of Lawyers. [Human Rights Committee General Comment 13, para. 9]

3.6 Right to confidential communication with counsel
The authorities must respect the confidentiality of the communications and consultations between lawyers and their clients. The right to confidential communication with a lawyer applies to all people, including those who are arrested or detained, whether or not charged with a criminal offence. Principles 22 and 8 of the Basic Principles on the Role of Lawyers, Principle 18 of the Body of Principles, Rule 93 of the European Prison Rules; see also Paragraph 2(E)(1) of the African Commission Resolution. [Human Rights Committee General Comment 13, para.9] See **Chapter 20.4, Right to confidential communications with counsel**.

BOX:
Principle 22 of the Basic Principles on the Role of Lawyers:
"Governments shall recognize and respect that all communications and consultations between lawyers and their clients within their professional relationship are confidential."

Principle 18(5) of the Body of Principles:
"Communications between a detained or imprisoned person and his legal counsel mentioned in the present principle shall be inadmissible as evidence against the detained or imprisoned person unless they are connected with a continuing or contemplated crime."
END BOX

The right to confidential communication means there must be no interception or censorship of written or oral communications (including telephone calls) between the accused and their lawyer. 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. Principle 18(5) of the Body of Principles.

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. 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, Rule 93 of the European Prison Rules.

BOX:

Principle 18(4) of the Body of Principles:

"Interviews between a detained or imprisoned person and his legal counsel may be within sight, but not within the hearing, of a law enforcement official."

END BOX

Chapter 4 The right of detainees to have access to the outside world

People held in custody are entitled to prompt access to families, lawyers, doctors, a judicial official and, if the detainee is a foreign national, to consular staff or competent international organization. Experience shows that access to the outside world is an essential safeguard against human rights violations such as "disappearances", torture or ill-treatment, and vital to the process of obtaining a fair trial. This chapter is about the rights of access to relatives and independent medical attention: the right to see a lawyer is covered in Chapter 3, and the right to be brought before a judge in Chapter 5.

4.1 Right to communicate and receive visits

People held lawfully in detention or imprisonment forfeit for a time the right to liberty, and face restrictions on other rights such as the right to privacy, freedom of movement and freedom of assembly. Although detainees are to be presumed innocent until they have been convicted, both detainees and prisoners are inherently vulnerable because they are under the control of the state. International law recognizes this and places special responsibility on the state to protect detainees and prisoners. When the state deprives a person of liberty, it assumes a duty of care for that person. The duty of care is to maintain the safety and safeguard the welfare of people deprived of their liberty. Detainees are not to be subjected to any hardship or constraint other than that resulting from the deprivation of liberty. [See Human Rights Committee General Comment 21, para. 3]

The rights of detainees to communicate with others and to receive visits are fundamental safeguards against human rights abuses such as torture, ill-treatment and "disappearances".

Detained and imprisoned people must be allowed to communicate with the outside world, subject only to reasonable conditions and restrictions. Principle 19 of the Body of Principles.

BOX
Principle 19 of the Body of Principles:
"A detained or imprisoned person shall have the right to be visited by and to correspond with, in particular, members of his family and shall be given adequate opportunity to communicate with the outside world, subject to reasonable conditions and restrictions as specified by law or lawful regulations."
END BOX

4.1.1 Incommunicado detention

Incommunicado detention (detention without access to the outside world) facilitates torture, ill-treatment and "disappearances". Prolonged incommunicado detention can be in itself a form of cruel, inhuman or degrading treatment. [Incommunicado detention, as used in this manual, covers people held in custody with or without charge who are deprived of access to family and friends, lawyers and doctors. Incommunicado detention may occur before or after being brought before a judicial authority

(see chapters 5 and 6). Incommunicado detention is not the same as solitary confinement, where a detainee or prisoner is deprived of contact with other inmates.]

International standards do not expressly prohibit incommunicado detention in all circumstances. However, international standards and expert bodies provide that restrictions and delays in granting detainees access to the outside world are permitted only in very exceptional circumstances for very short periods of time (see **Chapter 3.4.1, When does a detainee have the right of access to counsel?** and below).

> The UN Commission on Human Rights stated in April 1997 that "prolonged incommunicado detention may facilitate the perpetration of torture and can in itself constitute a form of cruel, inhuman or degrading treatment." [Resolution 1997/38, para. 20]
>
> The Human Rights Committee has found that the practice of incommunicado detention may violate Article 7 of the ICCPR (prohibiting torture and ill-treatment) or Article 10 of the ICCPR (safeguards for people deprived of their liberty). [*Albert Womah Mukong v. Cameroon*, (458/1991), 21 July 1994, UN Doc. CCPR/C/51/D/458/1991; *El-Megreisi v. Libyan Arab Jamahiriya*, (440/1990), 23 March 1994, UN Doc. CCPR/C/50/D/440/1990] The Committee has also stated that "[p]rovisions should also be made against incommunicado detention" as a safeguard against torture and ill-treatment. [Human Rights Committee General Comment 20, para.11]
>
> The Human Rights Committee has stated that "incommunicado detention is conducive to torture and ... consequently this practice should be avoided", and that "urgent measures should be taken to strictly limit incommunicado detention", in relation to the Committee's examination of Peruvian laws allowing up to 15 days' incommunicado detention at the discretion of the police to interrogate detainees suspected of terrorism-related offences. [Preliminary Observations of the HRC: Peru, UN Doc. CCPR/C/79/Add.67, paras 18 and 24, 25 July 1996]
>
> The UN Special Rapporteur on Torture has called for a total ban on incommunicado detention. He stated: "Torture is most frequently practised during incommunicado detention. Incommunicado detention should be made illegal and persons held incommunicado should be released without delay. Legal provisions should ensure that detainees be given access to legal counsel within 24 hours of detention." [Report of the Special Rapporteur on torture, UN Doc. E/CN.4/1995/434, para. 926(d)]
>
> The Inter-American Commission has stated that the practice of incommunicado detention is not in keeping with respect for human rights, as it "creates a situation conducive to other practices including torture", [Inter-American Commission, *Ten years of Activities 1971 - 1981*, at 318; see *Report on the Situation of Human Rights in Bolivia*, OEA/Ser.L/V/II.53, doc.6, rev.2, 1 July 1981, at 41- 42] and that incommunicado detention punishes the family of the detainee and as such impermissibly extends the sanction. [Annual Report of the Inter-American Commission, 1982 - 1983, OEA/Ser.L/V/II/61, doc.22, rev.1; Annual Report of the Inter-American Commission, 1983 - 1984, OEA/Ser.L/V/II/63, doc.22]

The Inter-American Court found that incommunicado detention of 36 days violated the prohibition against torture and ill-treatment set out in Article 5(2) of the American Convention. [*Suárez Rosero Case*, Ecuador, 12 November 1997]

4.2 Right to inform family of arrest or detention and place of confinement
Anyone who is arrested, detained or imprisoned has the right to inform, or have the authorities notify, their family or friends. The information must include the fact of their arrest or detention and the place where they are being kept in custody. (See **Chapter 10.1.1 The right to be held in a recognized place of detention.)** If the person is transferred to another place of custody, their family or friends must again be informed. Principle 16(1) of the Body of Principles, Rule 92 of the Standard Minimum Rules, Rule 92 of the European Prison Rules, Article 10(2) of the Declaration on Disappearance.

BOX:
Principle 16(1) of the Body of Principles:
"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.**"**

Rule 92 of the Standard Minimum Rules:
"An untried prisoner shall be allowed to inform immediately his family of his detention and shall be given all reasonable facilities for communicating with his family and friends, and for receiving visits from them, subject only to restrictions and supervision as are necessary in the interests of the administration of justice and of the security and good order of the institution."
END BOX

This notification is to take place immediately, according to Rule 92 of the Standard Minimum Rules, or at least without delay, according to other standards. While in exceptional cases the notification can be delayed in the interests of the administration of justice (i.e. the exceptional needs of the investigation), the delay shall not exceed a matter of days. Principles 16(1) and (4) and 15 of the Body of Principles.

BOX:
Principle 16(4) of the Body of Principles:
"Any notification referred to in the present principle shall be made or permitted to be made without delay. The competent authority may however delay a notification for a reasonable period where exceptional needs of the investigation so require."

Principle 15 of the Body of Principles:
"Notwithstanding the exceptions contained in principle 16, paragraph 4, and principle 18, paragraph 3, communication of the detained or imprisoned person with the outside world, and in particular his family or counsel, shall not be denied for more than a matter of days."
END BOX

4.3 Right of access to family
People held in pre-trial detention are to be given all reasonable facilities to communicate with family and friends and to receive visits from them. These rights are subject to restriction and supervision only as "are necessary in the interests of the administration of justice and of the security and good order of the institution". Principle 19 of the Body of Principles, Rule 92 of the Standard Minimum Rules, Rule 92 of the European Prison Rules.

The Inter-American Commission considers that the right to receive visits from relatives is "a fundamental requirement" for ensuring respect for the rights of detainees and the right to protection of the family, and that conditions or procedures related to visits must not infringe other rights protected by the American Convention without due process of law, including the rights to respect for personal integrity, privacy and family. [Report No. 38/96, Case 10.506 (Argentina), 15 October 1996], It stated that the right to visits applies to all detainees, independent of the nature of the offence of which they are accused or convicted. [Case 1992, 27 May 1977] It considered regulations allowing only short, infrequent visits and the transfer of detainees to distant facilities as arbitrary sanctions. [Annual Report of the Inter-American Commission, 1983 - 1984, OEA/Ser.L/V/II/63, doc.10, Uruguay; Seventh Report on the Situation of Human Rights in Cuba, 1983, OEA/Ser.L/V/II.61, doc.29, rev.1]

4.4 Rights of foreign nationals

Foreign nationals held in pre-trial detention are to be given all reasonable 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 or receive visits from representatives of the competent international organization. Article 36 of the Vienna Convention on Consular Relations, Rule 38 of the Standard Minimum Rules, Rule 44 of the European Prison Rules. See Principle 16 (2) of the Body of Principles, Article 2 of the Code of Conduct for Law Enforcement Officers, Article 10 of the Declaration on the Human Rights of Individuals Who are not Nationals of the Country in which They Live. Such contact is only with the consent of the detainee.

4.5 Right of access to doctors

People held in custody by law enforcement officials have the right to be examined by a doctor and, when necessary, to receive medical treatment.Principle 24 of the Body of Principles, Rule 24 of the Standard Minimum Rules, Rule 29 of the European Prison Rules. This right is viewed as a safeguard against torture and ill-treatment, among other things, as well as an integral part of the duty of the authorities to ensure respect for the inherent dignity of the human person. The Human Rights Committee has stated that the protection of detainees requires that each person detained be afforded prompt and regular access to doctors. [Human Rights Committee General Comment 20, para. 11]

Safeguards guaranteeing the standards of medical care for detainees are described in **Chapter 10.1.2 The right to adequate medical care.**

Law enforcement officials have a duty to ensure that assistance and medical aid are rendered to any injured or affected person whenever necessary. Article 6 of the Code of Conduct for Law Enforcement Officials.

BOX:
Article 6 of the Code of Conduct for Law Enforcement Officials:
"Law enforcement officials shall ensure the full protection of the health of persons in their custody and, in particular, shall take immediate action to secure medical attention whenever required."
END BOX

The rights of detainees to have access to medical care extends to dental treatment and psychiatric services for diagnosis, and, in appropriate cases, treatment. Rules 22(3) and 22(1) of the Standard Minimum Rules, respectively, Rule 26(3) and Rule 26(1) of the European Prison Rules, respectively.

Detainees or prisoners needing special treatment must be transferred to specialized institutions or civil hospitals for that treatment. Rule 22(2) of the Standard Minimum Rules, Rule 26(2) of the European Prison Rules.

Necessary medical care and treatment are to be provided free of charge. Principle 24 of the Body of Principles. Detainees have the right to request a second medical opinion, and to have access to their medical records. Principles 25 and 26 of the Body of Principles.

People in detention who have not been tried may be treated by their own doctor or dentist, if there is reasonable ground for such a request. Rule 91 of the Standard Minimum Rules, Rule 98 of the European Prison Rules. If the request is denied, reasons must be given. The expenses of treatment by a detainee's own doctor are not the responsibility of the detaining authority. Detainees also have the right to seek a second medical opinion. Principle 25 of the Body of Principles.

4.5.1 When should access to doctors start?
Detainees and imprisoned people should be offered a medical examination as promptly as possible after admission to a place of detention. Principle 24 of the Body of Principles. A medical officer should see and examine every person as soon as possible after his or her admission. Thereafter, medical care and treatment shall be provided whenever necessary. Rule 24 of the Standard Minimum Rules and Rule 29 of the European Prison Rules.

BOX:
Principle 24 of the Body of Principles:
"A proper medical examination shall be offered to a detained or imprisoned person as promptly as possible after his admission to the place of detention or imprisonment, and thereafter medical care and treatment shall be provided whenever necessary. This care and treatment shall be provided free of charge."

Rule 24 of the Standard Minimum Rules:
"The medical officer shall see and examine every prisoner as soon as possible after his admission and thereafter as necessary..."
END BOX

Chapter 5. The right to be brought promptly before a judge or other officer

Anyone deprived of their liberty has the right to be brought promptly before a judge or other judicial officer, so that their rights can be protected.

5.1 The right to be brought promptly before a judge or judicial officer

In order to safeguard the right to liberty and freedom from arbitrary arrest or detention, and in order to prevent violations of fundamental human rights, all forms of detention or imprisonment must be ordered by or subject to the effective control of a judicial or other authority. Principle 4 of the Body of Principles.

Anyone arrested or detained must be brought promptly before a judge or other officer authorized by law to exercise judicial power. Article 9(3) of the ICCPR, Paragraph 2(C) of the African Commission Resolution, Article 7(5) of the American Convention, Article XI of the Inter-American Convention on Disappearance, Article 5(3) of the European Convention, Article 59(2) of the ICC Statute, Principle 11(1) of the Body of Principles, Article 10(1) of the Declaration on Disappearance.

> Article 9(3) of the ICCPR applies to people arrested or detained on a criminal charge, but the other standards apply more broadly to all people deprived of their liberty.

BOX:

Article 9(3) of the ICCPR:

"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..."

Principle 11(1) of the Body of Principles:

"A person shall not be kept in detention without being given an effective opportunity to be heard promptly by a judicial or other authority. A detained person shall have the right to defend himself or to be assisted by counsel as prescribed by law."

END BOX

The purposes of the review before a judge or judicial authority include:

- to assess whether sufficient legal reason exists for the arrest;
- to assess whether detention before trial is necessary;
- to safeguard the well-being of the detainee;
- and to prevent violations of the detainee's fundamental rights.

This procedure often provides the detained person with their first opportunity to challenge the lawfulness of their detention and to secure release if the arrest or detention violated their rights.

> The Inter-American Commission has stated that if a court is not officially informed of a detention or is informed only after significant delay, the rights of a detainee are not protected. It pointed out that such situations lend themselves to other types of abuses, erode respect for the courts and their effectiveness and lead to the institutionalization of lawlessness. [Inter-

American Commission, Second Report on the Human Rights Situation in Suriname, OEA/Ser. L/V/II.66, doc. 21 rev. 1, 1985, at 23]

In view of the importance of this right in protecting detainees against serious violations of human rights, including "disappearances", Amnesty International, in its 14-Point Program for the Prevention of "Disappearances", calls for all prisoners to be brought before a judicial authority **without delay** after being taken into custody.

5.1.1 Officers authorized to exercise judicial power

If the detained person is brought before an officer other than a judge, the officer must be authorized to exercise judicial power and must be independent of the parties. All those exercising judicial authority must be independent -- they must fulfil the criteria set out in the Basic Principles on the Independence of the Judiciary (see **Chapter 12.4 The right to be heard by an independent tribunal**).

For example, the European Court held that there was a violation of Article 5(3) of the European Convention when the "other officer authorised by law to exercise judicial authority" was an *auditeur militaire* or a public prosecutor who could intervene in subsequent proceedings as a representative of the prosecuting authority. [*Brincat v. Italy*, (73/1991/325/397), 26 November 1992; *De Jong, Baljet and van den Brink*, 22 May 1984, 77 Ser. A 23]

5.2 What does "prompt" mean?

International standards require that this hearing take place **promptly** after detention. While no time limits are expressly stated within the standards themselves, and they are to be determined on a case by case basis, the Human Rights Committee has stated that "...delays should not exceed a few days". [Human Rights Committee General Comment 8, para. 2]

Members of the Human Rights Committee have questioned whether detention for 48 hours without being brought before a judge is not unreasonably long. [Report of the HRC, vol. I, (A/45/40), 1990, para. 333, Federal Republic of Germany] In a death penalty case, the Committee ruled that a delay of one week from the time of arrest before the detainee was brought before a judge was incompatible with Article 9(3) of the ICCPR. [*McLawrence v. Jamaica*, UN Doc. CCPR/C/60/D/702/1996, 29 September 1997, para. 5.6]

The European Court has ruled that detaining a person for four days and six hours before bringing him before a judge was not prompt access. [*Brogan et al. v. United Kingdom*, 29 November 1988, 145b Ser. A 33 at 62]

The Inter-American Commission stated that a person should be brought before a judge or other judicial authority "as soon as it is practicable to do so; delay is unacceptable". [Report on the Situation of Human Rights in Ecuador, OEA/Ser.L/V/II.96, doc 10, rev.1 at 73, 24 April 1997] It stated that in Cuba, "in theory, the law allows for a detainee to remain in prison for a week without appearing before a judge or court competent to hear his case. In the opinion of the Commission, this is an excessively prolonged period." [Inter-American Commission, Seventh Report on the Situation of Human Rights in Cuba, 1983, OEA/Ser.L/V/II.61, doc.29, rev.1, at 41]

Chapter 6 The 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, and to have the detention reviewed on a regular basis. This right differs from the right to be brought before a judge (see Chapter 5) because it is initiated by the detainee or on the detainee's behalf, rather than by the authorities.

6.1 Right to challenge the lawfulness of detention

Everyone deprived of their liberty has the right to take proceedings before a court to challenge the lawfulness of their detention. This right safeguards the right to liberty and provides protection against arbitrary detention and other human rights violations. This right is guaranteed to all people deprived of their liberty, not just those detained in connection with a criminal offence. Article 9(4) of the ICCPR, Principle 32 of the Body of Principles, Article XXV of the American Declaration, Article 7(6) of the American Convention, Article 5(4) of the European Convention; see Article 7(1)(a) of the African Charter.

In countries where the authorities hold people in unacknowledged detention, this right is a means to determine the whereabouts or state of health of detainees, and who is responsible for ordering and carrying out their detention. Article 9(1) of the Declaration on Disappearances.

> The African Commission held that the failure to allow a prominent political figure detained for 12 years without charge or trial to challenge the violation of his right to liberty before a court violated Article 7(1)(a) of the African Charter. [*Krischna Achutan (on behalf of Aleke Banda), Amnesty International on behalf of Orton and Vera Chirwa, Amnesty International on behalf of Orton and Vera Chirwa v. Malawi,* (64/92, 68/92, 78/92 respectively), 8th Annual Activity Report of the African Commission on Human and Peoples' Rights, 1994-1995, ACHPR/RPT/8th/Rev.I]

If such a proceeding is initiated, the detaining authorities must produce the detainee before the relevant court without unreasonable delay. Courts examining the lawfulness of detention must decide "speedily" or "without delay" and must order the release of the detainee if their detention is not lawful.

> The requirement that a decision must be made speedily applies to the initial decision on whether a detention is lawful and to any appeals against that decision provided for by national law or procedure. [See *Navarra v. France*, (38/1992/383/461), European Court, 23 November 1993]

BOX:
ICCPR Article 9(4):

"Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful."

Principle 32 of the Body of Principles:
"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."
END BOX

6.2 Procedures allowing challenges to lawfulness of detention
Governments are required to create procedures for challenging the lawfulness of detention and obtaining release if the detention is unlawful. Such procedures must be simple and expeditious, and free of charge if the detainee cannot afford to pay. Principle 32(2) of the Body of Principles.

In many legal systems, the right to challenge the lawfulness of detention, and to seek remedy, is invoked by *amparo* or by applying for a writ of *habeas corpus*.

The UN Commission on Human Rights and its Sub-Commission on Prevention of Discrimination and Protection of Minorities called on all states "to establish a procedure such as *habeas corpus* by which anyone who is deprived of his or her liberty by arrest or detention shall be entitled to institute proceedings before a court, in order that court may decide without delay on the lawfulness of his or her detention and order his or her release if the detention is found to be unlawful". [Commission Resolution 1992/35 and Sub-Commission Resolution 1991/15, respectively]

The Human Rights Committee and the European Court have made clear that the body reviewing the lawfulness of detention must be a court, in order to ensure a high degree of objectivity and independence.

> The Human Rights Committee held that review by a superior military officer of a disciplinary measure involving detention did not meet the requirements of Article 9(4) of the ICCPR. [*Vuolanne v. Finland*, (265/1987), 7 April 1989, Report of the HRC, (A/44/40), 1989] It also ruled that the possibility of review by the Ministry of the Interior of the detention of an asylum-seeker did not meet the requirements of Article 9(4). [*Torres v. Finland*, (291/1988), 2 April 1990, Report of the HRC vol II, (A/45/40), 1990, para.7]
>
> The European Court has ruled that an advisory panel which had no power of decision, but made non-binding recommendations to the Home Secretary, was not a "court" within the meaning of Article 5(4) of the European Convention. The panel's recommendations were not disclosed and the detainee was not entitled to legal representation before the panel. [*Chahal v. United Kingdom*, (70/1995/576/662), 15 November 1996]
>
> The African Commission decided that denying detainees considered illegal aliens the opportunity to appeal to national courts violated Article 7(1)(a) of the African Charter as it deprived them of the right to have their case heard. [*Rencontre Africaine pour la defense*

de droits de l'homme v. Zambia, (71/92), 10th Annual Report of the African Commission, 1996 -1997, ACHPR/RPT/10th]

The review of the lawfulness of the detention must ensure that the detention was carried out according to the procedures established by national law, and that the grounds for detention were authorized by national law. The detention must comply with both the substantive and the procedural rules of national legislation. Courts must also ensure that the detention is not arbitrary according to international standards. [See *Navarra v. France*, (38/1992/383/461), European Court, 23 November 1993]

6.3 Continuing review

Anyone held in detention has the right to have the lawfulness of that detention reviewed by a court or other authority at reasonable intervals. Principles 32 and 39 of the Body of Principles. [Principle 32 applies to all people deprived of their liberty; Principle 39 applies to those detained in connection with criminal offences.]

The Human Rights Committee stated that vesting the authority to decide upon the continuation of pre-trial detention with the Procurator and not with a judge is incompatible with Article 9(3) of the ICCPR. [Concluding Observations of the HRC: Belarus, UN Doc. CCPR/C/79/Add.86, 19 November 1997, para. 10]

BOX:

Principle 39 of the Body of Principles:

"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."

END BOX

6.4 This right should always apply

The right to challenge the lawfulness of detention is a guarantee essential for the protection of other rights. Under the American Convention states are not allowed to suspend (derogate from) this right even in exceptional circumstances such as a state of emergency. [See: *"Habeas Corpus* in Emergency Situations", Advisory Opinion OC-8/87 of 30 January 1987, Annual Report of the Inter-American Court, 1987, OAS/Ser.L/V/III.17 doc.13, 1987; and "Judicial Guarantees in States of Emergency", Advisory Opinion OC-9/87 of 6 October 1987, Annual Report of the Inter-American Court, 1988, OAS/Ser.L/V/III.19 doc.13, 1988]

Although the right to challenge the lawfulness of detention before a court is currently subject to derogation under the ICCPR and the European Convention, the Commission of Human Rights and its Sub-Commission on Prevention of Discrimination and Protection of Minorities have called on all states "to maintain the right to such a procedure at all times and under all circumstances, including during states of emergency". [Commission Resolution 1992/35 and Sub-Commission Resolution 1991/15, respectively]

6.5 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.) Article

9(5) of the ICCPR, Article 5(5) of the European Convention. See also Article 8 of the Universal Declaration, Principle 35 of the Body of Principles, Article 25 of the American Convention, Article 7 of the African Charter, Article 85(1) of the ICC Statute. [Forms of reparation include but are not limited to: restitution; compensation; rehabilitation; satisfaction; and guarantees of non-repetition. Draft Basic Principles and Guidelines on the Right to Reparation for Victims of [Gross] Violations of Human Rights and International Humanitarian Law, UN doc.: E/CN.4/1997/104, being considered by the UN Commission on Human Rights with a view to their adoption by the UN General Assembly, arising from a study by Theo Van Boven, former Special Rapporteur of the Sub-Commission on Prevention of Discrimination and Protection of Minorities, UN doc.: E/CN.4/Sub.2/1993/8. See Inter-American Court, *Vasquez Rodriguez Case*, 28 July 1988, paras 166, 174]

BOX:
Article 9(5) of the ICCPR:
"Anyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation."

Principle 35(1) of the Body of Principles:
"Damage incurred because of acts or omissions by a public official contrary to the rights contained in these principles shall be compensated according to the applicable rules or liability provided by domestic law."
END BOX

The right to reparation applies to people whose detention or arrest has violated national laws or procedures or international standards, or both. The procedure for exercise of this right is not specified. It is often exercised by the individual bringing a suit against the state, body or person responsible for the wrongful detention.

See also **Chapter 10.4.8, Right to reparation for torture or ill-treatment, Chapter 30, The right to reparation for miscarriages of justice**.

Chapter 7 The right to trial within a reasonable time or to release from detention

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

Anyone detained on a criminal charge has the right to trial within a reasonable time or to release pending trial. Article 9(3) of the ICCPR, Principle 38 of the Body of Principles, Article XXV of the American Declaration, Article 7(5) of the American Convention, Article 5(3) of the European Convention, paragraph 2(C) of the African Commission Resolution, Article 60(4) of the ICC Statute.

BOX

Article 9(3) of the ICCPR:

"Anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release. It shall not be the general rule that persons awaiting trial shall be detained in custody, but release may be subject to guarantees to appear for trial, at any other stage of the judicial proceedings, and, should occasion arise, for execution of the judgement."

Principle 38 of the Body of Principles:

"A person detained on a criminal charge shall be entitled to trial within a reasonable time or to release pending trial."

Article 7(5) of the American Convention:

"Any person detained 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 be released without prejudice to the continuation of the proceedings. His release may be subject to guarantees to assure his appearance for trial."

Article 5(3) of the European Convention:

"Everyone arrested or detained in accordance with the provisions of paragraph 1(c) of this Article shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial."

Paragraph 2(C) of the African Commission Resolution:

"Persons arrested or detained 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 be released."END BOX

There are two sets of standards that require trials to be held within a reasonable time. Both are tied to the presumption of innocence.

The first set is applicable to detainees, and requires that people in detention are brought to trial within a reasonable time or released. This right is protected by the safeguards set out in Article 9(3) of the ICCPR, Article 7(5) of the American Convention and Article 5(3) of the European Convention. It is based on the presumption of innocence and the right to personal liberty, which requires that anyone held in pre-trial detention is entitled to have their case given priority and to have the proceedings conducted with particular expedition. [European Court, *Tomasi v France*, 27 August 1992, 241-A Ser. A para. 84; *Abdoella v. the Netherlands*, (1/1992/346/419), 25 November 1992]

The second set of standards, which applies to everyone charged with a criminal offence, whether or not detained, requires that all criminal trials are held without undue delay. The main purpose is to ensure that people awaiting trial on criminal charges do not suffer unduly prolonged uncertainty and that evidence is not lost or undermined – the main purpose of the safeguards in Article 14(3)(c) of the ICCPR, Article 8(1) of the American Convention and Article 6(1) of the European Convention. (See **Chapter 19, The right to be tried without undue delay**.)

A release from pre-trial detention on the grounds that the trial has not started within a reasonable time does not mean that charges must be dropped. Rather, it is release pending trial. Some standards, including Article 9(3) of the ICCPR, Article 7(5) and Article 5(3) of the European Convention, state that such release may be conditional on guarantees to ensure the person's appearance for trial (bail or other security).

7.2 What is a reasonable time?

The reasonableness of a period of pre-trial detention has been assessed on a case-by-case basis by the Human Rights Committee and regional bodies. Factors considered in examining the reasonableness of a period of pre-trial detention include: the seriousness of the offence alleged to have been committed; the nature and severity of the possible penalties; and the danger that the accused will abscond if released. Also examined are whether the national authorities have displayed "special diligence" in the conduct of the proceedings, considering the complexity and special characteristics of the investigation, and whether continued delays are due to the conduct of the accused (such as refusing to cooperate with the authorities) or the prosecution.

The length of time deemed reasonable to hold a person in detention pending trial may be shorter than the delay considered reasonable before starting the trial of a person not in detention. For example, the European Commission has stated that although the length of time before trial may be reasonable under Article 6(1) of the European Convention, holding a person in detention for that period before trial may not be permissible under Article 5, "because the aim is to limit the length of a person's detention and not to promote a speedy trial". [*Haase v. Federal Republic of Germany* (7412 /76),12 July 1977, 11 DR 78]

> In the case of a murder suspect in Panama, held without bail for more than three and a half years before his acquittal, the Human Rights Committee stated that "[i]n cases involving serious charges such as homicide or murder, where the accused is denied bail by the court, the accused must be tried in as expeditious a manner as possible".*[del Cid Gómez v. Panama*, (473/1991), 19 July 1995, Fin. Dec., UN Doc. CCPR/C/57/1, 1996, at 46]
>
> The Human Rights Committee concluded that holding a person charged with capital murder for 16 months before trial, in the absence of satisfactory explanations from the state or other justification discernible from the file, was a violation of his right to be tried within a reasonable

time or released. [*McLawrence v. Jamaica*, UN Doc. CCPR/C/60/D/702/1996, 29 September 1997, para. 5.6]

In a case from Uruguay, where a detainee was held incommunicado for four to six months (the precise dates being disputed), and his trial by military court on charges of subversive association and conspiracy to violate the constitution began after five to eight months, the Human Rights Committee held that Article 9(3) of the ICCPR had been violated "because he was not brought promptly before a judge or other officer authorized by law to exercise judicial power and because he was not tried within a reasonable time". [*Pietraroia v. Uruguay*, (44/1979), 27 March 1981, paras 13.2 and 17]

The African Commission found that a delay of two years without a hearing or projected trial date constituted a violation of the requirement in Article 7(1)(d) of the African Charter to be tried within a reasonable time.[*Annette Pagnoulle (on behalf of Abdoulaye Mezou) v. Cameroon*, (39/90), 10th Annual Report of the African Commission, 1996 -1997, ACHPR/RPT/10th] In another case it found that detention of a person for seven years without bringing him to trial constituted a violation of the "reasonable time" standard stipulated in the African Charter. [*Alhassan Abubakar v. Ghana*, (103/93),10th Annual Report of the African Commission, 1996 -1997, ACHPR/RPT/10th]

The Inter-American Court stated that it would consider it an injustice to deprive a person of their liberty for a period of time disproportionate to the penalty corresponding to the criminal offence with which they were charged. In the case of Suárez Rosero, the Court considered that detention of three years and six months violated the presumption of innocence. [*Suárez Rosero Case*, Ecuador, 12 November 1992]

7.2.1 Risk of flight

Where the risk of flight is substantiated, although this is relevant in determining whether pre-trial detention is justified, it does not determine the issue of whether the length of pre-trial detention is reasonable. The conduct of the authorities must also be examined. [The European Court has stated that the danger of an accused's absconding cannot be gauged solely on the basis of the severity of the possible sentence, *Yagci and Sargin v. Turkey*, (6/1994/453/533-534), 8 June 1995]

7.2.2 Are the authorities acting with the necessary diligence?

The time considered to be reasonable to keep a person in detention pending trial may depend on how complex the case is, in terms of the nature of the offence and the number of alleged offenders.

In the words of the European Court, people held in pre-trial detention are entitled to "special diligence" on the part of the authorities in the conduct of the proceedings. [See *Tomasi v France*, 27 August 1992, 241-A Ser. A para. 84; *Abdoella v. the Netherlands*, (1/1992/346/419), 25 November 1992, para. 24]

The European Court has stated that the right of an accused held in pre-trial detention to have the case examined with all necessary expedition must be balanced against and not hinder the efforts of the authorities to carry out their tasks with proper care. [*Van der Tang v. Spain*, (26/1994/473/554), 13 July 1993] The Court found no violation of Article 5(3) of the European Convention in a case 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 that the protracted

time he remained in detention was not attributable to any lack of special diligence on the part of the authorities.

Chapter 8 The 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

In order to ensure that the right to defence is meaningful, anyone accused of a criminal offence and their lawyer, if any, must have adequate time and facilities to prepare the defence. Article 14(3)(b) of the ICCPR, Article 8(2)(c) of the American Convention, Article 6(3)(b) of the European Convention, paragraph 2(E)(1) of the African Commission Resolution, Article 21(4)(b) of the Yugoslavia Statute, Rwanda Statute 20(4)(b), Article 67(1)(d) of the ICC Statute. **See Chapter 20.1, The right to defend oneself**. [The right to adequate time and facilities to prepare a defence applies to people who have been charged with a criminal offence. International standards such as the ICCPR place this right among the rights pertaining to trial (ie in Article 14, rather than with other pre-trial rights in Article 9 of the ICCPR), although the preparation of the defence generally begins before trial.]

The right to adequate time and facilities to prepare the defence is an important aspect of the fundamental 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 during the course of the proceedings (see **Chapter 13.2, "Equality of Arms"**).

The right to adequate time and facilities to prepare the defence applies both to the accused and their lawyer at all stages of the proceedings, including before the trial and during any appeals.

BOX:
Article 11.1 of the Universal Declaration:
"Everyone charged with a penal offence has the right to be presumed innocent until proved guilty according to law in a public trial at which he has had all the guarantees necessary for his defence."

Article 14(3)(b) of the ICCPR:
"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;"
END BOX

This right requires that the accused is allowed to communicate in confidence with his or her lawyer, which is particularly relevant to people in detention (see **Chapter 3.4, Right of detainees to have access to counsel**).

8.2 What is adequate time?
The time adequate to prepare a defence depends on the nature of the proceedings (for example whether they are preliminary proceedings, trial or appeal) and the factual circumstances of each case. Factors include the complexity of a case, an accused's access to evidence and to his or her lawyer, and time limits prescribed within national law. [See Human Rights Committee General Comment 13, para. 9] The right to trial within a reasonable time may 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 legal counsel and reviewing documents) has been inadequate, it is clear from the jurisprudence that the accused should request the national court to adjourn the proceedings on the grounds of insufficient time to prepare. [*Douglas, Gentles and Kerr v. Jamaica*, (352/1989), 19 October 1993, Report of the HRC vol. II, (A/49/40), 1994; *Sawyers and McLean v. Jamaica*, (226/1987 and 256/1987), 11 April 1991, Report of the HRC, (A/46/40), 1991]

> Adjourning a murder trial and giving a newly appointed attorney (who replaced previous counsel) four hours to confer with the accused and prepare the case was deemed by the Human Rights Committee to be inadequate time to prepare the case. [*Smith v. Jamaica*, (282/1988), 31 March 1993, UN Doc. CCPR/C/47/D/282/1988] The Committee also found a violation of Article 14(3) of the ICCPR in a case where newly appointed counsel met with the accused only 10 minutes before the start of a trial and previously appointed counsel failed to appear at many of the hearings during the preliminary stages. [*Reid v. Jamaica*, (355/1989), 8 July 1994, UN Doc. CCPR/C/51/D/355/1989]

8.3 Access to information
The right to adequate facilities to prepare a defence requires that the accused and their counsel must be granted access to appropriate information, including documents, information and other evidence that might help the accused prepare their case, exonerate them or, if necessary, mitigate a penalty. Principle 21 of the Basic Principles on the Role of Lawyers, Article 67(2) of the ICC Statute, see also Rules 66 and 68 of the Yugoslavia Rules, Rwanda Rules 66,68. Such information provides the defence with an opportunity to learn about and comment on the observations filed or evidence adduced by the prosecution. [See Human Rights Committee General Comment 13, para. 9; see *Foucher*, European Court, 25EH RR 234]

BOX:
Principle 21 of the Basic Principles on the Role of Lawyers:
"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."
END BOX

> The European Commission has stated that the right to adequate facilities to prepare a defence implies a right of reasonable access to the prosecution's files.[*X v. Austria*, (7138/75), 5 July 1977, 9 DR 50] However, this right may be subjected to reasonable restrictions, on grounds including security. [*Haase v. Federal Republic of Germany*, (7412/76), 12 July 1977, 11 DR 78] It has ruled that the right may be satisfied when the accused's lawyer, but not the

accused, has access to a case file. [*Ofner v. Austria*, (524/59), 3 Yearbook 322, 19 December 1960]

8.4 Right to information about charges

One essential part of the information necessary for the realization of the right to adequate time and facilities to prepare a defence is the right of the accused to receive prompt notice of the charges against him or her.

All people charged with a criminal offence, whether or not detained before trial, have the right to be promptly informed of any charges against them. Article 14(3)(a) of the ICCPR, Article 8(2)(b) of the American Convention, Article 6(3)(a) of the European Convention, Article 20(2) of the Yugoslavia Statute, Rwanda Statute 19(2), Article 67(1)(a) of the ICC Statute.

BOX:

Article 14(3)(a) of the ICCPR:

"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;"

Article 8(2)(b) of the American Convention:

"Every person accused of a criminal offense has the right to be presumed innocent so long as his guilt has not been proven according to law. During the proceedings, every person is entitled, with full equality, to the following minimum guarantees:...
b. prior notification in detail to the accused of the charges against him;"

Article 6(3)(a) of the European Convention:

" Everyone charged with a criminal offence has the following minimum rights:
a. to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him;"
END BOX

See also **Chapter 2.3**, **Right to be informed promptly of any charges** on the right of people in custody to be informed of any charges against them, a right guaranteed by Article 9 (3) of the ICCPR and closely tied to the right to challenge the lawfulness of the detention.

> The Human Rights Committee has stated that "the duty to inform the accused under Article 14, paragraph 3(a), [of the ICCPR] is more precise than that for arrested persons under Article 9, paragraph 2." [*McLawrence v. Jamaica*, UN Doc. CCPR/C/60/D/702/1996, 29 September 1997, para. 5.9]

In order to comply with fair trial rights, the notification of charges before trial must be "in detail" and must provide information about the "nature and cause of the charges" against the accused.

> The Human Rights Committee has stated that the information to be given to a person charged with a criminal offence must indicate "both the law and the alleged facts on which [the

charge] is based." This information may be provided either orally or in writing. [Human Rights Committee General Comment 13, para. 8]

The European Commission has clarified the meaning of Article 6(3)(a) of the European Convention which guarantees the right of a person charged with a criminal offence "to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him". The European Commission explained that the "nature" of the accusation refers to the legal character or classification of the facts, while the "cause of the accusation" refers to the facts which form the basis of the accusation. The information provided should contain the material needed to enable the accused to prepare a defence but does not have to contain the evidence on which the charge is based. [*X v. Belgium*, (7628/76), 9 DR 169, 9 May 1977*; Ofner v. Austria*, 3 Yearbook 322, 19 December 1960]

8.4.1 When must information about charges be given?
Article 14(3)(a) of the ICCPR and Article 6(3)(a) of the European Convention require that notice of charges must be given "**promptly"**. Article 8(2)(b) of the American Convention requires "**prior"** notice.

In interpreting Article 14(3)(a) of the ICCPR, the Human Rights Committee has explained that the information should be given "as soon as the charge is first made by the competent authority. In the opinion of the Committee this right must arise when in the course of an investigation a court or an authority of the prosecution decides to take procedural steps against a person suspected of a crime or publicly names him as such." [Human Rights Committee General Comment 13, para.8]

Article 20(2) of the Yugoslavia Statute and Rwanda Statute 19(2) require that the accused are informed immediately of the charges against them.

8.4.2 Language
Information must be given in a language the accused person understands. Article 14(3)(a) of the ICCPR, Article 6(3)(a) of the European Convention, Article 21(4) (a) of the Yugoslavia Statute, Rwanda Statute 20(4)(a), Article 67(1)(a) of the ICC Statute. See also **Chapter 23, The right to an interpreter and to translation**.

8.5 Access to experts
The right to adequate facilities to prepare a defence includes the right of the accused to obtain the opinion of independent experts in the course of preparing and presenting a defence.

Article 8(2)(f) of the American Convention expressly provides the right of the defence to obtain the appearance of experts as witnesses. See **Chapter 22, The right to call and examine witnesses**.

Chapter 9 Rights during interrogation

People suspected of or charged with criminal offences are vulnerable to human rights violations, including torture and other cruel, inhuman or degrading treatment, during the investigatory stages of criminal proceedings. People held in detention for questioning by law enforcement officials are particularly at risk. This chapter examines detainees' rights during interrogation.

9.1 Safeguards for people undergoing interrogation

There are several rights which aim to safeguard people during the investigation of an offence. These include the presumption of innocence, the prohibition against torture and cruel, inhuman and degrading treatment, the prohibition against compelling people to confess guilt or testify against themselves, the right to remain silent and the right of access to counsel.

There are additional safeguards during interrogation. Key is the presence of a lawyer during interrogation (see **Chapter 3.1.1, The right to a lawyer in pre-trial stages**).

> The UN Special Rapporteur on the independence of judges and lawyers has stated that "it is desirable to have the presence of an attorney during police interrogation as an important safeguard to protect the rights of the accused. The absence of legal counsel gives rise to the potential for abuse..."[Report on the Mission of the Special Rapporteur to the United Kingdom, UN Doc. E/CN.4/1998/39/add.4, para 47, 5 March 1998]

> The Inter-American Commission considers that in order to safeguard the rights not to be compelled to confess guilt and to freedom from torture, a person should be interrogated only in the presence of their lawyer and a judge. [Report on the Situation of Human Rights of a Segment of the Nicaraguan Population of Miskito Origin, OEA Ser.L/V/11.62, doc.10, rev. 3, 1983, at 100]

Among other things, international standards require the authorities not to take undue advantage of the situation of a detained person during interrogation. Principle 21 of the Body of Principles. The authorities must keep records of the interrogation process. Principle 23 of the Body of Principles. [Human Rights Committee General Comment 20, para 11] Statements obtained as a result of torture or ill-treatment must be excluded from evidence, except at trials of alleged torturers. Article 15 of the Convention against Torture, Article 12 of the Declaration against Torture. See **Chapter 17, Exclusion of evidence elicited as a result of torture or other compulsion**.

9.2 Prohibition against coerced confessions

No one who is charged with a criminal offence may be compelled to confess guilt or testify against themselves. Article 14(3)(g) of the ICCPR, Article 8(2)(g) of the American Convention, Principle 21(2) of the Body of Principles, Article 21(4)(g) of the Yugoslavia Statute, Rwanda Statute 20(4)(g), Article 55(1)(a) of the ICC Statute. See **Chapter 16, The right not to be compelled to testify or confess guilt**.

This right is applicable at both the pre-trial and trial stages. The Human Rights Committee has stated that coercion to provide information, coercion of confessions, and extraction of confessions by torture or ill-treatment are all prohibited.

> The Human Rights Committee has stated that "the wording of Article 14(3)(g) – i.e. that no one shall be compelled to testify against himself or to confess guilt – must be understood in terms of 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. *A fortiori*, it is unacceptable to treat an accused person in a manner contrary to Article 7 of the Covenant in order to extract a confession." [*Kelly v. Jamaica*, (253/1987), 8 April 1991, Report of the HRC, (A/46/40), 1991; *Conteris v. Uruguay*, (139/1983), 17 July 1985, 2 Sel. Dec. 168; *Estrella v. Uruguay*, (74/1980), 29 March 1983, 2 Sel. Dec. 93]
>
> The European Court made clear, however, that the right not to incriminate oneself does not extend to excluding from criminal proceedings material which may be obtained from the accused through the use of compulsory powers but which has an existence independent of the will of the suspect, such as *inter alia*, documents, breath, blood and urine samples and bodily tissue for the purpose of DNA testing. [*Saunders v. United Kingdom*, (943/1994/490/572), European Court, 17 December 1996]

Recognizing the vulnerability of people in detention, Principle 21 of the Body of Principles provides

> "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.
> "2. No detained person while being interrogated shall be subject to violence, threats or methods of interrogation which impair his capacity of decision or judgment." Principle 21 of the Body of Principles.

See **Chapter 10.4, Freedom from torture and ill-treatment**, **Chapter 10.4.3, Physical pressure during interrogation** and **Chapter 17, Exclusion of evidence elicited as a result of torture or other compulsion**.

9.3 The right to silence

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 confess guilt or testify against oneself. See **Chapter 16, The right not to be compelled to testify or confess guilt**. The right to remain silent is vulnerable during the interrogation of people detained on criminal charges, as law enforcement officials often do their best to extract a confession or incriminating statements from the detainee, and a detainee's exercise of their right to remain silent frustrates these efforts.

The right to silence is incorporated into many national legal systems. Although it is not expressly guaranteed in international human rights treaties, it has been deemed to be implicit in the European Convention and is set out as a right in the rules of the international tribunals for the former Yugoslavia and Rwanda and the ICC Statute.

The European Court has stated that “[a]lthough not specifically mentioned in article 6 of the [European] Convention, 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.” [*Murray v. United Kingdom*, (41/1994/488/570), 8 February 1996, at 20] The Court found, however, that whether or not drawing adverse inferences against an accused for remaining silent violates fair trial rights is to be determined in light of all the circumstances of a case.

The European Court ruled that the introduction into evidence at a criminal trial for the purpose of incriminating the accused of transcripts of statements made under compulsion to non-prosecutorial inspectors violated the right not to incriminate oneself. [*Saunders v. United Kingdom*, (943/1994/490/572), European Court, 17 December 1996]

In another case, the European Court found that when a man was prosecuted for refusing to hand over documents to customs officials, this constituted an “attempt to compel the accused to provide the evidence of offences he had allegedly committed” and was “an infringement of the right of anyone charged with a criminal offence... to remain silent and not to contribute in incriminating himself”. [*Funke v. France*, (82/1991/334/407), 25 February 1993, at 18]

Rule 42(A) of the Yugoslavia Rules expressly sets out the right to silence. It provides that "[a] suspect who is to be questioned by the Prosecutor shall have the following rights, of which he shall be informed by the Prosecutor prior to questioning, in a language he speaks and understands:... (iii) the right to remain silent, and to be cautioned that any statement he makes shall be recorded and may be used in evidence." Rule 42(A) of the Rwanda Rules is identical. Article 55(2)(b) of the ICC Statute provides that where a suspect is about to be questioned by the ICC Prosecutor or by national authorities, the suspect must be informed of the right to "remain silent, without such silence being a consideration in the determination of guilt or innocence".

9.4 Right to an interpreter

Anyone who does not understand or speak the language of the authorities is entitled to have an interpreter to help them with the legal proceedings after arrest, free of charge if necessary. Principle 14 of the Body of Principles.

BOX:

Principle 14 of the Body of Principles:

“A person who does not adequately understand or speak the language used by the authorities responsible for his arrest, detention or imprisonment is entitled to receive promptly in a language which he understands the information referred to in principle 10, principle 11, paragraph 2, principle 12, paragraph 1, and principle 13 and to have the assistance, free of charge, if necessary, of an interpreter in connection with legal proceedings subsequent to his arrest.”

END BOX

The Yugoslavia and Rwanda Rules and the European Prison Rules provide that people in custody who have not yet been brought to trial are entitled to the assistance of an interpreter, free of charge, for all essential contacts with the administration and for their defence, including contacts with their legal

advisers. Rule 93 of the European Prison Rules, Rule 42 of the Yugoslavia Rules, Rwanda Rules 42, see also Article 55(2)(c) of the ICC Statute.

9.5 Records of interrogation

Records of any interrogation of a detained or imprisoned person must be kept. The records are to contain the duration of each interrogation, the intervals between interrogations and the identities of the officials conducting the interrogation and other persons present. These records should be accessible to the detainee or their counsel. Principle 23 of the Body of Principles. The Human Rights Committee has also stated that the time and place of all interrogations should be recorded, and that this information should be available for judicial or administrative proceedings. [Human Rights Committee General Comment 20, para.11]

The Yugoslavia and Rwanda Rules require video or audio recordings of interrogations. Rule 43 of the Yugoslavia Rules, Rwanda Rules 43.

9.6 Review of interrogation rules and practices

International standards require that states regularly and systematically review rules and instructions for the conduct of interrogations, interrogation methods and practices. Article 11 of the Convention against Torture.

Chapter 10 The right to humane conditions of detention and freedom from torture

The right to a fair trial cannot be realized if detention conditions interfere with the ability of the accused to prepare for trial, or if the accused is tortured or ill-treated.

10.1 The right to humane conditions of detention

The right of all people deprived of their liberty to be treated humanely is protected by many international standards. While the broader standards are found in human rights treaties, many of the specific requirements are found in non-treaty standards, including the Body of Principles, the Standard Minimum Rules, the Principles for Medical Ethics and the European Prison Rules.

Everyone has the right to liberty and security of the person (see **Chapter 1, The right to liberty**), the right to be treated with humanity and respect for the inherent dignity of the human person, the right to freedom from torture or ill-treatment (see below) and the right to be presumed innocent until proved guilty beyond reasonable doubt in the course of a fair trial (see **Chapter 15, The presumption of innocence**).

All people deprived of their liberty are entitled to be treated with "humanity and with respect for the inherent dignity of the human person". Article 10 of the ICCPR, Article 5 of the American Convention, Article XXV of the American Declaration; see Articles 4 and 5 of the African Charter.

BOX:
Article 10(1) of the ICCPR:
"All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person."
END BOX

These international standards impose a duty on states to ensure minimum standards of detention and imprisonment and to protect every detainee's rights while he or she is deprived of liberty.

The Human Rights Committee has stated that people deprived of their liberty may not be "subjected to any hardship or constraint other than that resulting from the deprivation of their liberty... Persons deprived of their liberty enjoy all the rights set forth in the [ICCPR], subject to the restrictions that are unavoidable in a closed environment." [Human Rights Committee General Comment 21, para.3)]

The Human Rights Committee has also said that the duty to treat detainees with respect for their inherent dignity is a basic standard of universal application. States cannot claim a lack of material resources or financial difficulties as a justification for inhumane treatment. States are obliged to provide all detainees and prisoners with services that will satisfy their essential needs. [*Kelly v. Jamaica*, (253/1987), 8 April 1991, Report of the HRC, (A/46/40), 1991; *Párkányi v. Hungary* (410/1990), 27 July 1992, Report of the HRC, (A/47/40), 1992]

These essential needs include food, washing and sanitary facilities, bedding, clothing, medical care, access to natural light, recreation, physical exercise, facilities to allow religious practice and communication with others including those in the outside world.

Article 10 of the ICCPR imposes a duty on states to treat detainees humanely, while Article 7 of the ICCPR prohibits torture and ill-treatment. Conditions of detention which violate Article 10 may or may not also violate Article 7. "*[I]nhuman treatment* within the meaning of Article 10 evidences a lower intensity of disregard for human dignity than that within the meaning of Article 7." [Manfred Nowak, *UN Covenant on Civil and Political Rights: CCPR Commentary*, NP Engel, 1993, at 186]

> The Human Rights Committee found a violation of Article 10(1) of the ICCPR when a detainee claimed he had been held in a 500-year-old prison infested by rats, lice and cockroaches, where men, women and children were held 30 people to a cell. Detainees were exposed to the cold and the wind. There was excrement on the floor and sea water was used for showers and often for drinking. Detainees were given urine-soaked mattresses and blankets, despite the existence of new bed linen. There was a high incidence of suicide, self-mutilation, fights and beatings. [*Griffin v. Spain*, (493/1992), UN Doc. CCPR/C/57/1, 23 August 1996, p. 52, paras 3.1 and 9.2]
>
> The Human Rights Committee has also stated that failure to provide adequate food and recreational facilities constitutes a violation of Article 10 of the ICCPR, unless there are exceptional circumstances. [*Kelly v. Jamaica*, (253/1987), 8 April 1991, Report of the HRC, (A/46/40), 1991, para. 5]
>
> The African Commission found that refugee women, children and elderly people were held in deplorable conditions in Rwanda, in violation of Article 5 of the African Charter. [*Organisation mondiale contre la torture, Association internationale des juristes democrates, Commission internationale des juristes, Union interafricaine des droits de l'homme v. Rwanda*, (27/89, 46/91, 49/91, 99/93 respectively),10th Annual Report of the African Commission, 1996 -1997, ACHPR/RPT/10th]

Anyone detained or imprisoned has the right to request improvements in their treatment or to complain about their treatment. The authorities must reply promptly, and if the request or complaint is refused, it may be brought to a judicial or other authority. Principle 33 of the Body of Principles.

> The Human Rights Committee expressed concern that there was little if any investigation of most complaints of ill-treatment of detainees in France, "resulting in virtual impunity". The Committee recommended the establishment of an independent mechanism to monitor detainees and to receive and deal with individual complaints of ill-treatment by law enforcement officials. [Concluding Observations of the HRC: France, UN doc.: CCPR/C/79/Add.80, 4 August 1997, para.16]

10.1.1 The right to be held in a recognized place of detention
To ensure that detainees have access to the outside world and as a safeguard against human rights violations such as "disappearance" and torture, all detained people have the right to be held only in an officially recognized place of detention, located if possible near their place of residence, under a valid order committing them to detention. Principles 11(2) and 20 of the Body of Principles, Article 10 of the Declaration on Disappearance, Rule 7(2) of the Standard Minimum Rules, Rule 7(1) of the European Prison Rules, Article XI of the Inter-American Convention on Disappearance.

10.1.2 Records of detention
The authorities must keep and maintain up-to-date official registers of all detainees, both at each place of detention and centrally. The information in such registers must be made available to courts and other competent authorities, members of the detainee's family, their lawyer and any person with a legitimate interest in the information. Article 10(2) and (3) of the Declaration on Disappearances, Rule 7 of the Standard Minimum Rules, Principle 12 of the Body of Principles; see Article XI of the Inter-American Convention on Disappearance, Rules 7(2) and 8 of the European Prison Rules. [See Human Rights Committee General Comment 20, para. 11]

10.1.3 The right to adequate medical care
States are obliged to provide quality medical care to people in custody, as they cannot readily obtain such care for themselves. They should be given access to the health services available in the country without discrimination on the grounds of their legal situation. Principle 9 of the Basic Principles on the Treatment of Prisoners.

Law enforcement officials are responsible for protecting the health of people in their custody. Article 6, Code of Conduct for Law Enforcement Officials.

This section concerns the standards governing the *quality* of the care provided to people in custody; the right of detainees to *access* to doctors and medical care is covered in **Chapter 4.5, Right of access to doctors**.

Principle 24 of the Body of Principles, Rules 25 and 26 of the Standard Minimum Rules, Rules 29, 30 and 31 of the European Prison Rules and the Principles of Medical Ethics set out standards for the treatment of detainees and prisoners. Principle 24 of the Body of Principles, Rules 25 and 26 of the Standard Minimum Rules, Rules 29, 30 and 31 of the European Prison Rules and the Principles of Medical Ethics.

Rule 25 of the Standard Minimum Rules and Rule 30(1) of the European Prison Rules require the medical officer to see all detainees or prisoners who are ill, who complain of illness or injury and any prisoner to whom their attention is specifically directed "under the conditions and with a frequency consistent with hospital standards". Rule 25(2) of the Standard Minimum Rules and Rule 30(2) of the

European Prison Rules state that "[t]he medical officer shall report to the director of the institution, whenever he considers that a prisoner's mental or physical health has been or will be injuriously affected by continued imprisonment or by any condition of imprisonment".

> Amnesty International believes that a detainee or prisoner should have prompt access to a doctor when an allegation of torture or ill-treatment is made or when there is suspicion that torture or ill-treatment has taken place. Such access should not be dependent on the institution of an official investigation of the allegation of torture or ill-treatment.
>
> Amnesty International believes that any female detainee who alleges that she has been raped or sexually abused must be given an immediate medical examination, preferably by a female doctor. This is a crucial measure in obtaining evidence for prosecution of the perpetrator.

Principle 1 of the Principles of Medical Ethics states that health personnel must provide the same standard and quality of protection and treatment to detained and imprisoned people as is afforded to those who are not in custody. Principles 2 to 5 state that it is a contravention of medical ethics for health personnel:

- to engage in acts which constitute participation in or complicity in torture or other cruel, inhuman or degrading treatment;
- to engage in a professional relationship with detainees or prisoners that is not solely to evaluate, protect or improve their health;
- to apply their skills and knowledge to assist in interrogation in a manner that may adversely affect the health or condition of detainees or prisoners or which contravenes international standards;
- to participate in the certification of the fitness of detainees or prisoners for any treatment or punishment that may adversely affect their mental or physical health or contravenes international standards, or to participate in any way in treatment which contravenes international standards;
- to participate in any procedure to restrain a detainee or prisoner unless such procedure is determined to be necessary, in accordance with purely medical criteria, for the protection of the physical or mental health or the safety of the prisoner or others, and presents no hazard to the person's physical or mental health.

Records must be kept of every medical examination of a detainee, and access to these records must be ensured. Principle 26 of the Body of Principles.

10.2 Additional safeguards for people in pre-trial custody

International standards provide additional safeguards for people held in custody in connection with a criminal offence, who have not yet been tried. Principle 36(2) of the Body of Principles.

BOX

Principle 36(2) of the Body of Principles:

"The imposition of restrictions upon such a person [held pending investigation or trial] which are not strictly required for the purpose of the detention or to prevent hindrance to the process of investigation or the administration of justice, or for the maintenance of security and good order in the place of detention shall be forbidden."

END BOX

Anyone suspected of, charged with, arrested or detained in connection with a criminal offence who has not yet been tried is to be treated in accordance with the presumption of innocence (see **Chapter 15, The presumption of innocence**). In accordance with the presumption of innocence, international standards require that the treatment of people held in pre-trial custody should be different from that of people who have been convicted. Article 10(2)(a) of the ICCPR, Rule 84(2) of the Standard Minimum Rules, Article 5(4) of the American Convention, Rule 91 of the European Prison Rules.

BOX:
Article 10(2)(a) of the ICCPR:
"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;"

Rule 84(2) of the Standard Minimum Rules:
"Unconvicted prisoners are presumed to be innocent and shall be treated as such."
END BOX

Among the special conditions applicable to detainees held before trial are:

-the right to be segregated from people who have been convicted and sentenced. Article 10(2) of the ICCPR, Article 5(4) of the American Convention. See also Rule 85(1) of the Standard Minimum Rules, Rule 11(3) of the European Prison Rules.

-the right to be assisted by an interpreter for the purposes of their defence. Principle 14 of the Body of Principles, Rules 36(4) and 93 of the European Prison Rules.

- a limited right to be visited by their own doctor and dentist, at their own expense. Rule 91 of the Standard Minimum Rules, Rule 98 of the European Prison Rules.

- the right to wear their own clothing if it is clean and suitable or prison clothing which is different from that of convicted prisoners; and to wear civilian clothing in good condition for court appearances. Rule 88 of the Standard Minimum Rules, Rule 95 of the European Prison Rules.

- the right to buy books, writing materials and newspapers, so long as they are compatible with security, order and justice. Rule 90 of the Standard Minimum Rules, Rule 97 of the European Prison Rules.

10. 3 Women in custody

Women in custody should be held separately from men and supervised by female members of staff. They should either be held in separate institutions, or segregated within an institution, under the authority of female staff. No male staff should enter the part of the institution set apart for women unaccompanied by a female member of staff. Standard Minimum Rules 8(a) and 53.

> The Human Rights Committee expressed concern at the practice in the USA of allowing "male prison officers access to women's detention centres, and which has led to serious allegations of sexual abuse of women and the invasion of their privacy." [Observations of the HRC: USA, UN Doc. CCPR/C/79/Add.50, 7 April 1995, para.20]

Female staff should be present during the interrogation of female detainees and prisoners and should be solely responsible for conducting body searches. [Human Rights Committee General Comment 16, para.8]

States should provide gender-sensitive training of judicial and law enforcement officers and other public officials. [Article 4 (h) of the Declaration on the elimination of violence against women, adopted by the UN General Assembly 20 December 1993; Committee on the Elimination of Discrimination against Women, General Recommendation No. 19 (11th session, 1992), 24 September 1996, p. 19; Report of the UN Special Rapporteur on torture, UN Doc. E/CN.4/1995/34, p. 8]

In institutions where women are held in custody, facilities for pre-natal and post-natal care and treatment must be provided. Whenever possible, arrangements should be made for children to be born in a hospital outside the institution. Rule 23(1) of the Standard Minimum Rules, Rule 28 of the European Prison Rules.

The treatment of women detainees and prisoners during pregnancy and childbirth must comply with the obligation to respect the inherent dignity of the human person, the prohibitions against cruel, inhuman or degrading treatment, and rules regulating the use of force and of restraints. Articles 7 and 10 of the ICCPR, Article 5 of the African Charter, Article 5(2) of the American Convention, Article 3 of the European Convention.

10.4 Freedom from torture and ill-treatment
No one may be subjected to torture or to cruel, inhuman or degrading treatment or punishment. Article 5 of the Universal Declaration, Article 7 of the ICCPR, Principle 6 of the Body of Principles, Article 5 of the African Charter, Article 5(2) of the American Convention, Article 3 of the European Convention.

BOX:
Article 5 of the Universal Declaration of Human Rights:
"No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment."

Article 7 of the ICCPR:
"No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation."

Principle 6 of the Body of Principles:
"No person under any form of detention or imprisonment shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. No circumstance whatever may be invoked as a justification for torture or other cruel, inhuman or degrading treatment or punishment."
END BOX

This right is absolute and non-derogable. It applies to all people. It may never be suspended even during times of war, threat of war, internal political instability, or states of emergency. Article 4 of the ICCPR, Article 27(2) of the American Convention, Article 15 of the European Convention. See **Chapter 31.3, Rights that may never be restricted**. No circumstances may be used to justify torture or other cruel, inhuman or degrading treatment or punishment. See Article 2(2) of the Convention against Torture, Article 3 of the Declaration against Torture, Principle 6 of the Body of Principles, Article 5 of the Code of Conduct for Law Enforcement Officials, Article 5 of the Inter-American Convention on Torture. [See Human Rights Committee General Comment 20, para.3]

This right is of particular importance to people deprived of their liberty.

All law enforcement officials are prohibited from inflicting, instigating or tolerating torture or other cruel, inhuman or degrading treatment or punishment of any person. The fact that they were ordered to do so by their superiors may not be used as a justification; in fact, they are bound by international standards to disobey such orders and to report them. See Article 2(3) of the Convention against Torture, Articles 5 and 8 of the Code of Conduct for Law Enforcement Officials, Article 3 of the Inter-American Convention on Torture. The fact that a person is considered dangerous does not justify torture. Article 5 of the Inter-American Convention on Torture.

The prohibition against torture and cruel, inhuman or degrading treatment or punishment includes acts which cause mental as well as physical suffering to the victim. Article 1 of the Declaration against Torture, Article 1 of the Convention against Torture, Article 2 of the Inter-American Convention on Torture.

Corporal punishment, punishment by placing in a dark cell, and all cruel, inhuman or degrading punishments are completely prohibited as punishments for disciplinary offences. Rule 31 of the Standard Minimum Rules. See also **Chapter 25.4, Corporal punishment**.

The Human Rights Committee has instructed states to ensure that all places of detention are free from any equipment liable to be used for inflicting torture or ill-treatment. [Human Rights Committee General Comment 20, para.11]

10.4.1 Prolonged solitary confinement

The Human Rights Committee has stated that prolonged solitary confinement may amount to a violation of the prohibition against torture and ill-treatment in Article 7 of the ICCPR. [Human Rights Committee General Comment 20, para. 6] (See also **Chapter 4.1.1, Incommunicado detention**.)

Principle 7 of the Basic Principles on the Treatment of Prisoners provides that states should undertake efforts to abolish solitary confinement as a punishment or to restrict its use.

> The Inter-American Commission has stated: “Prolonged solitary confinement is not a measure considered by the law to be a sentence, and therefore there is no justification for its frequent use”. [Annual Report of the Inter-American Commission, 1981-1982, OEA/Ser.L/V/II.57, doc. 6 rev. 1, 1982, p. 124, Uruguay]

10.4.2 Use of force

International standards restrict the use of force on detainees by law enforcement officials. Law enforcement officials may use force only when strictly necessary, and to the minimum extent required in the circumstances. In all cases they must act with restraint and in accordance with the seriousness of the situation and the legitimate objectives to be achieved. Article 3 of the Code of Conduct for Law Enforcement Officials.

Force may only be used on people in custody when it is 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, force may be used only if non-violent means have proved ineffective. Rule 54 of the Standard Minimum Rules, Principle 15 of the Basic Principles on the Use of Force and Firearms by Law Enforcement Officials.

Firearms may only be used by law enforcement officers 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 may only be made when strictly unavoidable in order to protect life. Principle 9 of the Basic Principles on the Use of Force and Firearms by Law Enforcement Officials.

BOX:
Rule 54(1) of the Standard Minimum Rules:
"Officers of the institutions shall not, in their relations with the prisoners, use force except in self-defence or in cases of attempted escape, or active or passive physical resistance to an order based on law or regulations. Officers who have recourse to force must use no more than is strictly necessary and must report the incident immediately to the director of the institution."
END BOX

10.4.3 Physical pressure during interrogation
The Committee against Torture has stated that the application of "moderate physical pressure" as an authorized mode of interrogation of detainees "is completely unacceptable". It ruled that even if a suspect is believed to have information about imminent attacks against the state which may involve loss of civilian life, the following methods of interrogation may not be used as they violate the prohibition on torture and ill-treatment: restraining a person in very painful conditions; hooding; prolonged playing of loud music; prolonged sleep deprivation; threats, including death threats; violent shaking; and using cold air to chill the detainee. The Committee against Torture recommended that interrogations by Israeli security officers applying these methods "cease immediately". [UN Doc. CAT/C/SR.297/Add.1 at 3, para.8] See also **Chapter 9, Rights during interrogation**.

10.4.4 Use of restraints
International standards regulate the use of restraints, including handcuffs, chains, irons and strait-jackets, on detained and imprisoned people. They state that the central prison administration is to decide on the pattern and manner of use of instruments of restraint. Restraints are not to be used as punishment and chains and irons are not to be used as restraints. When used, restraints must not be applied for longer than is strictly necessary. Rules 33 and 34 of the Standard Minimum Rules, Principle 5 of the Principles of Medical Ethics, Rule 39 of the European Prison Rules.

BOX:
Rule 33 of the Standard Minimum Rules:
"Instruments of restraint, such as handcuffs, chains, irons and strait-jacket, shall never be applied as a punishment. Furthermore, chains or irons shall not be used as restraints. Other instruments of restraint shall not be used except in the following circumstances:
(a) As a precaution against escape during a transfer, provided that they shall be removed when the prisoner appears before a judicial or administrative authority;
(b) On medical grounds by direction of the medical officer;
(c) By order of the director, if other methods of control fail, in order to prevent a prisoner from injuring himself or others or from damaging property; in such instances the director shall at once consult the medical officer and report to the higher administrative authority."
END BOX

Principle 5 of the Principles of Medical Ethics specifies that "[i]t is a contravention of medical ethics for health personnel, particularly physicians, to participate in any procedure for restraining a prisoner or detainee unless such a procedure is determined in accordance with purely medical criteria as being necessary for the protection of the physical or mental health or the safety of the prisoner or detainee himself, or of his fellow prisoners or detainees, or of his guardians, and presents no hazard to his physical or mental health."

Restraints must be removed when a detainee or prisoner appears before a judicial or other authority -- they may have a bearing on the presumption of innocence. Rule 33 of the Standard Minimum Rules.

10.4.5 Body searches
Personal and body searches of detainees or prisoners should be carried out by people of the same sex and in a manner consistent with the dignity of the person being searched. [Human Rights Committee General Comment 16, para. 8; see Inter-American Commission, Report No. 38/96, Case 10.506 (Argentina), paras 66,76, 15 October 1996]

10.4.6 Medical or scientific experimentation
International standards specifically prohibit medical or scientific experimentation without the free consent of the person concerned. Article 7 of the ICCPR. [Human Rights Committee General Comment 20, para 7] . This prohibition is absolute, regardless of consent, if such experimentation may be detrimental to a detainee's or prisoner's health. Principle 22 of the Body of Principles, Rule 27 of the European Prison Rules.

10.4.7 Disciplinary offences
No prisoner may be subjected to punishment within an institution except in accordance with previously existing laws or regulations. The prisoner must be informed of the alleged offence, the competent authorities must conduct a thorough examination of the case and the prisoner must be given an opportunity to present a defence, including through an interpreter when necessary and practicable. Principle 30 of the Body of Principles, Rules 29-30 of the Standard Minimum Rules, Rules 35 and 36 of the European Prison Rules. A detainee or imprisoned person has the right to have a decision to take disciplinary action reviewed by a higher authority. Principle 30 of the Body of Principles.

Standards prohibit the imposition of the following punishments for disciplinary offences: collective punishments, corporal punishment, placement in a dark cell and all other cruel, inhuman or degrading punishments. Rule 31 of the Standard Minimum Rules; Rules 37 and 38 of the European Prison Rules. (See also **Chapter 25.4, Corporal punishment**.)

10.4.8 Right to reparation for torture or ill-treatment

Victims of torture and ill-treatment should have an enforceable right to reparation, including financial compensation. (While the English texts of Article 11 of the Declaration against Torture and Article 14 of the Convention against Torture use the word redress, the French and Spanish texts use the more inclusive term reparation.) Article 11 of the Declaration against Torture; see Article 14 of the Convention against Torture, Article 9 of the Inter-American Convention against Torture. Forms of reparation include: restitution; compensation; rehabilitation; satisfaction; and guarantees of non-repetition. [Draft Basic Principles and Guidelines on the Right to Reparation for Victims of [Gross] Violations of Human Rights and International Humanitarian Law, UN doc.: E/CN.4/1997/104, being

considered by the UN Commission on Human Rights with a view to their adoption by the UN General Assembly, arising from a comprehensive study by Theo Van Boven, former Special Rapporteur of the Sub-Commission on Prevention of Discrimination and Protection of Minorities, UN doc.: E/CN.4/Sub.2/1993/8.]

Section B: Rights at trial

Chapter 11 The right to equality before the law and courts

The guarantee of equality in the context of the trial process is multi-faceted. It prohibits discriminatory laws and includes the right to equal access to the courts and equal treatment by the courts.

11.1 The right to equality before the law

All people are entitled to equality before the law. Articles 7 and 10 of the Universal Declaration, Articles 2(1), 3 and 26 of the ICCPR, Articles 2 and 15 of the Women's Convention, Articles 2, 5 and 7 of the Convention against Racism, Articles 2 and 3 of the African Charter, Articles 1, 8(2) and 24 of the American Convention, Article 14 of the European Convention, Articles II and XVIII of the American Declaration.

BOX:

Article 7 of the Universal Declaration:
"All are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination."

Article 2(1) of the ICCPR:
"Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status."

Article 26 of the ICCPR:
"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."
END BOX

The right to equality before the law means that laws must not be discriminatory, and that judges and officials must not act in a discriminatory fashion in enforcing the law.

The right to equal protection of the law prohibits discrimination in law or in practice in any field regulated and protected by public authorities. However, this does not make all differences of treatment discriminatory, only those not based on reasonable and objective criteria. [*Broeks v. the Netherlands*, (172/1984), Human Rights Committee, 9 April 1987, 2 Sel. Dec.196; *Zwaan-de Vries v. the Netherlands*, (182/1984), Human Rights Committee, 9 April 1987, 2 Sel. Dec. 209]

11.2 The right to equality before the courts
All people are entitled to be equal before the courts and tribunals. Article 14(1) of the ICCPR, Articles 2 and 15 of the Women's Convention, Articles 2 and 5 of the Convention against Racism, Article 21(1) of the Yugoslavia Statute, Rwanda Statute 20(1), Article 67(1) of the ICC Statute. This general principle of the rule of law means that everyone is entitled both to equal access to a court and to equal treatment by that court.

BOX
Article 14(1) of the ICCPR:
"All persons shall be equal before the courts and tribunals..."
END BOX

The Human Rights Committee has stated that the guarantee of equality in Article 14(1) of the ICCPR requires that states "ensure the equal rights of men and women to all civil and political rights" protected by the ICCPR.

> The Human Rights Committee found that a Peruvian law allowing only husbands to represent matrimonial property before the courts violated the ICCPR. [See *Ato del Avellanal v. Peru*, (202/1986), 28 October 1988, Report of the HRC, (A/44/40), 1989, at 196]

On the right of foreign nationals to equality before the courts, the Human Rights Committee has specified that`` "once aliens are allowed to enter the territory of a State party they are entitled to the rights set out in the [ICCPR]... Aliens shall be equal before the courts and tribunals..."[Human Rights Committee General Comment 15, paras 1 and 7] This right is set out in Article 5 of the Declaration on the Human Rights of Individuals Who are not Nationals of the Country in which They Live.

11.2.1 The right to equal access to the courts

Everyone has an equal right to access to the courts, without discrimination.

In some countries women are not granted access to courts on an equal basis with men. This violates international standards including Articles 2, 3, 14 and 26 of the ICCPR and Articles 2 and 15 of the Women's Convention.

> The Committee on the Elimination of Discrimination against Women 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. Such laws or customs limit the woman's right effectively to pursue or retain her equal share of property and diminish her standing as an independent, responsible and valued member of her community." [General Recommendations on Articles of the Convention on the Elimination of All Forms of Discrimination Against Women, 24 September 1996]

See also **Chapter 29, Special courts and military courts**.

11.2.2 The right to equal treatment by the courts

The requirement of equal treatment by the courts in criminal cases has two important aspects. One is the basic principle that the defence and the prosecution will be treated in a manner that ensures that both parties have an equal opportunity to prepare and present their case during the course of the proceedings (see **Chapter 13.2, "Equality of arms"**).

Another aspect is that every accused person is entitled to be treated equally with other similarly placed accused people, without discrimination on any of the grounds spelt out in Article 2 of the ICCPR. Article 15 of the Women's Convention, Article 5 of the Convention against Racism. 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 is similar. Equality would be violated if a court or administrative decision were made on discriminatory grounds.

BOX:
Article 10 of the Universal Declaration:
"Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him."
END BOX

One implication is that a person charged with a criminal offence such as destruction of property should be afforded the same guarantees whether or not the offence occurred in a "political" or "ordinary criminal" context. Another is that laws giving a different weight to the testimony of witnesses on a discriminatory basis such as gender violates the right to equal treatment by the courts.

The Beijing Declaration and Platform for Action identified as a strategic objective for all governments that they should ensure equality and non-discrimination under the law and in practice, by, among other things, revoking any laws that discriminate on the basis of sex and removing gender bias in the administration of justice. [Report of the Fourth World Conference on Women, UN Doc. A/CONF.177/20, 17 October 1995, at 99]

Chapter 12 The 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 the responsibility of making decisions in a case must be established by law, and must be competent, independent and impartial.

12.1 The right to trial by a competent, independent and impartial tribunal

The primary institutional guarantee of a fair trial is that decisions will not be made by political institutions but by competent, independent and impartial tribunals established by law. The individual's right to trial in court, with guarantees for the accused in criminal proceedings, lies at the heart of due process of law.

Everyone facing a criminal trial or a suit at law has the right to trial by a competent, independent and impartial tribunal established by law. Article 10 of the Universal Declaration, Article 14(1) of the ICCPR, Article 8(1) and 27(2) of the American Convention, Article XXVI of the American Declaration, Article 6(1) of the European Convention; see Articles 7(1) and 26 of the African Charter, Basic Principles on the Independence of the Judiciary.

BOX:

Article 10 of the Universal Declaration:

"Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him."

Article 14(1) of the ICCPR:

"...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..."

END BOX

The right to trial by an independent and impartial tribunal is so basic that the Human Rights Committee has stated that it "is an absolute right that may suffer no exception". [*González del Río v. Peru*, (263/1987), 28 October 1992, Report of the HRC, vol. II, (A/48/40), 1993, at 20]

The essential judicial guarantees necessary for the protection of human rights, including the right to a competent, independent, impartial judiciary, may not be suspended even in states of emergency, under the American Convention. Article 27(2) of the American Convention. [Inter-American Court, Advisory Opinion OC-8/87, 30 January 1987, "*Habeas Corpus* in Emergency Situations"; Inter-American Court, Advisory Opinion OC-9/87, 6 October 1987, *Judicial Guarantees in States of*

Emergency, OAS/Ser.L/V/III.19 doc.13, 1988] See also **Chapter 31, Fair trial rights during states of emergency.**

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". [See European Court, *Delcourt Case*, 17 January 1970, 11 Ser. A 17, para. 31]

> The standards refer to "tribunals" rather than courts. The European Court has defined a tribunal as a body which exercises judicial functions, established by law to determine matters within its competence on the basis of rules of law and in accordance with proceedings conducted in a prescribed manner. [See *Sramek Case*, 22 October 1984, 84 Ser. A 17, para. 36; *Le Compte, Van Leuven and De Meyere Case*, 23 June 1981, 43 Ser. A 24, para. 55]

12.2 The right to be heard by a tribunal established by law

Any tribunal hearing a case must be one that has been established by law. Article 14(1) of the ICCPR, Article XXVI of the American Declaration, Article 8(1) of the American Convention, [The American Convention requires that the tribunal be *previously* established by law], Article 6(1) of the European Convention; see Article 26 of the African Charter. A tribunal established by law 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 tribunals set up to decide a particular individual case at issue. See Principle 5 of the Basic Principles on the Independence of the Judiciary.

BOX

Principle 5 of the Basic Principles on the Independence of the Judiciary:

"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."

END BOX

12.3 The 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.

12.4 The right to be heard by an independent tribunal

The independence of the tribunal is essential to a fair trial. It means that decision-makers in a given case are free to decide matters before them 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. It also means that the people appointed as judges are selected primarily on the basis of their legal expertise.

The factors which influence the independence of the judiciary have been articulated to some extent in the Basic Principles on the Independence of the Judiciary. They include the separation of powers which protects the judiciary from undue external influence or interference, and practical safeguards of independence such as technical competence and security of tenure for judges.

BOX:
Principle 2 of the Basic Principles on the Independence of the Judiciary.
"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."
END BOX

12.4.1 Separation of powers
The independence of tribunals is rooted in the separation of powers in a democratic society. [Seventh Report on the Situation of Human Rights in Cuba, 1983, OEA/Ser.L/V/II.61, October 1983; Report on the Situation of Human Rights in Ecuador, OEA/Ser.L/V/II.96, doc 10, rev.1 at 73, April 1997] Different organs of the state have exclusive and specific responsibilities. The judiciary as an institution, and judges as individuals, must have the exclusive power to decide cases before them.

The judiciary as a whole and each judge must be free from interference either by the state or by private individuals. The independence of the judiciary should be guaranteed by the state, enshrined in law and respected by all governmental institutions. States should ensure that there are structural and functional safeguards against political or other interference in the administration of justice. Principle 1 of the Basic Principles on the Independence of the Judiciary.

BOX
Principle 1 of the Basic Principles on the Independence of the Judiciary:
"The independence of the judiciary shall be guaranteed by the State and enshrined in the Constitution or the law of the country. It is the duty of all governmental and other institutions to respect and observe the independence of the judiciary."
END BOX

The independence of the judiciary requires it to have exclusive jurisdiction over all issues of a judicial nature. This means that judicial court 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. Principles 3 and 4 of the Basic Principles on the Independence of the Judiciary.

The independence of the judiciary also requires that the officials responsible for the administration of justice are completely autonomous from those responsible for prosecutions. Guideline 10 of the Guidelines on the Role of Prosecutors.

BOX:
Principle 3 of the Basic Principles on the Independence of the Judiciary:
"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."

Principle 4 of the Basic Principles on the Independence of the Judiciary:
"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."

Guideline 10 of the Guidelines on the Role of Prosecutors:
"The office of prosecutors shall be strictly separated from judicial functions."
END BOX

Interference in the independence of the judiciary is sometimes direct.

> The African Commission considered two decrees issued by the Nigerian Government which removed the jurisdiction of the courts for challenges to government decrees and actions. The African Commission ruled that the decrees violated guarantees under Article 7 of the African Charter of the right to be heard, and under Article 26 of the independence of the courts. The Commission stated "[a]n 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". *[Civil Liberties Organization v. Nigeria*, (129/93), 8th Annual Report of the African Commission, 1994-1995, ACHPR/RPT/8th/Rev.I]

> The Inter-American Commission has been critical of states' lack of respect for the guarantee of an independent tribunal. It has criticized, among other things, the transfer or dismissal of judges who issue rulings which run counter to the interests of governments, the nomination of judges by the executive, and judges' acquiescence to executive injunctions. In Chile, it criticized in particular the failure of the judiciary to exercise its powers and to investigate complaints of human rights violations, and in Peru, it criticized the system of keeping secret the identity of judges in cases involving terrorism charges (see also **Chapter 14.4 Violations of the right to a public hearing**). [See Report on the Situation of Human Rights in Chile, 1985, OEA/Ser.L/V/II.66, paras 36 -45; Annual Report of the Inter-American Commission, 1996, OEA/Ser.L/V/II. 95, doc.7, at 736, 1997]

In other countries, the composition of the judiciary fails to satisfy the requirements of the separation of powers (see also **Chapter 29, Special courts and military courts**).

> The Inter-American Commission found that special criminal courts in Nicaragua, which were composed of members of the militia, reservists and other supporters of the ruling political party, violated the right to an independent and impartial judiciary. [See Annual Report of the Inter-American Commission, 1982-1983, OEA/Ser.L/V/II.61 doc. 22 rev. 1, 1983, at 18]

> The Inter-American Commission found that military courts in Colombia and in Chile lacked independence. [Inter-American Commission, Report on the Situation of Human Rights in Colombia, OEA/Ser.L/V/II.53 doc.22, 30 June 1981, at 222; Inter-American Commission, Report on the Situation of Human Rights in Chile, OEA/Ser.L/V/II.66 Doc.17, 1985, at 286, para.8]

In determining whether or not a tribunal is independent, the European Commission and Court have examined whether the decision-makers were subject to orders by branches of the executive.

> The European Commission considered a military court and found it to be independent. The judges were serving military personnel, and although they were subject to the authority of their hierarchical superiors as members of the military, they were not answerable to their superiors in their judicial functions in the performance of the administration of justice. *[Sutter v. Switzerland*, (8209/78), 1 March 1979, 16 DR166, at 174]

> However, the European Court found that a municipal Police Board which fined a student for taking part in an unauthorized demonstration did not appear to be sufficiently independent to satisfy Article 6(1) of the European Convention. The Police Board was presided over by a police officer who was not subject to orders while heading the Police Board but who, following his term of office, was likely to return to other police duties. The Court stated that an ordinary citizen would tend to see the person as a member of the police force who was subordinate and loyal to his superiors and colleagues. [*Belilos case*, 29 April 1988, 132 Ser. A 30]

12.4.2. Appointment and conditions of employment of judges

In order to safeguard the independence and competence of the judiciary, there are international standards relating to the selection of judges and their conditions of employment. Many of these are articulated in the Basic Principles on the Independence of the Judiciary.

Protection of the independence of the judiciary requires that people are selected as judges on the basis of their legal training and experience. Judges should not be selected for "improper motives" and should be properly qualified. Principle 10 of the Basic Principles on the Independence of the Judiciary. Promotion of judges should be based on objective factors, particularly ability, integrity and experience. Principle 13 of the Basic Principles on the Independence of the Judiciary.

States must provide adequate resources to enable the judiciary to perform its functions, and to ensure adequate salaries and pensions for judges. Judges' terms of office, conditions of service and retirement age are to be secured by law.Principles 7 and 11 of the Basic Principles on the Independence of the Judiciary.

> The Human Rights Committee expressed concern about the impact that the election of judges in a few states in the USA may have on the implementation of fair trial rights under Article 14 of the ICCPR. It recommended a system of appointment of judges on merit by an independent body. The Committee was also concerned that "in many rural areas [in the USA] justice is administered by unqualified and untrained persons". [Observations of the HRC: USA, UN Doc. CCPR/C/79/Add.50, 7 April 1995, para.23, 36]

> The Human Rights Committee expressed concern that the judiciary in Sudan was neither independent in fact or appearance. It found that many judges 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.[Concluding Observations of the HRC: Sudan, UN Doc. CCPR/C/79/Add.85, 19 November 1997, para.21]

BOX
Principle 10 of the Basic Principles on the Independence of the Judiciary:
"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."

Principle 11 of the Basic Principles on the Independence of the Judiciary:
"The term of office of judges, their independence, security, adequate remuneration, conditions of service, pensions and the age of retirement shall be adequately secured by law."
END BOX

In order to ensure the independence of the judiciary, 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. 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. Principles 12 and 18 of the Basic Principles on the Independence of the Judiciary.

Judges may be subjected to disciplinary procedures and sanctions for misconduct, including suspension and removal. The state may also be liable to pay compensation for judicial misconduct. However, judges should enjoy personal immunity from civil suits for damages for improper acts or omissions in the exercise of their judicial functions. Complaints made against judges in their judicial capacity should be processed expeditiously and fairly in the course of fair hearings. Principles 16,17, 19 and 20 of the Basic Principles on the Independence of the Judiciary.

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 impose and collect a fine imposed by the executive. The Committee expressed its view that the procedures in Belarus relating to tenure, disciplining and dismissal of judges did not comply with the principle of independence and impartiality of the judiciary. [Concluding Observations of the HRC: Belarus, UN Doc. CCPR/C/79/Add.86, 19 November 1997, para.13]

BOX:
Principle 18 of the Basic Principles on the Independence of the Judiciary:
"Judges shall be subject to suspension or removal only for reasons of incapacity or behaviour that renders them unfit to discharge their duties."

Principle 19 of the Basic Principles on the Independence of the Judiciary:
"All disciplinary, suspension or removal proceedings shall be determined in accordance with established standards of judicial conduct."

Principle 20 of the Basic Principles on the Independence of the Judiciary:
"Decisions in disciplinary, suspension or removal proceedings should be subject to an independent review. This principle may not apply to the decisions of the highest court and those of the legislature in impeachment or similar proceedings."
END BOX

12.4.3 Assignment of cases

The assignment of cases to judges within the court to which they belong is an internal matter of judicial administration. Principle 14 of the Basic Principles on the Independence of the Judiciary.

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 and based on objective factors.

12.5 The right to be heard by an impartial tribunal

The tribunal must be impartial. The principle of impartiality, which applies to each individual case, demands that each of the decision-makers, whether they be professional or lay judges or juries, be unbiased. [See, *Karttunen v. Finland*, (387/1989), 23 October 1992, Report of the HRC, vol. II, (A/48/40), 1993, at 120, relating to lay judges; and *Collins v. Jamaica*, (240/1987), 1 November 1991, Report of the HRC, (A/47/40), 1992, at 236 para. 8.4, requiring jurors to be impartial. See also Article 67(1) of the ICC Statute guaranteeing a fair hearing conducted impartially]

Actual impartiality and the appearance of impartiality are both fundamental for maintaining respect for the administration of justice.

The right to an impartial tribunal requires that judges and jurors have no interest or stake in a particular case and do not have pre-formed opinions about it.

The judiciary is required to ensure that proceedings are conducted fairly, and that the rights of all of the parties are respected. Principle 6 of the Basic Principles of the Independence of the Judiciary.

> The Human Rights Committee has stated that impartiality "implies that judges must not harbour preconceptions about the matter put before them, and that they must not act in ways that promote the interests of one of the parties". [*Karttunen v. Finland*, (387/1989), 23 October 1992, Report of the HRC, vol. II, (A/48/40), 1993, at 120, para. 7.2]
>
> The European Court has held that judges must not have a "preconceived view on the merits of a case". [*Fey v. Austria*, 24 February 1993, 255 Ser. A 13, para. 34]

Decisions about facts must be made 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. Principle 2 of the Basic Principles on the Independence of the Judiciary.

Judges should conduct themselves in a manner which preserves the impartiality and independence of the judiciary, as well as the dignity of their office. Principle 8 of the Basic Principles on the Independence of the Judiciary.

12.5.1 Challenges to the impartiality of a tribunal

Challenges to the impartiality of a tribunal have been raised in various contexts, including when a deciding judge has taken part in other parts of the proceedings in another capacity, and when judges have had a personal stake in the proceedings or some relationship with one of the parties.

Cases examining the impartiality of tribunals brought before the Human Rights Committee and regional bodies undergo two tests. 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. While these cases show that the appearance of partiality is considered along with actual partiality, there is a general assumption that a judge (and jury) is personally impartial unless one of the parties raises proof to the contrary, normally in the course of proceedings available under national law.

> 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. [*Karttunen v. Finland*, (387/1989), 23 October 1992, Report of the HRC, vol. II, (A/48/40), 1993, at 120, para. 7.2]

> 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". [*The Constitutional Rights Project (in respect of Zamani Lakwot and six others) v. Nigeria*, (87/93), 8th Annual Activity Report of the African Commission on Human and Peoples' Rights, 1994-1995, ACHPR/RPT/8th/Rev.I at 14, para. 10]

BOX:
Article 7(1)(d) of the African Charter:
"Every individual shall have the right to have his cause heard. This comprises:... (d) the right to be tried within a reasonable time by an impartial court or tribunal."
END BOX

The European Court found no lack of impartiality in cases including the following:

- where a trial judge had participated in pre-trial procedures, including deciding that the accused should be held in pre-trial custody. The Court stated that "[t]he mere fact that [the judge] also made pre-trial decisions, including decisions relating to detention on remand, cannot be taken in itself as justifying fears as to his impartiality; what matters is the scope and nature of these decisions". [*Nortier v. the Netherlands, (*31/1992/376/450), 24 August 1993, at 12]
- where the presiding trial judge had, on the basis of the court file, decided that there was *prima facie* evidence which justified the case being brought to trial. The Court found that the judge's detailed knowledge of the case based on his role in the preliminary phases did not mean that he was prejudiced in a way that prevented him from being impartial when the case came to trial. [*Saraiva de Carvalho v. Portugal*, (14/1993/409/488), 22 April 1994, at 11]

The European Court has, however, found a lack of impartiality in the following cases:

- where the presiding judge of the appeal court, who had extensive powers, had been in an influential position in the public prosecutor's department previously, the Court found that the

impartiality of the tribunal was "capable of appearing open to doubt". The Court, however, noted that the mere fact that a judge was once a member of the public prosecutor's office is not determinative in and of itself. *[Piersack Case*, 1 October 1982, 53 Ser. A 14, para. 31]

C where an investigating judge had ordered the accused to be detained prior to trial and had interrogated the accused on a number of occasions during the investigation and was later appointed as the trial judge and as such conducted the trial of the same case. [*De Cubber Case*, 26 October 1984, 86 Ser. A 13-16]

Chapter 13 The right to a fair hearing

The right to a fair hearing encompasses all the procedural and other guarantees of fair trial laid down 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 criterion of a fair hearing.

13.1 The 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. Article 10 of the Universal Declaration, Article 14(1) of the ICCPR, Article 6(1) of the European Convention, Article XXVI of the American Declaration, Article 8 of the American Convention, Article 20(1) of the Yugoslavia Statute, Rwanda Statute 19(1), Articles 64(2) and 67(1) of the ICC Statute.

The right to a fair hearing in criminal trials is specified by a number of concrete rights, such as the right to be presumed innocent, the right to be tried without undue delay, the right to prepare a defence, the right to defend oneself in person or through counsel, the right to call and examine witnesses and the right to protection from retroactive criminal laws. However, the international standards governing the conduct of trials 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 guarantees, and depends on the entire conduct of the trial. [See: Human Rights Committee General Comment 13, para. 5; Advisory Opinion of the Inter-American Court of Human Rights, OC-11/90, *Exceptions to the Exhaustion of Domestic Remedies*, 10 August 1990, Annual Report of the Inter-American Court, 1990, OAS/Ser L./V/III.23 doc.12, rev. 1991, at 44, para.24]

BOX
Article 14(1) of the ICCPR:
"...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..."
END BOX

The Human Rights Committee has stated that a fair hearing requires a number of conditions, including equality of arms (see below), respect for the principle of adversary proceedings and expeditious procedure. [*Morael v. France*, (207/1986), 28 July 1989, Report of the HRC, (A/44/40), 1989, at 210]

> The Human Rights Committee found a general violation of the right to a fair hearing in the case of eight political opponents of President Mobutu Sese Seko of the former Zaire, who were sentenced to long prison terms in the absence of procedural guarantees. The accused, who had all previously been banished or placed under house arrest in 1981, were again arrested and subsequently tried in a state security court on charges of plotting to overthrow the regime. The accused were not summoned to court and three had not been heard during

pre-trial stages. They and their families were forcibly relocated from their homes under an "administrative banning measure". The Committee found among other things that they had been subjected to arbitrary detention and denied a fair and public trial on account of their opinions. [*Mpandanjila et al v. Zaire*, (138/1983), 26 March 1986, 2 Sel. Dec. 164]

13.2 "Equality of arms"

One essential criterion of a fair hearing is the principle of "equality of arms" between the parties in a case. Equality of arms, which must be observed throughout the trial process, means that both parties are treated in a manner ensuring that they have a procedurally equal position during the course of the trial, and are in an equal position to make their case. [See European Court judgments in the cases of *Ofrer* and *Hopfinger*, Nos. 524/59 and 617/59, Dec. 19.12.60, Yearbook 6, p. 680 and 696] It means that each party must be afforded a reasonable opportunity to present its case, under conditions that do not place it at a substantial disadvantage vis à vis the opposing party.

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 right to defend oneself. The principle of equality of arms ensures that the defence has a reasonable opportunity to prepare and present its case on a footing equal to that of the prosecution. Its requirements include the right to adequate time and facilities to prepare a defence, including disclosure by the prosecution of material information. [Case of *Foucher*, European Court, 25 EH RR 234, at p.247] Its requirements also include the right to legal counsel, the right to call and examine witnesses and the right to be present at the trial. This principle would be violated, for example, if the accused was not given access to information necessary for the preparation of the defence, if the accused was denied access to expert witnesses, or if the accused was excluded from an appeal hearing where the prosecutor was present.

See also **Chapter 8, The right to adequate time and facilities to prepare a defence.**

Chapter 14 The 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 The right to a public hearing

Except in narrowly defined circumstances, court hearings and judgments must be public. [Human Rights Committee General Comment 13, para.6] Article 10 of the Universal Declaration, Article 14(1) of the ICCPR, Article 6(1) of the European Convention, Article 20(4) of the Yugoslavia Statute, Rwanda Statute 19(4), Articles 64(7) and 67(1) of the ICC Statute. The right to a public hearing in *criminal* proceedings is also set out in international standards. Article 11 of the Universal Declaration, Principle 36(1) of the Body of Principles, Article 8(5) of the American Convention and Article XXVI of the American Declaration.

The right to a public hearing means that not only the parties in the case, but also the general public, have the right to be present. The public has a right to know how justice is administered, and what decisions are reached by the judicial system.

The right to hearings in public is relied upon by trial observers. The right of trial observers to "attend public hearings, proceedings and trials, and to form an opinion on their compliance with national law and applicable international obligations and commitments" is expressly included as a right in the draft Declaration on Human Rights Defenders, which may be adopted by the UN General Assembly in 1998. [The draft UN Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote Universally Recognized Human Rights and Freedoms (draft Declaration on Human Rights Defenders) was adopted by the UN Working Group on Human Rights Defenders in March 1998, endorsed by the (UN) Commission on Human Rights at its 54th session in 1998, and referred to the UN Economic and Social Council for adoption and referral to the 53rd session of the UN General Assembly, UN Doc: E/CN.4/1998/L.18, (annex) rev.1]

BOX

Article 10 of the Universal Declaration:
"Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him."

Article 14(1) of the ICCPR:
"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."
END BOX

14.2 Requirements of a public hearing
A public hearing requires oral hearings on the merits of the case held in public, which members of the public, including the press, can attend. Courts must make information about the time and venue of the oral hearings available to the public and provide adequate facilities, within reasonable limits, for the attendance of interested members of the public. [*Van Meurs v. the Netherlands* (215/1986), 13 July 1990, Report of the HRC, (A/45/40), 1990, at 60]

Judgments in all criminal cases and suits at law are to be made public, with few exceptions (see **Chapter 24, Judgments**).

Whether or not appeals have to be public depends on the nature of the appeal (see **Chapter 21.3, The right to be present at appeals**).

> The European Court and Commission have stated that at least one court must deal with the merits of a case in public, unless the case falls within one of the permissible exceptions. The Court concluded that where there have been oral hearings on the merits of the case in lower courts, proceedings in appeal courts did not necessarily have to be conducted orally or in public. However, there may be a right to an oral hearing when an appeal is capable of raising issues of both fact and law. [*Fredin v. Sweden (No. 2*), (20/1993/415/494), 23 February 1994, at 6-7]

14.3 Permissible exceptions to a public hearing
The public's access to hearings may be restricted in certain narrowly defined circumstances.

The grounds on which the press and the public may be excluded from all or part of hearings are the same in the ICCPR and the European Convention. The grounds are: morals (for example, some hearings involving sexual offences); public order (*ordre public*), which relates primarily to order within the courtroom; national security in a democratic society; when the interests of juveniles or the private lives of the parties so require; or to the extent strictly necessary, in the opinion of the court, in special circumstances where publicity would prejudice the interests of justice.Article 14(1) of the ICCPR, Article 6(1) of the European Convention. All of these exceptions are narrowly construed.

> The Human Rights Committee has stated: "It should be noted that, apart from such exceptional circumstances [set out in Article 14(1) of the ICCPR], the Committee considers that a hearing must be open to the public in general, including members of the press, and must not, for instance, be limited only to a particular category of persons". [Human Rights Committee General Comment 13, para.6]
>
> International law does not grant to states an unfettered discretion to define for themselves what constitutes an issue of national security. According to experts in international law, national security and human rights: "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 threat or use of force, whether from an external source, such as a military threat, or an internal source, such as incitement to overthrow the government." [The Johannesburg Principles on National Security, Freedom of Expression and Access to Information, October 1995, adopted at a meeting convened by Article 19, the International Centre Against Censorship, and the Centre for Applied Legal Studies of the University of Witwatersrand, South Africa.]

The European Commission found that the exclusion of the public from a case involving sexual offences against minors was permissible under Article 6(1) of the European Convention. *[X v. Austria*, (1913/63), 2 Digest of Strasbourg Case Law 438 (30 April 1965) (unpublished).]

The European Court decided that reasons of public order and security justified the exclusion of the press and public from disciplinary proceedings held in a prison against convicted prisoners. It stated that holding these proceedings in public would impose "a disproportionate burden on the authorities of the State". [*Campbell and Fell Case*, 28 June 1984, 80 Ser. A 42]

Under the American Convention, the right to a public trial in criminal proceedings may be suspended only "in so far as may be necessary to protect the interests of justice". Article 8(5) of the American Convention.

14.4 Violations of the right to a public hearing

The Human Rights Committee and the Inter-American Commission considered that secret trials in Peru and Colombia for "terrorism-related offences" and drug-trafficking cases violated the right to a fair trial.

In Peru, the public has been denied access to proceedings in such cases and subsequent appeal or review hearings, which were held in precincts before judges who sat behind screens to conceal their identities from the accused. The judges, who used numbers rather than their names on all court documents, were known as "faceless judges". The Human Rights Committee urged the Peruvian Government to abolish the system of "faceless judges" and to ensure that public trials were reinstated for all people charged with criminal offences, including those charged with terrorist-related activities. [Preliminary Observations of the HRC: Peru, UN Doc. CCPR/C/79/Add.67, 25 July 1996, at para. 26] Although the system of "faceless judges" was abolished in October 1997, trials in Peru for terrorism-related offences continue to be held behind closed doors, either in closed military courts or in civilian prisons.

Similarly, Colombia's practice of holding secret proceedings conducted by "faceless judges" has been deemed by both the Human Rights Committee and the Inter-American Commission to be contrary to the principles of the ICCPR and the American Convention. The Inter-American Commission recommended the elimination of any form of secret justice in favour of "an across-the-board strengthening of the justice system, particularly the fundamental guarantees". [Inter-American Commission, Second Report on the Situation of Human Rights in Colombia, OEA/ Ser.L/V/II.84, doc 39, 1993, p. 249]

The Inter-American Commission found that secret proceedings of a Chilean military tribunal trying army personnel for the death and serious injury of two citizens denied the victims due process of law, as the secrecy made it virtually impossible for the victims' lawyers to gain access to basic elements of the trial and allowed the military authorities to control the evidence submitted. [Case 9755, Chile, Inter-American Commission, 132, 137, OEA/Ser.L/V/I.74, doc.10, rev. 1 (1988)]

Chapter 15 The presumption of innocence

A fundamental principle of the right to fair trial is the right of every person 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

Everyone has the right to be presumed innocent, and treated as innocent, until and unless they are convicted according to law in the course of proceedings which meet at least the minimum prescribed requirements of fairness. Article 11 of the Universal Declaration, Article 14(2) of the ICCPR, Principle 36(1) of the Body of Principles, Article 7(1)(b) of the African Charter, Paragraph 2(D) of the African Commission Resolution, Article XXVI of the American Declaration, Article 8(2) of the American Convention, Article 6(2) of the European Convention, Article 21(3) of the Yugoslavia Statute, Rwanda Statute 20(3), Article 66 of the ICC Statute; see also Rule 84(2) of the Standard Minimum Rules, Rule 91 of the European Prison Rules.

The right to be presumed innocent applies not only to treatment in court and the evaluation of evidence, but also to treatment before trial. It applies to suspects, before criminal charges are filed prior to trial, and carries through until a conviction is confirmed following a final appeal. (See Chapters **1.5, The presumption of release pending trial**; **7, The right to trial within a reasonable time or to release from detention; 9, Rights during interrogation,** and **10.2 Additional safeguards for people in pre-trial custody**.)

The right not to be compelled to testify against oneself or confess guilt and the related right of silence are rooted in the presumption of innocence (see **Chapter 16, The right not to be compelled to testify or confess guilt**).

The right to the presumption of innocence requires that judges and juries refrain from prejudging any case. It also applies to all other public officials. This means that public authorities, particularly prosecutors and police, should not make statements about the guilt or innocence of an accused before the outcome of the trial. [Human Rights Committee General Comment 13, para. 7] It also means that the authorities have a duty to prevent the news media or other powerful social groups from influencing the outcome of a case by pronouncing on its merits.

> The presumption of innocence is *not*, however, considered to be violated if the authorities inform the public about criminal investigations and in doing so name a suspect, or state that a suspect has been arrested or has confessed, so long as there is no declaration that the person is guilty. [*Krause v. Switzerland*, 13 DR 73, 3 October 1978; see also *Worm v. Austria*, (83/1996/702/894), European Court, 29 August 1997]

15.2 The burden of proof

The requirement that the accused be presumed innocent unless and until proved guilty in the course of a trial which meets all guarantees of fairness has enormous impact at a criminal trial. It means that the prosecution has to prove an accused person's guilt. If there is reasonable doubt, the accused must not be found guilty.

Article 66(3) of the ICC Statute provides: "In order to convict the accused, the Court must be convinced of the guilt of the accused beyond reasonable doubt". Although the standard of proof is not expressly specified in other international standards, the Human Rights Committee has stated "[b]y reason of the presumption of innocence, the burden of proof of the charge is on the prosecution and the accused has the benefit of the doubt. No guilt can be presumed until the charge has been proved beyond reasonable doubt." [Human Rights Committee General Comment 13, para. 7]

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 (at or near the place where a crime occurred), or their possession of certain things (such as stolen property or contraband). Such requirements, when incorporated into law, are known as statutory presumptions. 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.

> The European Court has found that statutory presumptions do not necessarily violate the presumption of innocence, but they must be defined by law and reasonably limited. They must also preserve the right of the accused to a defence -- in other words they must be capable of rebuttal by the accused. [See *Pham Hoang v. France*, (66/1991/318/390), 25 September 1992, finding that a French customs law which created rebuttable assumptions did not violate the presumption of innocence.]
>
> 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. [Annual Report of the Inter-American Commission, 1996, OEA/Ser.L/V/II.95, doc. 7, para.4 p.745, Peru]
>
> The Inter-American Commission found that Special Tribunals in Nicaragua violated the presumption of innocence as they considered the fact that an accused was a member of the former National Guard or bodies linked to it to be *per se* evidence which warranted a presumption of guilt. According to the Commission, the Special Tribunals began their investigation on the basis that all such accused individuals were guilty until they proved their innocence. [Report on the Situation of Human Rights in Nicaragua, OEA/ Ser.L/V/II.53, doc. 25, 1981, at 91]

15.3 Procedures impinging on the presumption of innocence

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. (See **Chapter 12.5, The right to be tried by an impartial tribunal**.)

Particular attention should be paid that no attributes of guilt are borne by the accused during the trial which might impact on the presumption of their innocence. Such attributes could include holding the accused in a cell within the courtroom, requiring the accused to wear handcuffs, shackles or prison uniform in the courtroom, or taking the accused to trial with a shaven head in countries where convicted prisoners have their heads shaved.

In an attempt to avoid such prejudicial indications, if an accused has no suitable clothing of his or her own, he or she should be provided with civilian clothing in good condition in which to appear in court. Rule 95(3) of the European Prison Rules; see also Rule 17(3) of the Standard Minimum Rules.

> The European Commission has expressed its view in several cases that informing decision-makers of a person's prior convictions before a verdict is reached does not violate fair trial guarantees including the presumption of innocence. In one case the presiding judge disclosed details of the accused's previous convictions to lay judges before a verdict was reached on a burglary charge; in another the accused's previous convictions for theft were referred to in the course of the trial; in another the public prosecutor informed the court of the accused's numerous previous convictions before the jury reached a verdict on a rape charge.[*X v. Austria*, 3 April 1967, 23 Coll. Dec. 31; *X v. Austria*, 1 April 1966, 19 Coll. Dec. 95; *X v. Denmark*, 14 December 1965, 18 Coll. Dec. 44]

15.4 After acquittal

If a person is acquitted of a criminal offence by final judgment of a court, the judgment is binding on all state authorities. Therefore, the public authorities, particularly 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.

> The European Court found that the presumption of innocence had been violated when, after an accused was acquitted, Austrian courts voiced suspicions about his innocence when explaining a decision to refuse compensation for pre-trial detention. [*Sekanina v. Austria*, 25 August 1993, 266-A Ser. A]

> The European Commission found that the presumption of innocence had been violated when a Swiss court ordered the accused to pay part of the investigation and court costs on the ground that the court considered the accused had committed offences, even though criminal proceedings were discontinued because the prosecution had not been completed within the required time limit. [*I. and C. v. Switzerland*, (10107/82), 4 December 1985, 48 DR 35]

Many states in common law systems separate criminal from non-criminal (civil) jurisdiction. In such states, being acquitted of a criminal offence does not prohibit courts exercising non-criminal jurisdiction from establishing civil liability based on the same set of facts, but using a different (lower) standard of proof. [*X. v. Austria*, (9295/81), 6 October 1982, 30 DR 227]

Chapter 16 The right not to be compelled to testify or confess guilt

No one charged with a criminal offence may be compelled to testify against themselves or to confess guilt, in accordance with the presumption of innocence (see Chapter 15).

16.1 The right not to be compelled to testify against oneself or confess guilt

No one charged with a criminal offence may be compelled to testify against him or herself or to confess guilt. This prohibition is in line with the presumption of innocence, which places the burden of proof on the prosecution, and with the prohibition against torture and other cruel, inhuman or degrading treatment. Article 14(3)(g) of the ICCPR, Articles 8(2)(g) and 8(3) of the American Convention, Principle 21 of the Body of Principles, Article 21(4)(g) of the Yugoslavia Statute, Rwanda Statute 20(4)(g), Article 67(1)(g) of the ICC Statute.

BOX:
Article 14(3)(g) of the ICCPR:
"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."
END BOX

> This fundamental right is considered to be inherent in Article 6 of the European Convention, even though it is not expressly set out. The European Court has stated that "[a]lthough not specifically mentioned in Article 6 of the [European] Convention, there can be no doubt 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 under Article 6. By providing the accused with protection against improper compulsion by the authorities these immunities contribute to avoiding miscarriages of justice and to securing the aims of Article 6". [*Murray v. United Kingdom* (41/1994/488/ 570), 8 February 1996, at para. 45]

The prohibition against compelling an accused to testify or confess guilt is broad. It prohibits the authorities from engaging in any form of coercion, whether direct or indirect, physical or psychological. It prohibits torture and cruel, inhuman or degrading treatment. It prohibits treatment which violates the right of detainees to be treated with respect for the inherent dignity of the human person. [Human Rights Committee General Comment 13, para 14; *Kelly v. Jamaica*, (253/1987), 8 April 1991, Report of the HRC, (A/46/40), 1991, at 246] (See **Chapter 10, The right to humane conditions of detention and freedom from torture.**) It also prohibits the imposition of judicial sanctions to compel the accused to testify. [Manfred Nowak, *U.N. Covenant on Civil and Political Rights: CCPR Commentary*, NP Engel, 1993, at 264]

16.2 The right to silence

The right of an accused to remain silent during police questioning and at trial has been deemed to be implicit in two internationally protected rights: the right to be presumed innocent and the right not to be

compelled to testify or confess guilt. [*Murray v. United Kingdom* (41/1994/488/ 570), 8 February 1996, at para. 45]

The right of an accused to silence, even when suspected of the worst possible crimes such as genocide, other crimes against humanity and war crimes, is expressly recognized in the Rule 42(A)(iii) of the Yugoslavia Rules, Rwanda Rules 42(A)(iii) and Article 55(2)(b) of the ICC Statute.

> The European Court 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. However, the European Court held that the right to silence is not absolute. Rather, the question 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. The European Court ruled that a court *could* draw adverse inferences from an accused's failure to explain his presence at the scene of a crime during police questioning and at trial, without violating the presumption of innocence or the corresponding right not to be compelled to testify. In reaching this conclusion the Court considered the following to be decisive: such inferences were drawn only after the prosecution made out a *prima facie* case against the accused; the judge had discretion about whether or not to draw inferences; the only permissible inferences which could be drawn were "common sense" inferences and the reasons for drawing them were explained in the court's judgment; and the case against the accused was "formidable". However, the European Court did find that the failure to grant the accused access to counsel for the first 48 hours of his detention, when he was being questioned by police and had to decide whether to exercise his right of silence, was a violation of Article 6 of the European Convention. [*Murray v. United Kingdom* (41/1994/488/ 570), 8 February 1996.]

See **Chapter 9.3, The right to silence**, in **Chapter 9, Rights during interrogation**.

16.3 Allegations of coercion

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 authority to consider such an allegation at any stage. [Human Rights Committee General Comment 13, para. 15]

All allegations that statements have been extracted through torture or other cruel, inhuman or degrading treatment must be promptly and impartially examined by the competent authorities, including judges. Articles 13 and 16 of the Convention against Torture, Article 8 of the Inter-American Convention on Torture.

All detainees and prisoners, or lawyers or relatives acting on their behalf, have the right to complain to the authorities of torture or ill-treatment, in confidence. All such complaints should be promptly dealt with and replied to without undue delay. If the complaint is rejected or inordinately delayed, the complainant is entitled to bring it before a judicial or other authority. The complainant should suffer no prejudice as a result of making a complaint. Principle 33 of the Body of Principles.

In addition, whenever there is reasonable ground to believe that an act of torture or other cruel, inhuman or degrading treatment has been committed, a prompt and impartial investigation must be

initiated. Articles 12 and 16 of the Convention against Torture, Article 8 of the Inter-American Convention on Torture.

Evidence elicited as a result of torture, cruel, inhuman or degrading treatment, or other coercion, including confessions by the accused, must be excluded by the court except in proceedings brought against alleged perpetrators of torture, ill-treatment or coercion (see **Chapter 17, Exclusion of evidence elicited as a result of torture or other compulsion**). See also **Chapter 9, Rights during interrogation** and **Chapter 10.4, Freedom from torture and ill-treatment**.

Chapter 17 Exclusion of evidence elicited as a result of torture or other compulsion

Evidence elicited as a result of torture or other coercion, including confessions by the accused, must be excluded by the court.

17.1 Exclusion of evidence elicited by torture or ill-treatment

Evidence, including confessions by the accused, elicited as a result of torture or other cruel, inhuman or degrading treatment must not be used in any proceedings except those bourhgt against the suspected perpetrators. Any statement made as a result of torture is inadmissible in evidence, except in proceedings against the alleged perpetrator of the torture. Article 15 of the Convention against Torture, Article 10 of the Inter-American Convention on Torture.

Other international standards are broader, excluding not only statements elicited as a result of torture, but also those elicited as a result of other cruel, inhuman or degrading treatment. Article 12 of the Declaration against Torture, Article 69(7) of the ICC Statute, Guideline 16 of the Guidelines on the Role of Prosecutors; see Principle 27 of the Body of Principles.

These standards apply not only to statements made by the accused but also to statements made by any witness.

BOX:

Guideline 16 of the Guidelines on the Role of Prosecutors:
"When prosecutors come into possession of evidence against suspects that they know or believe on reasonable grounds was obtained through recourse to unlawful methods, which constitute a grave violation of the suspect's human rights, especially involving torture or cruel, inhuman or degrading treatment or punishment, or other abuses of human rights, they shall refuse to use such evidence against anyone other than those who used such methods, or inform the Court accordingly, and shall take all necessary steps to ensure that those responsible for using such methods are brought to justice."

Article 12 of the Declaration against Torture:
"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."

Article 15 of the Convention against Torture:
"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."

Article 69(7) of the ICC Statute:
Evidence obtained by means of a violation of this Statute or internationally recognized human rights shall not be admissible if:

a) The violation casts substantial doubt on the reliability of the evidence; or
b) The admission of the evidence would be antithetical to and would seriously damage the integrity of the proceedings.
END BOX

17.2 Exclusion of evidence elicited under duress

There are forms of duress which do not constitute torture but remain prohibited as methods of eliciting evidence, and taint any evidence so obtained. The Human Rights Committee has expanded the prohibition on the use of evidence obtained under duress by stating that "the law must prohibit the use of admissibility in judicial proceedings of statements or confessions obtained through torture or other prohibited treatment". [Human Rights Committee General Comment 20, para. 12]

The Committee has stated that: "[t]he law should require that evidence provided by...any...form of compulsion is wholly unacceptable". [Human Rights Committee General Comment 13, para.14] The Committee has also stated that "[c]onfessions obtained under duress should be systematically excluded from judicial proceedings...". [Concluding Observations of the HRC: Georgia, UN Doc: CCPR/C/79/Add.75 at para.26 (5 May 1997)]

The Body of Principles prohibits taking advantage of the situation of detainees to compel them to testify or confess, or using violence, threats or methods of interrogation which impair their capacity of decision or their judgement. Principle 21 of the Body of Principles. Principle 27 states that non-compliance with these principles in obtaining evidence must be taken into account in determining the admissibility of such evidence. Principle 27 of the Body of Principles.

Amnesty International believes that whenever there is an allegation that a statement was elicited as a result of torture, cruel, inhuman or degrading treatment or duress, a separate hearing should be held *before* such evidence is admitted in the trial. At such a hearing, evidence should be taken on whether the statement in question was made voluntarily. If it is determined that the statement was not made voluntarily, then it must be excluded from evidence in all proceedings except proceedings brought against those accused of coercing the statement.

When prosecutors come into possession of evidence against suspects that they know or believe on reasonable grounds was obtained through recourse to unlawful methods which constitute grave violations of the suspect's human rights, they must take all necessary steps to ensure that those responsible for using such methods are brought to justice. Guideline 16 of the Guidelines on the Role of Prosecutors.

17.2.1 Article 8(3) of the American Convention

Article 8(3) of the American Convention, which states that a confession of guilt by the accused shall be valid only if made without coercion of any kind, differs from the standards cited in 17.1 above. It relates only to confessions of the accused, rather than "any evidence". It *also* requires exclusion of a confession if there was coercion *of any kind*, including any conduct which, while coercive, might not amount to torture or other cruel, inhuman or degrading treatment.

> The Inter-American Commission expressed its view that the use of confessions obtained while the accused was detained incommunicado (without access to his counsel) violated the

accused's rights under the American Convention. [Resolution no. 29/89 of 29 September 1989 (Nicaragua) Annual Report of the Inter-American Commission, 1989-1990, OEA/ Ser. L/V/II.77 doc.7 rev.1.1990, at 73- 96]

BOX:
Article 8(3) of the American Convention
"A confession of guilt by the accused shall be valid only if it is made without coercion of any kind."
END BOX

Chapter 18 The prohibitions on retroactive application of criminal laws and on double jeopardy

No one may be prosecuted for an act or omission which was not a criminal offence at the time that it was committed. No one may be prosecuted more than once in the same jurisdiction for the same offence.

18.1 The prohibition on prosecution for offences which were not crimes when committed

No one may be convicted for an act or an omission which was not an offence at the time it was committed under national or international law or according to the general principles of law recognized by the community of nations. Article 11(2) of the Universal Declaration, Article 15 of the ICCPR, Article 7(2) of the African Charter, Article 9 of the American Convention, Article 7 of the European Convention, Article 22 of the ICC Statute.

This prohibition on retroactive application of criminal laws may not be suspended in any circumstances, including during states of emergency. Article 4 of the ICCPR, Article 27(2) of the American Convention, Article 15(2) of the European Convention. (See **Chapter 31, Fair trial rights during states of emergency**.)

This prohibition prevents the retroactive application of criminal law. It gives rise not only to a prohibition on retroactive prosecutions, but also imposes an obligation on states to define precisely by law all criminal offences.

Definitions of offences under national law include those that arise from written laws, and those arising from norms of common law.

An offence under international law is an act that violates international treaty law or customary international law. This means that a person may be prosecuted for offences such as genocide and other crimes against humanity, grave breaches of the Geneva Conventions (known as war crimes), slavery or torture, even if these were not defined as criminal under national law when committed. Article 11(2) of the Universal Declaration, Article 15(1) of the ICCPR, Article 7(2) of the European Convention.

The prohibition on retroactive criminal law also bars the imposition of a heavier penalty than was prescribed in law at the time of the offence, although states are obliged to apply retroactively a lighter penalty if it is subsequently provided for by law. (See **Chapter 25, Punishments.**)

BOX:
Article 11(2) of the Universal Declaration:
"No one shall be held guilty of any penal offence on account of any act or omission which did not constitute a penal offence, under national or international law, at the time when it was committed..."

Article 15(1) of the ICCPR:
"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..."
END BOX

> In various cases from Uruguay, where members of the opposition had been sentenced by military tribunals for "subversive association" because they had belonged to subsequently banned parties, the Human Rights Committee found that Article 15 of the ICCPR had been violated. [*Weinberger v. Uruguay*, (28/1978), 29 October 1980, 1 Sel. Dec. 57, paras. 12, 16; *Pietraroia v. Uruguay*, (44/1979), 27 March 1981, 1 Sel. Dec.76]
>
> The African Commission decided that the retrospective effect of a Nigerian decree constituted a violation of Article 7(2) of the African Charter. [*Civil Liberties Organization in respect of the Nigerian Bar Association v. Nigeria*, (101/93) 8th Annual Report of the African Commission, 1994-1995, ACHPR/RPT/8th/Rev.I]

18.2 The prohibition on 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. Article 14(7) of the ICCPR, Article 4 of Protocol 7 to the European Convention.

This 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.

BOX:
Article 14(7) of the ICCPR:
"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."

Article 4 of Protocol 7 to the European Convention:
1. No one shall be liable to be tried or punished again in criminal proceedings under the jurisdiction of the same State for an offence for which he has already been finally acquitted or convicted in accordance with the law and penal procedure of the State.

2. The provisions of the preceding paragraph shall not prevent the re-opening of the case in accordance with the law and penal procedure of the State concerned, if there is evidence of new or newly discovered facts, or if there has been a fundamental defect in the previous proceedings, which could affect the outcome of the case.

3. No derogation from this Article shall be made under Article 15 of the Convention.

END BOX

The prohibition applies to criminal offences. Even though an offence is not characterized as "criminal" under the law of a state, it may be deemed a criminal offence in the context of international standards,

depending on the nature of the offence and of the potential penalties. The prohibition applies to all criminal offences, regardless of their seriousness.

The prohibition against double jeopardy applies after a final judgment of conviction or acquittal according to the law and procedure of the state. All applicable judicial reviews and appeals must be finally exhausted and the time limits for invoking such reviews or appeals must have passed.

The prohibition prevents **new** trials or punishments in the **same** jurisdiction. Subsequent trials for different offences or in different jurisdictions do not violate the prohibition against double jeopardy.

> The Human Rights Committee considered the case of an Italian national who was tried by the Italian authorities after he had been finally convicted in Switzerland for the same acts, and found that the prohibition on double jeopardy was not breached. "The Committee observes that this provision prohibits double jeopardy only with regard to an offence adjudicated in a given State." [*A. P. v. Italy*, (204/1986), 2 November 1987, 2 Sel. Dec. 67 at 68]

The prohibition against double jeopardy does not prevent the reopening of cases (including new trials) when there has been a miscarriage of justice. A distinction must be made between the reopening or new trial of a case justified by 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, after conviction, of serious procedural flaws or in the event of new or newly discovered facts. (See **Chapter 30, The right to compensation for miscarriages of justice**.)

18.2.1 Prohibition of double jeopardy under the American Convention

The prohibition of double jeopardy (the principle of *ne bis in idem*) under Article 8(4) of the American Convention differs from that in the ICCPR and Protocol 7 to the European Convention.

First, in contrast to the ICCPR and Protocol 7 to the European Convention which apply to convictions and acquittals, the prohibition under the American Convention applies only to cases in which a person has previously been found not guilty (ie has been acquitted). Second, while the ICCPR and Protocol 7 to the European Convention prohibit subsequent trials of the same offence, the American Convention prohibits 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 offence charged is different. A person's rights under Article 8(4) of the American Convention would be violated even if they were acquitted during the new trial, by the fact that a second prosecution was brought. [*Case of Loayza Tamayo*, Inter-American Court, 17 September 1997; see also Report on the Situation of Human Rights in Cuba, 1979, OEA/Ser.L/V/II.48, Annual Report of the Inter-American Commission, 1983-1984]

BOX:
Article 8(4) of the American Convention:
"An accused person acquitted by a nonappealable judgment shall not be subjected to a new trial for the same cause."
END BOX

18.3 International tribunals

People who have already been tried in national courts for acts which constitute serious violations of humanitarian law may be tried again before the International Tribunals for the former Yugoslavia and Rwanda, if: the act for which the person was tried before the national court was characterized as an ordinary crime (as opposed to a serious violation of humanitarian law); or the proceedings in the national court were not independent or impartial; or the proceedings in the national court were designed to shield the accused from international criminal responsibility; or if the case before the national court was not diligently prosecuted.

However, people who have been tried for acts constituting serious violations of humanitarian law before either the International Tribunal for the former Yugoslavia or for Rwanda may not be subsequently tried for those acts before a national court. Article 10 of the Yugoslavia Statute, Rwanda Statute 9, see also Article 22(2) of the ICC Statute.

Chapter 19 The 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 The right to trial without undue delay

Criminal proceedings must be started and completed within a reasonable time. Article 14(3)(c) of the ICCPR, Article 7(1)(d) of the African Charter, Article 8(1) of the American Convention, Article 6(1) of the European Convention, Article 21(4)(c) of the Yugoslavia Statute, Rwanda Statute 20(4)(c), Article 67(1)(c) of the ICC Statute. This requirement means that, balanced against the right of the accused to adequate time and facilities to prepare the defence (see **Chapter 8**), the proceedings must start and final judgment must be rendered (after all appeals), without undue delay. This right obliges the authorities to ensure that all proceedings, from pre-trial stages to final appeal, are completed and judgments issued within a reasonable time.

> This right is enshrined in Article 14(3)(c) of the ICCPR, Article 21(4)(c) of the Yugoslavia Statute, Article 20(4)(c) of the Rwanda Statute and Article 67(1)(c) of the ICC Statute, which require that trials on criminal charges take place **without undue delay**, and Article 7(1)(d) of the African Charter, Article 8(1) of the American Convention, Article 6(1) of the European Convention, which require that *all* trials (criminal or other) are conducted **within a reasonable time**. (The variation in language between "without undue delay" and "within a reasonable time" does not appear to be of significance in practice.)

For anyone charged with a criminal offence and held in pre-trial detention, the obligation on the state to expedite trials is even more pressing; when the accused is detained, less delay is considered reasonable. International standards require that a person charged with a criminal offence be released from detention pending trial if the time deemed reasonable in the circumstances is exceeded. See **Chapter 7, The right to trial within a reasonable time or to release from detention**.

BOX:
Article 14(3)(c) of the ICCPR:
"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;"
END BOX

The guarantee of prompt trial in criminal proceedings is tied to the right to liberty, the presumption of innocence and the right to defend oneself. It aims to ensure that an accused person's fate is determined without undue delay. It is aimed at ensuring that a person's defence is not undermined by the passage of inordinate amounts of time, during which witnesses' memories may fade or become distorted, witnesses may become unavailable, and other evidence may be destroyed or disappear. It is

also aimed at ensuring that the uncertainty which an accused person faces and the stigma which attaches to a person charged with a criminal offence, despite the presumption of innocence, are not protracted. The right to be tried promptly encapsulates the maxim that justice delayed is justice denied.

The right to trial within a reasonable time does not depend on the accused requesting the authorities to expedite proceedings. Although the burden of proving that proceedings were not conducted within a reasonable time is generally on the accused, an accused person does not have to show that the delay caused particular prejudice.

The time period considered in determining whether this right has been respected begins at the time that the suspect is informed that the authorities are taking specific steps to prosecute him or her. It ends when final appeal avenues have been exhausted and judgments have been issued. The Human Rights Committee has stated that "[t]his guarantee relates not only to the time by which a trial should commence, but also the time by which it should end and judgment be rendered; all stages must take place 'without undue delay'. To make this right effective, a procedure must be available in order to ensure that the trial will proceed 'without undue delay', both in first instance and on appeal." [Human Rights Committee General Comment 13, para. 10]

19.2 What is a reasonable time?

What is a reasonable time is judged on the circumstances of the individual case. Elements to be considered include: national legislation, whether the accused is in custody (see **Chapter 7**), the complexity of the case, the conduct of the accused and the conduct of the authorities. Trials lasting as long as 10 years have been deemed reasonable, while others lasting less than one year have been found to be unreasonably delayed.

> In the case of a murder suspect in Panama, held without bail for more than three and a half years before his acquittal, the Human Rights Committee found that the delay between indictment and trial "cannot be explained exclusively by a complex factual situation and protracted investigations". *[del Cid Gómez v. Panama*, (473/1991), 19 July 1995, Fin. Dec., UN Doc. CCPR/C/57/1, 1996, at 46]
>
> After considering national legislation, the complexity of the case, the conduct of the proceedings and of the authorities, the Inter-American Court considered that a period of 50 months to complete proceedings greatly exceeded the requirement of Article 8(1) of the American Convention. [Case of Suárez Rosero (Ecuador), 17 November 1997, para. 73]

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 offence involved, the number of charges faced by the accused, the nature of the investigation required, the number of people allegedly involved in the crime and the number of witnesses.

Economic or drug crimes involving a number of defendants, cases with international aspects, multiple murder cases and cases involving "terrorist" organizations have been accepted as being more difficult and complex than routine criminal cases, and thus longer delays have been considered reasonable.

> In a case involving 723 accused and 607 criminal offences, the European Court held that it was reasonable that the proceedings at the first instance lasted about eight and a half years. However, it held that subsequent periods of delay and inactivity, including a three-year period for the Martial Law Court to issue written reasons for its judgment, and appeals processes in two courts which lasted more than six years, exceeded a reasonable time. *[Mitap and Müftüo™lu v. Turkey*, (6/1995/512/595-596), 25 March 1996]

19.2.2 Conduct of the accused

The accused is not obliged to cooperate in criminal proceedings or to renounce any procedural rights. [*Yagci and Sargin v. Turkey*, (6/1994/453/533-534), 8 June 1995.] However, the conduct of the accused during proceedings is taken into consideration in determining whether the proceedings were carried out without undue delay. Attempts by the accused to abscond and failure of the accused to cooperate (for example by failing to choose counsel or to appear at hearings) have been taken as delays which cannot be attributed to the authorities. Such delays attributable to the accused have been discounted when determining whether the proceedings were conducted within a reasonable time. In addition, applications by the accused considered unnecessary and offering no chance of success from the outset have been deemed to be deliberate obstruction.

19.2.3 Conduct of the authorities

The authorities have the 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 unreasonable 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 fact that it took 29 months to produce the trial transcripts, was found by the Human Rights Committee to be a violation of Article 14 of the ICCPR. [*Pinkney v. Canada*, (27/1978), 29 October 1981, 1 Sel. Dec. 95, at paras. 10, 22]

> The European Court considered that a lapse of 15 and a half months between the filing of an appeal and its transfer to the registry of the relevant court of appeal was unreasonable, where the authorities offered no satisfactory explanation. [*Bunkate v. the Netherlands*, (26/1992/371/445), 26 May 1993]

Chapter 20 The right to defend oneself in person or through counsel
Everyone charged with a criminal offence has 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 lawyer assigned to assist them in the interests of justice, free of charge if they cannot afford to pay. They have the right to confidential communication with their lawyer. (See also *Chapter 3, The right to legal counsel before trial.*)

20.1 The right to defend oneself
Everyone charged with a criminal offence has the right to defend him or herself against the charges. Article 11(1) of the Universal Declaration, Article 14(3)(d) of the ICCPR, Article 7(1)(c) of the African Charter, Article 8(2)(d) of the American Convention, Article 6(3)(c) of the European Convention, Article 21(4)(d) of the Yugoslavia Statute, Rwanda statute 20(4)(d), Article 67(1)(d) of the ICC Statute.

BOX
Article 14(3)(d) of the ICCPR:
"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;"

Article 7(1)(c) of the African Charter:
"Every individual shall have the right to have his cause heard. This comprises:...: (c) the right to defence, including the right to be defended by counsel of his choice;..."

Article 8(2)(d) of the American Convention:
"Every person accused of a criminal offense has the right to be presumed innocent so long as his guilt has not been proven according to law. During the proceedings, every person is entitled, with full equality, to the following minimum guarantees:...
(d) the right of the accused to defend himself personally or to be assisted by legal counsel of his own choosing, and to communicate freely and privately with his counsel;..."

Article 6(3)(c) of the European Convention:
"Everyone charged with a criminal offence has the following minimum rights: ...

(c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;..."
END BOX

For the right of defence to be meaningful, the accused must have the right to be present at trial (see **Chapter 21, The right to be present at trial and appeal**) and to defend him or herself in person. An accused also has the right to be assisted in his or her defence by counsel. The right to be assisted by counsel includes the right to choose counsel or, in cases where the interests of justice require, to be assigned counsel, free of charge if necessary.

The accused and their counsel, if any, must be given adequate time and facilities to prepare the defence (see **Chapter 8**). Further, the accused must be given opportunities equal to that of the prosecution to present a case (see **Chapter 13.2, "Equality of arms"**), including the right to call and examine witnesses (see **Chapter 22**).

20.2 The right to defend oneself in person
Everyone charged with a criminal offence has the right to defend him or herself in person. Article 14(3)(d) of the ICCPR, Article 8(2)(d) of the American Convention, Article 6(3)(c) of the European Convention, Article 21(4)(d) of the Yugoslavia Statute, Rwanda Statute 20(4)(d), Article 67(1)(d) of the ICC Statute.

The accused may decide to be assisted by defence counsel, and the court is required to inform the accused of the right to counsel.

20.3 The right to be assisted by counsel
The assistance of counsel is a primary means of ensuring the protection of the human rights of people accused of criminal offences, and in particular their right to a fair trial.

Everyone accused of a criminal offence has the right to legal assistance to protect their rights and defend them. Article 14(3)(d) of the ICCPR, Principle 1 of the Basic Principles on the Role of Lawyers, Article 7(1)(c) of the African Charter, Article 8(2)(d) and (e) of the American Convention, Article 6(3)(c) of the European Convention, Article 21(4)(d) of the Yugoslavia Statute, Rwanda Statute 20(4)(d), Article 67(1)(d) of the ICC Statute.

BOX:
Principle 1 of the Basic Principles on the Role of Lawyers:
"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."
END BOX

The right to legal assistance applies to all stages of the criminal proceedings, including during the preliminary investigation and before trial. (See also **Chapter 2.2.1, Notification of the right to legal counsel,** and **Chapter 3, The right to legal counsel before trial**.)

> The right to be represented by counsel applies even if the accused chooses not to appear at the proceedings. *[Poitrimol v. France*, (39/1992/384/462), 23 November 1993, at 10]

In a case where the offence is punishable by death, the Human Rights Committee has held that the interests of justice require that the case should not proceed if the accused is not represented by counsel. [*Robinson v. Jamaica*, (223/1987), 30 March 1989, Report of the HRC, (A/ 44/40), 1989, at 245] See **Chapter 28, Death penalty cases**.

The denial of counsel to Vera and Orton Chirwa during a trial in Malawi in which they were sentenced to death violated Article 7(1)(c) of the African Charter, according to the African Commission. [*Amnesty International on behalf of Orton and Vera Chirwa*, (78/92), 8th Annual Activity Report of the African Commission on Human and Peoples' Rights, 1994-1995, ACHPR/RPT/8th/Rev.I]

The right to be defended by counsel includes the right to notification of the right to counsel, the right of access to and confidential communications with counsel and the right to assistance by counsel of choice or by qualified appointed counsel.

20.3.1 Notice of the right to counsel

Anyone facing a criminal trial must be notified of their right to be defended by counsel. This right is applicable whether or not the accused has been arrested or detained before trial. In order for this notice to be effective, it must be given sufficiently in advance of the trial to allow adequate time and facilities to prepare a defence. Principle 5 of the Basic Principles on the Role of Lawyers, Article 21(4)(d) of the Yugoslavia Statute, Rwanda Statute 20(4)(d), Article 55(2)(c) of the ICC Statute; see Article 14(3)(d) of the ICCPR. See also **Chapter 2.2.1**, **Notification of the right to legal counsel.**

20.3.2 Right to choose defence counsel

Because of the importance of trust and confidence between the accused and their lawyer, the accused may generally choose which lawyer will represent them. See Article 14(3)(d) of the ICCPR, Principle 1 of the Basic Principles on the Role of Lawyers, Article 7(1)(c) of the African Charter, Article 8(2)(d) of the American Convention, Article 6(3)(c) of the European Convention, Article 21(4)(d) of the Yugoslavia Statute, Rwanda Statute 20(4)(d), Article 67(1)(d) of the ICC Statute.

Where a military court limited the accused to a choice between two appointed attorneys, the Human Rights Committee found that the right to defence by counsel of choice had been violated. [*Estrella v. Uruguay*, (74/1980), 29 March 1983, 2 Sel. Dec. 93, at 95] Similarly, the Human Rights Committee found that this right was violated when the accused was given only a list of military lawyers from which to choose, and when an accused was forced to accept appointed military counsel, although a civilian attorney was willing to represent him. [*Burgos v. Uruguay*, (R.12/52), 29 July 1981, Report of the HRC, (A/36/40), 1981, at 176; *Acosta v. Uruguay*, (110/1981), 29 March 1984, 2 Sel. Dec. 148]

The Inter-American Commission stated that there was a serious violation of the right to counsel of choice in a Decree Law which provided that defence attorneys in Peru could represent only one person accused of terrorism offences at any one time nationwide. [Annual Report of the Inter-American Commission, 1993, OEA/Ser.L/V/II. 85, doc.9 rev. 1994, at 493]

The right to be represented by a lawyer of one's choice may be restricted, if the lawyer is not acting within the bounds of professional ethics, is the subject of criminal proceedings or refuses to follow court procedure.

> The European Commission did not find a violation of the European Convention in a case where the national courts prohibited the lawyers chosen by the accused from defending the accused because they were suspected of complicity in the same criminal acts as the accused; and in a case where the domestic court refused to allow the lawyer chosen by the accused because the lawyer refused to wear robes. [*Baader, Raspe v. Federal Republic of Germany*, (7572/76, 7586/76, 7587/76), 8 July 1978, 14 DR 64; and *X v. Federal Republic of Germany*,(5217/71, 5367/72), 20 July 1972, 42 Coll. Dec. 139]

In addition, an accused does not have an unrestricted right to choose assigned counsel, particularly if the state is paying the costs. However, in death penalty cases the Human Rights Committee has stated that the court should give preference to appointing counsel chosen by the accused, including for the appeal, even if it requires adjournment of the hearing. [See *Pinto v. Trinidad and Tobago*, (232/1987), 20 July 1990, Report of the HRC, (A/45/40), Vol. II, 1990, at 73] See **Chapter 28, Death penalty cases**.

> The European Court has held that "When appointing defence counsel the national courts must certainly have regard to the defendant's wishes... However they can override those wishes when there are relevant and sufficient grounds for holding that this is necessary in the interests of justice." [*Croissant v. Germany*, (62/1991/314/385), 25 September 1992, at 12]

20.3.3 Right to have defence counsel assigned; right to free legal assistance
If a person does not have a lawyer of their choice to represent them, they may have counsel assigned. Article 14(3)(d) of the ICCPR, Article 8(2)(e) of the American Convention; see also Article 6(3)(c) of the European Convention, Article 21(4)(d) of the Yugoslavia Statute, Rwanda Statute 20(4)(d), Article 67(1)(d) of the ICC Statute.

Under Article 8(2)(e) of the American Convention, the right to appointed counsel is inalienable if the accused chooses not to defend him or herself personally or does not engage counsel within the time period established by law. However, the right to have counsel assigned under Article 14(3)(d) of the ICCPR and Article 6(3) of the European Convention is conditional upon a conclusion that the interests of justice require it.

BOX:
Article 8(2)(e) of the American Convention:
"...During the proceedings, every person is entitled, with full equality, to the following minimum guarantees: the inalienable right to be assisted by counsel provided by the state, paid or not as the domestic law provides, if the accused does not defend himself personally or engage his own counsel within the time period established by law;"
END BOX

The determination of whether the interests of justice require appointment of counsel is based primarily on the seriousness of the offence, the issues at stake, including the potential sentence, and the complexity of the issues.

> The Human Rights Committee has held that the interests of justice require that counsel be appointed at all stages of the proceedings for people charged with crimes punishable by death, if the accused does not have the assistance of counsel of choice. [*Henry and Douglas v. Jamaica*, (571/1994), 26 July 1996, UN Doc. CCPR/C/57/D/571/1994, para.9.2]
>
> The Human Rights Committee considered the case of a man who was charged with speeding and tried at the same time for the unrelated offence of failing to provide information to an official register about a firm that he operated. The Committee held that the accused had failed to show that in his particular case the interests of justice would have required the assignment of a lawyer at the expense of the state. *[OF v. Norway*, (158/1983), 26 October 1984, 2 Sel. Dec. 44]

The state is required to provide counsel **free of charge** to the accused under the ICCPR and the European Convention, if two conditions are met. The first is that the interests of justice require that counsel be appointed. The second is that the accused does not have sufficient funds to pay for a lawyer. Article 14(3)(d) of the ICCPR, Principle 6 of the Basic Principles on the Role of Lawyers, Article 6(3)(c) of the European Convention; see paragraph 4 of the African Commission Resolution.

Under Article 8(2)(e) of the American Convention, appointed counsel will be paid by the state only if domestic law so provides. However, the Inter-American Court has held that states must provide counsel free of charge for a person who cannot afford to pay, if counsel is necessary to ensure a fair hearing. [Inter-American Court, Advisory Opinion of 10 August 1990, OC-11/90, *Exceptions to the Exhaustion of Domestic Remedies*, OAS/Ser.L/V/III.23 Doc.12 rev. 1991, paras 25-28.]

BOX:
Principle 3 of the Basic Principles on the Role of Lawyers:
"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."
END BOX

> The European Court held that there was a violation of Article 6(3)(c) of the European Convention when a man was denied free legal assistance during a judicial investigation and trial on drug charges. The offence with which he was charged was punishable by up to three years' imprisonment, and because the accused had allegedly committed the crime while on probation for another offence, the issues before the court and the range of measures available to it were complex. In addition, the accused was a young adult and had a long criminal record and history of taking drugs. *[Quaranta v. Switzerland*, 24 May 1991, 205 Ser. A 17]
>
> Similarly, the European Court held that during the appeal of a man who faced a five-year sentence, free counsel should have been appointed. [*Maxwell v. United Kingdom*, (31/1993/426/505) 28 October 1994, at 10; see also *Boner v. United Kingdom*, (30/1993/425/504), 28 October 1994, where the accused was sentenced to eight years' imprisonment in the court of first instance.]

Governments are required to provide sufficient funding and other resources to provide legal counsel for the poor and disadvantaged. Principle 3 of the Basic Principles on the Role of Lawyers.

20.4 Right to confidential communications with counsel

Communications between the accused and their counsel are confidential. Article 8(2)(d) of the American Convention, Article 67(1)(b) of the ICC Statute; see also paragraph 2(E)(1) of the African Commission Resolution, Principle 22 of the Basic Principles on the Role of Lawyers; see Article 14(3)(b) of the ICCPR. The authorities must ensure that such communications remain confidential.

> Principle 22 of the Basic Principles on the Role of Lawyers requires governments to recognize and respect the fact that all communications between lawyers and their clients within their professional relationship are confidential. Principle 22 of the Basic Principles on the Role of Lawyers.
>
> The Human Rights Committee has explained that Article 14(3)(b) of the ICCPR, which guarantees the right to communicate with counsel, requires "counsel to communicate with the accused in conditions giving full respect for the confidentiality of their communications". [Human Rights Committee General Comment 13, para. 9]

For people in custody, the authorities must provide adequate time and facilities for the accused to meet and have confidential communications with their lawyers, whether face to face, on the telephone, or written. Such meetings or telephone calls may take place within the sight, but not within the hearing, of others. Principle 8 of the Basic Principles on the Role of Lawyers; Principle 18 of the Body of Principles, Rule 93 of the Standard Minimum Rules. (See **Chapter 3, The right to legal counsel before trial.**)

> The Human Rights Committee has stated that where excessive bureaucracy renders access to counsel difficult, the conditions required by Article 14 of the ICCPR are not met. [Concluding Observations of the HRC: Georgia, UN Doc: CCPR/C/79/Add.75, at para. 18, 5 May 1997]

Communications between a detained or imprisoned person and their lawyer are inadmissible as evidence unless they are connected with a continuing or contemplated crime. Principle 18(5) of the Body of Principles.

20.5 Right to experienced, competent and effective defence counsel

Defence lawyers 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, and assist their clients before the courts. Principle 13 of the Basic Principles on the Role of Lawyers. [See Human Rights Committee General Comment 13, para. 9] In protecting the rights of their clients and in promoting the cause of justice, lawyers must seek to uphold human rights and fundamental freedoms recognized by national and international law. Principle 14 of the Basic Principles on the Role of Lawyers.

> The Inter-American Commission considered that the right to legal counsel is violated when a lawyer fails to fulfill their obligations in the defence of their client. [Report on the Situation of Human Rights of a Segment of the Nicaraguan Population of Miskito Origin, OEA/Ser.L/V/11.62, doc.10, rev. 3, 1983]

When an accused is represented by assigned counsel, the authorities must ensure that the lawyer assigned has the experience and competence commensurate with the nature of the offence of which their client is accused. Principle 6 of the Basic Principles on the Role of Lawyers. The authorities have a special duty to take measures to ensure that the accused is effectively represented. [*Kelly v. Jamaica* (253/1987), 8 April 1991, Report of the HRC, (A/46/40), 1991, at 248, para. 5.10] If the appointed counsel is not effective, the authorities must ensure that counsel performs their duties or is replaced. [*Artico Case*, 13 May 1980, 37 Ser. A 16]

> The Human Rights Committee noted concern about "the lack of effective measures [in the USA] to ensure that indigent defendants in serious criminal proceedings, particularly in state courts, are represented by competent counsel".[Comments of the HRC: USA, UN Doc. CCPR/C/79/Add.50, 7 April 1995, para.23]
>
> The Human Rights Committee held that when an accused was offered only a limited choice of officially appointed counsel, and the counsel then adopted "the attitude of a prosecutor", the accused's right to an adequate defence had been violated. [*Estrella v. Uruguay*, (74/1980), 29 March 1983, 2 Sel. Dec. 93 at paras. 1.8, 8.6, 10]
>
> In the case of a lawyer representing an accused on appeal, effective assistance, in the view of the Human Rights Committee, would have included the lawyer consulting the accused and informing him of the lawyer's intention to withdraw the appeal or argue that it had no merit. [*Kelly v. Jamaica*, (253/1987), 8 April 1991, Report of the HRC, (A/46/40), 1991, at 248]

20.6 The prohibition on harassment and intimidation of counsel

Lawyers (including those representing people charged with a criminal offence) should be free from intimidation or improper interference in the exercise of their professional duties. Principle 16 of the Basic Principles on the Role of Lawyers.

> The Human Rights Committee has stated that lawyers "should be able to counsel and represent their clients in accordance with their established professional standards and judgment without any restrictions, influences, pressures or undue interference from any quarter." [Human Rights Committee General Comment 13, para. 9]
>
> In a case in which defence counsel were harassed and intimidated to such an extent that they were forced to withdraw from the proceedings, but the trial continued and the accused were convicted and sentenced to death, the African Commission found that the accused were denied their right to defence, in violation of Article 7(1)(c) of the African Charter. [*The Constitutional Rights Project (in respect of Zamani Lakwot and six others) v. Nigeria*, (87/93), 8th Annual Activity Report of the African Commission on Human and Peoples' Rights, 1994-1995, ACHPR/RPT/8th/Rev.I]

Governments must ensure that lawyers are not identified with their clients or their clients' causes as a result of defending them. Principle 18 of the Basic Principles on the Role of Lawyers.

> The Inter-American Commission has stated that the malicious and unfounded linking of a defence lawyer to the unlawful activities of which his client was accused constituted a "threat

to the free exercise of the legal profession and infringe[d] one of the fundamental guarantees of the administration of justice and of due process, i.e. the right to defence". [Report No. 27/94 (Case 11.084, Peru), Annual Report of the Inter-American Commission, 1994, OEA/Ser.L/V/II.88, doc. 9 rev. 1995, at 123]

The UN Special Rapporteur on the independence of judges and lawyers expressed concern that police have identified lawyers who represent people charged with terrorism related offences in Northern Ireland with their clients' causes and have interfered in the attorney-client relationship during interrogations by questioning the integrity and professionalism of lawyers. The Special Rapporteur concluded that the harassment and intimidation of defence lawyers by Royal Ulster Constabulary officers were consistent and systematic. He considered that the murder of a lawyer who had defended people charged with offences related to terrorism, who had been threatened during interrogations of clients by members of the security forces, had a "chilling effect" on the legal profession and further undermined public confidence in the legal system. [Report on the Mission of the Special Rapporteur to the United Kingdom, UN Doc. E/CN.4/1998/39/add.4, paras 25, 38, 5 March 1998]

Chapter 21 The right to be present at trial and appeal

Everyone charged with a criminal offence has the right to be tried in their presence, in order to hear the prosecution case and present a defence.

21.1 The right to be present at trial

Everyone charged with a criminal offence has the right to be tried in their presence so that they can hear and challenge the prosecution case and present a defence. Article 14(3)(d) of the ICCPR, Article 21(4)(d) of the Yugoslavia Statute, Rwanda Statute 20(4)(d), Article 67(1)(d) of the ICC Statute. The right to be present at trial is an integral part of the right to defend oneself. (See **Chapter 20, The right to defend oneself in person or through counsel.**)

> Although the right to be present at trial is not expressly mentioned in the European Convention, the European Court has stated that the object and the purpose of Article 6 mean that a person charged with a criminal offence is entitled to take part in the trial hearing. [*Colozza and Rubinat,* 12 February 1985, 89 Ser. A .14, para. 27]

> Article 8(2)(d) of the American Convention guarantees the right of the accused to defend him or herself in person, and the right to be present at trial is inherent in this right. The Inter-American Commission criticized a trial which proceeded when the accused was obstructed from attending court hearings. [Report on the Situation of Human Rights in Panama, OEA/Ser.L/V/II.44, doc. 38, rev. 1, 1978]

The right to be present at trial imposes duties on the authorities to notify the accused (and defence counsel) in sufficient time of the date and location of the proceedings, to request the presence of the accused and not to improperly exclude the accused from the trial. [*Mbenge v. Zaire*, (16/1977), 25 March 1983, 2 Sel. Dec.76, at 78]

> There may be limits on the efforts the authorities can be expected to make in contacting the accused, according to the Human Rights Committee. However, it found a violation of the right to be present at trial in a case where the authorities of the former Zaire issued summonses only three days before the trial and did not attempt to send them to the accused, who was living abroad, even though his address was known.[*Mbenge v. Zaire*, (16/1977), 25 March 1983, 2 Sel. Dec.76, at 78]

The right of an accused to be present at trial may be temporarily restricted if the accused disrupts the court proceedings to such an extent that the court deems it impractical for the trial to continue in his or her presence. The Human Rights Committee has stated that it may also be relinquished if the accused fails to appear in court for trial after having been duly notified of the proceedings.

The accused may waive his or her right to be present at hearings, but such a waiver must be established in an unequivocal manner, preferably in writing. [See *Colozza and Rubinat,* 12 February 1985, 89 Ser. A 14, at para. 28; *Poitrimol v. France*, (39/1992/384/462), 23 November 1993, at 13]

21.2 Trials *in absentia*

A literal reading of Article 14(3)(d) of the ICCPR would not seem to permit trials to proceed *in absentia*, i.e. if the accused is not present.

BOX

Article 14(3)(d) of the ICCPR:

"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, ..."

END BOX

This interpretation is backed by the UN Secretary-General's Report with recommendations on the establishment of the International Criminal Tribunal for the former Yugoslavia. This states: "[a] trial should not commence until the accused is physically present before the international tribunal. There is a widespread perception that trials *in absentia* should not be provided for in the statute [of the International Criminal Tribunal for the former Yugoslavia] as this would not be consistent with Article 14 of the International Covenant on Civil and Political Rights, which provides that the accused shall be tried in his presence." [Report of the Secretary-General pursuant to Para 2 of Security Council Resolution 808(1993), UN Doc: S/25704, 3 May 1993 and S/25704/Corr.1, 30 July 1993, Part V. A. at para 101.] The Yugoslavia and Rwanda Statutes and the ICC Statute exclude trials *in absentia*.

However, the Human Rights Committee had held 10 years earlier that, in exceptional circumstances, it may be permissible to try a person *in absentia*, provided the accused has been informed of the proceedings and has been summonsed to appear in court in a timely manner, thus enabling the accused to prepare a defence. *[Mbenge v. Zaire*, (16/1977), 5 March 1983, 2 Sel. Dec.76]

In such exceptional circumstances, extra vigilance is required. The Human Rights Committee has stated that "[w]hen exceptionally for justified reasons trials *in absentia* are held, strict observance of the rights of the defence is all the more necessary". [Human Rights Committee General Comment 13, paragraph 11]. These rights include the right to counsel, even if the accused has chosen not to attend the trial. [See *Pelladoah v. the Netherlands*, 22 September 1994, 297-B Ser. A 35; *Lala v. the Netherlands*, 22 September 1994,297-A Ser. A 13; *Poitrimol v. France*, (39/1992/384/462), 23 November 1993, at 14]

An accused has the right to remedy if he or she has been convicted *in absentia* without being aware of the proceedings. *[Colozza and Rubinat*, 12 February 1985, 89 Ser. A 14]

Amnesty International believes that the accused should be present in court during a trial to hear the full prosecution case, to put forward a defence or assist their counsel in doing so, to refute or provide information to enable their counsel to refute evidence and to examine witnesses or advise their counsel in the examination of witnesses. The organization believes that the sole exceptions to this should be if the accused has deliberately absented themselves from the proceedings ***after*** they have begun or has been so disruptive that they have had to be removed temporarily. In such cases video or audio links should be employed to allow the accused to follow proceedings. Amnesty International believes that, if an accused is apprehended following a trial in which he or she was convicted *in absentia* for other than these reasons, the verdict rendered *in absentia* should be quashed and a completely new trial held before a different trial court.

21.3 The right to be present at appeals

The right to be present during appeals proceedings depends on the nature of those proceedings. In particular, it depends on whether the appeal court examines issues of fact as well as of law, and on the manner in which the accused's interests are presented and protected.

If the court of appeal has jurisdiction to decide on both issues of law and fact, a fair trial generally requires the presence of the accused.

> The European Court found a violation of the accused's rights in a case before the Supreme Court in Norway. The Supreme Court convicted and sentenced an accused, overturning an acquittal by a lower court and considering both issues of law and fact, without summoning the accused to appear, in the absence of any special feature to justify this step. The European Court held that the overturning of the acquittal in this case could not have been properly done without having assessed the evidence of the accused in person. The European Court stated that in this case the Supreme Court was under a duty to summon and take evidence directly from the accused in person. [See *Botten v. Norway*, (50/1994/497/579), 19 February 1996, at 22; see also, *Kremzow v. Austria*, (29/1992/374/448), 21 September 1993, at 16]

The right to be present at an appeal hearing may be satisfied if the accused's counsel of choice is present.

> The Human Rights Committee held that there was no violation where the accused was not present before a court of appeal in Jamaica, but was represented by counsel. In Jamaica, only issues of law are at stake on appeal. [*Henry v. Jamaica*, (230/1987), 1 November 1991, Report of the HRC, (A/47/40), 1992 at 225]

If the appeal court is only addressing issues of law, the European Court has ruled that the accused does not necessarily have the right to be present.

> The European Court found no violation of the European Convention when an accused was not represented at a hearing before the Court of Cassation in Italy because his lawyer failed to appear and failed to obtain a substitute lawyer. The Court of Cassation decides cases on issues of law, its proceedings are essentially written and at its hearings, lawyers are limited to arguing issues raised in the appeal and written submissions. The European Court held that the decision of the accused's counsel of choice not to arrange for the accused to be present (or to send a substitute counsel to the hearing) was not the responsibility of the state. [*Tripodi v. Italy*, (4/1993/399/477), 22 February 1994]

The principle of equality of arms applies during appeals (see **Chapter 13.2, "Equality of arms"**).

> This principle was cited by the European Court when it found that there was no violation of the right to be present when neither the prosecution nor the accused or their counsel were present at a hearing to decide on leave to appeal. The court found that the nature of the issue to be decided was not such that the physical attendance of the accused was essential, and that the accused had not been placed at a disadvantage as compared with the prosecution. *[Case of Monnell and Morris*, 2 March 1987,115 Ser. A 23]

Chapter 22 The right to call and examine witnesses
All people charged with a criminal offence have the right to call witnesses on their behalf, and to examine, or have examined, witnesses against them.

22.1 Witnesses

A fundamental element of the principle of equality of arms (see **Chapter 13.2**) and of the right of defence is the right of the accused to call and to question witnesses. Article 14(3)(e) of the ICCPR, Article 8(2)(f) of the American Convention, Article 6(3)(d) of the European Convention, paragraph 2(E)(3) of the African Commission Resolution, Article 21(4)(e) of the Yugoslavia Statute, Rwanda Statute 20(4)(e), Article 67(1)(e) of the ICC Statute. This right is "designed to guarantee to 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".[Human Rights Committee General Comment 13, para. 12]

The right to call and examine witnesses ensures that the defence has an opportunity to question witnesses who will give evidence on behalf of the accused and to challenge evidence against the accused. The questioning of witnesses by both the prosecution and the defence provides the court with an opportunity to hear evidence and challenges to that evidence.

The wording of international standards, which use the phrase "to examine or have examined", takes into account different legal systems, including systems based on adversarial trials and systems where the judicial authorities examine witnesses. [See Manfred Nowak, *U.N. Covenant on Civil and Political Rights: CCPR Commentary*, NP Engel, 1993, p.262]

The right of the accused to examine witnesses against them and to call and examine witness on their behalf is not without limitation. Article 14(3)(e) of the ICCPR, Article 6(3)(d) of the European Convention and paragraph 2(E)(3) of the African Commission Resolution contain virtually identical guarantees. Article 8(2)(f) of the American Convention is somewhat broader (see **21.3** below).

BOX
Article 14(3)(e) of the ICCPR:
"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;**"**
END BOX

22.2 The right of the defence to question witnesses against the accused

All people accused of a criminal offence have the right to examine, or have examined, witnesses against them. Article 14(3)(e) of the ICCPR, Article 6(3)(d) of the European Convention, Article 8(2)(f) of the American Convention and paragraph 2(E)(3) of the African Commission Resolution,

Article 21(4)(e) of the Yugoslavia Statute, Rwanda Statute 20(4)(e), Article 67(1)(e) of the ICC Statute.

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 implied obligation on the prosecution to give the defence adequate advance notification of the witnesses that the prosecution intends to call at trial. However, the defence may be deemed to have waived its right of adequate time to prepare if it does not ask for an adjournment when a previously undisclosed witness statement is introduced at trial. [See *Adams v. Jamaica*, (607/1994), 30 October 1996, UN Doc: CCPR/C/58/D/607/1994]

The right to examine or have examined witnesses against the accused means that all of the evidence must normally be produced in the presence of the accused at a public hearing, so that the evidence itself and the reliability and credibility of the witness can be challenged. Although there are exceptions to this principle, the exceptions must not infringe the rights of the defence.

> The European Court, noting the difficulties in prosecuting drug trafficking cases, including problems relating to producing witnesses in court, stated that "...such considerations cannot justify restricting to this extent the rights of the defence [to examine witnesses] ". [*Saïdi v. France*, (33/1992/378/452), 20 September 1993, at 17]
>
> In a drug trafficking case, the European Court found a violation of the accused's rights when a court based its judgment on the reports of an under-cover police officer, transcripts of intercepted telephone calls, and statements made by the accused after being shown the transcripts. The accused had no opportunity to check or challenge the transcripts or to examine the under-cover police officer, who was not named or called as a witness in order to protect his identity. The European Court noted, however, that the under-cover officer was not an "anonymous witness", as he was a sworn police officer, the investigating judge knew of his function and the accused knew the officer as a result of having met him five times. *[Lüdi v. Switzerland*, (17/1991/269/340), 15 June 1992]

22.2.1 Anonymous witnesses

The use of testimony from an anonymous witness (i.e. where the defence is unaware of the witness's identity at trial) violates the accused's right to examine witnesses, because the accused is deprived of the necessary information to challenge the witness's reliability. The use of evidence from anonymous witnesses may render the trial as a whole unfair.

> The Human Rights Committee has criticized the system of "faceless judges" in Colombia, in which the names of judges, prosecutors and witnesses were kept from the defence in regional public order courts trying cases involving charges of drug trafficking, terrorism, rebellion and illegal possession of weapons. The Committee stated that the system "does not comply with article 14 [of the ICCPR], particularly paragraphs 3(b) and (e)", and recommended that the system be abolished. [Concluding Observations by the Human Rights Committee, UN Doc. CCPR/C/79/Add.75, 9 April 1997, paras 21, 40]
>
> Similarly, the Inter-American Commission reiterated its concern about this system of "faceless judges", stating that it was "disturbed that this was still a part of Colombian law".

> The Commission welcomed the decision of the Colombian Constitutional Court that a decree allowing convictions to be based on testimony given by unidentified witnesses was unconstitutional. [Inter-American Commission, Second Report on the Situation of Human Rights in Colombia, OEA/Ser.L/V/II.84, doc. 39 rev.1993 , at 96, 98 and 249] The Commission stated that notwithstanding this reform, and another which permitted non-disclosure of the identity of the prosecutor only in special circumstances, the structure of the regional justice system does not protect the rights of the accused or guarantee access to justice. The Inter-American Commission also stated, with reference to Peru and to Colombia, that the use of testimony from anonymous witnesses is contrary to due process. [Annual Report of the Inter-American Commission, 1996, OEA/Ser.L/V/II.95, doc.7 rev. 1997, at 658 and 736]

The European Court has not completely ruled out the use of anonymous witnesses in all cases, but has advised that their use must be strictly limited. [See *Doorson v. The Netherlands*, 26 March 1996, 2 Ser.A 470, para.69]

> The European Court has stated that "all evidence must normally be produced at a public hearing, in the presence of the accused with a view to adversarial argument. There are exceptions to this principle, but they must not infringe on the rights of the defence; as a general rule paragraphs 1 and 3(d) of Article 6 [of the European Convention] require that the defendant be given an adequate and proper opportunity to challenge and question a witness against him either when he makes his statement or at a later stage."[*Van Mechelen and others v. The Netherlands*, (55/1996/674/861-864), 23 April 1997, para. 51]
>
> The European Court considered a case where two anonymous witnesses gave statements to a police officer, who subsequently testified in court. The European Court found that although the defence could submit written questions to the witnesses, there was a violation of the accused's rights. The Court stated that "[b]eing unaware of [the witnesses'] identities, the defence was confronted with an almost insurmountable handicap: it was deprived of the necessary information permitting it to test the witnesses' reliability or cast doubt on their credibility". *[Windisch Case*, 27 September 1990,186 Ser. A 11; see *Kostovski v. the Netherlands*, 20 November 1989, 166 Ser. A 20]
>
> The European Court examined a case where the accused was convicted "to a decisive extent" on the basis of statements by anonymous police officers. The defence was not only unaware of the identity of the witnesses, but was also prevented from observing their demeanour, and thus from testing their reliability, under direct questioning. The police officers gave evidence to the examining judge, while the accused, defence counsel and the prosecutor were in a separate room where they could hear the questions asked and the replies through a sound link. The rationale behind these measures was the officers' stated fear of reprisals. The Court concluded that "these measures cannot be considered a proper substitute for the possibility of the defence to question the witnesses in their presence and make their own judgment as to their demeanour and reliability", and decided therefore that the proceedings as a whole were not fair.[*Van Mechelen and others v. The Netherlands*, (55/1996/674/861-864), 23 April 1997]

Amnesty International has opposed the use of testimony from anonymous witnesses in a number of countries, including Colombia and Peru, and has opposed their use in international courts.

22.2.2 Limitations on the examination of prosecution witnesses

The right of the accused to examine or have examined witnesses against them may be limited on the basis of the accused's conduct (for example, if the accused absconds), or if the witness becomes unavailable (having moved country or moved residence leaving no forwarding address), or when the witness reasonably fears reprisal.

> In a case where the accused was brought to court after three years' absence from the country, and the main prosecution witness failed to appear, the European Court held that the witness's failure to appear "did not in itself make it necessary to halt the prosecution.... provided that the authorities had not been negligent in their efforts to find the persons concerned". The Court noted that the statements of the missing witness to the police and the examining magistrate, which were read out in court, corroborated other evidence. [*Artner v. Austria*, (39/1991/291/362), 28 August 1992, at 7]

The Human Rights Committee and the European Court may deem that an accused has waived the right to examine a witness unless the defence specifically objects at trial or appeal to the introduction of evidence that the defence has not had an opportunity to challenge.

> The Human Rights Committee found that there was no violation of the rights of the accused when a court allowed into evidence the testimony of a police officer who had since left the country. His evidence had been given under oath at a preliminary hearing when the defence had been able to question him. The accused argued before the Human Rights Committee that the officer's statement conflicted with other evidence subsequently admitted at trial, and that as the officer was not present at the trial the accused had been denied the right to raise these contradictions with the officer. However, the Human Rights Committee noted that the defence did not object to the introduction of this evidence at trial or on appeal and that the defence examined the officer at the preliminary hearing under the same conditions as the prosecution. It stated that Article 14 (3)(e) of the ICCPR "protects the equality of arms between the prosecution and the defence in the examination of witnesses, but does not prevent the defence from waiving or not exercising its entitlement to cross-examine a prosecution witness during the trial hearing." [*Compass v. Jamaica,* (375/1989), 19 October 1993, UN Doc. CCPR/C/49/D/375/1989, at 6]

22.3 The 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". Article 14(3)(e) of the ICCPR, Article 6(3)(d) of the European Convention, Article 8(2)(f) of the American Convention, paragraph 2(E)(3) of the African Commission Resolution, Article 21(4)(e) of the Yugoslavia Statute, Rwanda Statute 20(4)(e), Article 67(1)(e) of the ICC Statute.

The right to call defence witnesses "under the same conditions" as prosecution witnesses gives criminal courts relatively broad discretion in deciding which witnesses to summons, although judges must not violate the principles of fairness and equality of arms.

> The European Court has held that although Article 6(3)(d) of the European Convention does not require the attendance and examination of *every* witness on the accused's behalf, a court must exercise its discretion over which witnesses will be called in accordance with the principle of equality of arms. It found a violation of the right to a fair trial where a judgment did not explain the reasons why the court had rejected the accused's request that four witnesses be examined. *[Vidal v. Belgium*, (14/1991/266/337), 22 April 1992]
>
> In a murder trial where a witness for the defence was willing to testify but was unable to be present in court on the particular day because she did not have a means of transport, the Human Rights Committee found a violation of Articles 14(1) and 14(3)(e) of the ICCPR to the extent that the witness's failure to appear was attributable to the authorities, who could have adjourned the proceedings or provided her with transportation. [*Grant v. Jamaica*, (353/1988), 31 March 1994, UN Doc. CCPR/C/50/D/353/1988, at 10]
>
> However, in several cases in the past, the European Commission has expressed the view that there was no violation of the accused's rights where the national court exercised its discretion not to summon a witness requested by the accused on the grounds that it deemed that the testimony of the witness would not assist in elucidating the truth. [*X v. Austria*, 31 May 1973, 45 Coll. Dec. 59; *X v. United Kingdom*, 6 April 1973, 43 Col. Dec. 151; *X v. the Federal Republic of Germany*, 1 April 1970, 37 Coll. Dec. 119; *X v. the Federal Republic of Germany*, 21 July 1970, 35 Coll. Dec. 127]

The American Convention is broader in this regard. Article 8(2)(f) of the American Convention gives the defence the right to examine witnesses present in court and to obtain the appearance as witnesses of experts or others who may throw light on the facts.

BOX
Article 8(2)(f) of the American Convention:
"Every person accused of a criminal offense has the right to be presumed innocent so long as his guilt has not been proven according to law. During the proceedings, every person is entitled, with full equality, to the following minimum guarantees:
(f) the right of the defense to examine witnesses present in the court and to obtain the appearance, as witnesses, of experts or other persons who may throw light on the facts;"
END BOX

22.4 The rights of victims and witnesses

The rights of victims and other witnesses to be protected from reprisals and from unnecessary anguish have to be balanced against the right of the accused to a fair trial. In balancing these rights, measures taken by courts include providing victims and witnesses with information and assistance throughout the proceedings, closing all or part of the proceedings to the public "in the interests of justice" (see **Chapter 14, The right to a public hearing**) and allowing the presentation of evidence by electronic or other special means.

The European Court has stated that where the interests of the life, liberty or security of witnesses may be at stake, states must organize criminal proceedings so as to ensure that these interests are not unjustifiably imperilled. It explained: "Against this background, principles of fair trial also require that in appropriate cases the interests of the defence are balanced against those of witnesses and victims called upon to testify." [*Doorson v. The Netherlands*, 26 March 1996, 2 Ser.A 470, para.70] Nevertheless, as the court more recently stated, the right to the fair administration of justice requires that measures restricting the rights of the defence must be carefully limited and strictly necessary. [*Van Mechelen and others v. The Netherlands*, (55/1996/674/861-864), 23 April 1997, para. 54 and 58]

The Inter-American Commission has also recognized the need for measures to protect the personal safety of witnesses and experts, without affecting the guarantees of due process. [Second Report on the Situation of Human Rights in Colombia, OEA/Ser.L/V/II.84, doc.39, 1993, at p.109]

Among the fundamental principles set out in the UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power are that: "the responsiveness of judicial and administrative process to the needs of the victims should be facilitated by ... allowing the views and concerns of victims to be presented and considered at appropriate stages of the proceedings where their personal interests are affected, without prejudice to the accused and consistent with the relevant national criminal justice system". [Article 6(b)of the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power.] In addition the Declaration emphasises that victims should be given information and assistance throughout the legal process, measures should be taken to minimize inconvenience, protect their safety and avoid unnecessary delay. [Article 6 of the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power.]

Special measures may be needed to deal with the particular demands of investigating, prosecuting and judging crimes involving violence against women, including rape and other forms of serious sexual abuse. Women who have suffered such violence are often reluctant to testify. The UN Secretary-General, when setting up the former Yugoslavia Tribunal, made clear that female investigators and prosecutors should be available for such cases. Amnesty International believes that all judges and judicial staff who may be involved in such cases should receive training to familiarize and sensitize them to the issues and assist them in dealing with cases involving violence against women. Amnesty International also believes that courts (including the International Criminal Court) should take effective measures to protect women victims, their families and witnesses from reprisals and unnecessary anguish to which they might be exposed in a public trial, without prejudicing the rights of suspects and accused to a fair trial. [See Amnesty International, *The International Criminal Court: Making the right choices - part II*, July 1997, (AI Index: IOR 40/11/97) at 36; Amnesty International, *The International Criminal Court - Ensuring justice for women*, March 1998 (AI Index: IOR 40/06/98]

Chapter 23 The 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 they do not understand or speak the language used in court. They also have the right to have documents translated.

23.1 Interpretation and translation

If an accused has difficulty speaking, understanding or reading the language used by the courts, the right to interpretation and translation are crucial to ensure the fairness of the proceedings. An interpreter translates orally between the language of the court and the language of the accused, and vice versa. A translator produces written versions of documents in the relevant language. These functions are crucial to the right to adequate facilities to prepare a defence, the principle of equality of arms (see **Chapters 8** and **13.2**) and the right to a fair trial. Without such assistance an accused may not be able to understand and participate fully and effectively in the preparation of their defence and at trial. The possibility of an accused (or witness) being questioned about the contents of documents makes the right to translation a necessary prerequisite of the right to a fair trial.

23.2 The right to a competent interpreter

Everyone charged with a criminal offence has the right to the assistance of an interpreter, free of charge, if they do not understand or speak the language used in court. Article 14(3)(f) of the ICCPR, Article 8(2)(a) of the American Convention, Article 6(3)(e) of the European Convention, paragraph 2(E)(4) of the African Commission Resolution, Article 21(4)(f) of the Yugoslavia Statute, Rwanda Statute 20(4)(f), Article 67(1)(f) of the ICC Statute. For this right to be meaningful, the interpretation must be competent and accurate. Article 67(1)(f) of the ICC Statute guarantees the right to the assistance of a "competent interpreter".

BOX:
Article 14(3)(f) of the ICCPR:
“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;”
END BOX

The right to an interpreter is an integral part of the right to defend oneself and the right to adequate time and facilities to prepare a defence. The Human Rights Committee has stated that this right is “of basic importance in cases in which ignorance of the language used by a court or difficulty in understanding may constitute a major obstacle to the right of defence”. [Human Rights Committee General Comment 13, para. 13]

The right to an interpreter applies at all stages of criminal proceedings, including during police questioning and preliminary examinations or inquiries. Principle 14 of the Body of Principles. (See

Chapter 2.4, Notification in a language the person understands, and **Chapter 9.4, Right to an interpreter**.)

In order to secure this right an accused or their counsel should request an interpreter.

The Human Rights Committee has made clear that the right to free assistance of an interpreter must be available to people who do not speak or understand the language of the court, nationals and non-nationals alike. [Human Rights Committee General Comment 13, para. 13]

However, if the accused *does* speak and understand the language of the court adequately, but prefers to speak another language, there is no obligation on the authorities to provide the accused with the free assistance of an interpreter.

> In two cases where the accused's first language was Breton and they and their witnesses wished to testify in Breton rather than French (the language of the court), the court denied an interpreter as the accused and the witnesses understood and were able to express themselves adequately in French. The Human Rights Committee found there had been no violation of the ICCPR. *[Cadoret and Bihan v. France,* (221/1987 and 323/1988), 11 April 1991, Report of the HRC, (A/46/40), 1991, at 219; *Barzhig v. France*, (327/1988), 11 April 1991, Report of the HRC, (A/46/40), 1991, at 262]

Interpreters are to be provided free of charge, regardless of the outcome of the trial.

> The European Court found a violation of the right to the free assistance of an interpreter when the authorities sought to make the accused repay the costs of the interpreter when convicted. [*Case of Luedicke, Belkacem and Koc*, 28 November 1978, 29 Ser. A, 17 -19]

23.3 The right to have documents translated

While only Article 8(2)(a) of the American Convention expressly provides the right to be assisted by a translator to translate written materials, in practice, the right to an interpreter has generally included the right of an accused to have relevant documents translated free of charge. Article 8(2)(a) of the American Convention, see also Article 67(1)(f) of the ICC Statute. However, the Human Rights Committee and the European Court have held that oral translations of documents are sufficient to guarantee the right, at least in certain circumstances. [*Harward v. Norway*, (451/1991), 15 July 1994, UN Doc. CCPR/C/51/D/451/1991]

If an accused needs to have relevant documents translated, they should request translation in the course of the proceedings and assert that their right to adequate facilities to prepare the defence would be prejudiced without such translations.

> The Inter-American Commission considers that the right to translation of documents is fundamental to due process.. [Report on the Situation of Human Rights of a Segment of the Nicaraguan Population of Miskito Origin, OEA Ser.L/V/11.62, doc.10, rev. 3, 1983]

Chapter 24 Judgments
Judgments must be made public, with limited exceptions, and everyone tried by a court of law has the right to be given reasons for the judgment and to be judged only by decision-makers who have attended the proceedings.

24.1 The right to a public judgment
Judgments in trials – criminal or otherwise – must be made public except in certain narrowly defined circumstances. Article 14(1) of the ICCPR, Article 6(1) of the European Convention, Article 23(2) of the Yugoslavia Statute, Rwanda Statute 23(2); see Article 8(5) of the American Convention; see also Articles 74(5) and 76(4) of the ICC Statute.

This applies to judgments rendered by all courts, including special and military courts and courts of appeal. [Human Rights Committee General Comment 13, para. 4]

The exceptions to the requirement of a public judgment under Article 14(1) of the ICCPR are cases involving juveniles, whose privacy is to be protected, matrimonial disputes and cases about the guardianship of children.

BOX:
Article 14(1) of the ICCPR:
"...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."
END BOX

Article 8(5) of the American Convention requires that criminal proceedings shall be public except in so far as may be necessary to protect the interests of justice.

The principal aim of the right to a public judgment is to ensure that the administration of justice is public and open to public scrutiny. Therefore the right to have a judgment made public can be asserted by anyone, including people who are not parties to the proceedings.

A judgment is made public if it is pronounced orally in a session of the court which is open to the public or if a written judgment is published.

> The right to public judgment is violated if judgments are made accessible only to a certain group of people or when only people having a specific interest are allowed to inspect a judgment. However, where a judgment was not read aloud in open court but the parties to a case received copies and the judgment was deposited in the court registry, available to anyone who could establish an interest, the European Court held that there was no violation of Article 6(1) of the European Convention. [See *Sutter Case*, Series A Vol 74, 22 February 1984.]

The requirement that judgments be made public (in all but the exceptional circumstances defined above) applies even if the public has been excluded from all or parts of the trial. [Human Rights Committee General Comment 13, para.6]

> The Human Rights Committee found a violation of the requirement that judgments be made public in a case where the accused was not allowed to attend his trial, which was not public, and did not receive a copy of the judgment. [*Tourón v. Uruguay*, (32/1978), 31 March 1981, 1 Sel. Dec. 61]

24.2 The right to know the reasons for the judgment

The right to a public judgment has been interpreted to require courts to give reasons for their judgments. The right to receive a reasoned judgment is essential to the right of the accused to appeal. (See **Chapter 26, The right to appeal**.) [*Hadjianastassiou v. Greece*, (69/1991/321/393), 16 December 1992, para. 33]

> In a case where a Jamaican appeals court failed to issue a reasoned written judgment, the Human Rights Committee found that the accused's rights had been violated because the failure was likely to prevent the accused from successfully arguing for special leave to appeal to a higher tribunal and thus from availing himself of a further remedy. [*Hamilton v. Jamaica*, (333/1988), 23 March 1994, UN Doc. CCPR/C/50/D/333/1988, 1994 at 5 - 6]

> Article 74(5) of the ICC Statute requires "a full and reasoned statement of the ...findings on the evidence and conclusions". Article 74(5) of the ICC Statute, see also Article 23(2) of the Yugoslavia Statute, Rwanda Statute 22(2).

24.3 Judgment within a reasonable time

The right to trial within a reasonable time (see **Chapter 19, The right to be tried without undue delay**) includes the right to receive a reasoned judgment (at trial and appeal) within a reasonable time.

> The Human Rights Committee held that the failure of the Jamaican court of appeal to render a reasoned written judgment within a reasonable time prevented the accused from enjoying the effective exercise of their right to have conviction and sentence reviewed by a higher tribunal. [*Currie v. Jamaica*, (377/1989), 29 March 1994, Report of the HRC, vol. II, (A/49/40), 1994 at 73]

Chapter 25 Punishments

Punishments imposed upon conviction of a crime may only be inflicted on people who have been convicted after a fair trial. Punishments must be proportionate and may not violate international standards.

25.1 When can punishments be imposed?

Punishments provided for by law may be imposed only on those convicted of crimes after trials which meet international standards for fairness.

The Human Rights Committee has held that the continued imprisonment of a person sentenced after an unfair trial may violate the ICCPR. [*Pinto v. Trinidad and Tobago*, (512/1992), 16 July 1996, UN Doc. CCPR/C/37/D/512/1992]

25.2 What penalties can be imposed?

The punishments imposed upon conviction following a fair trial must be proportionate to the gravity of the crime and the circumstances of the offender. [Report of the 8th UN Congress on the Prevention of Crime and Treatment of Offenders, UN Doc. A/Conf.144/28, rev.1 (91.IV.2), Res. 1(a), 5(c), 1990;] Neither the punishment nor the manner in which it is imposed may violate international standards.

Courts may not impose a heavier penalty than the one that applied when the crime was committed. However, if legal reform reduces the penalty for an offence, states are obliged to apply retroactively the lighter penalty. Article 11 of the Universal Declaration, Article 15(1) of the ICCPR, Article 9 of the American Convention, Article 7(1) of the European Convention, see also Article 7(2) of the African Charter.

The death penalty may not be imposed if it was not a punishment prescribed by law for the crime at the time the crime was committed. See **Chapter 28, Death penalty cases, Chapter 27.7, Punishments; Children.**

BOX:
Article 15(1) of the ICCPR:
"...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."
END BOX

25.3 Punishments must not violate international standards

Neither the punishment itself nor the way that a punishment is imposed may violate international standards, including the prohibition against torture and other cruel, inhuman or degrading treatment or punishment and the right to be treated with respect for the inherent dignity of the human person.

Torture and other cruel, inhuman or degrading treatment or punishment are absolutely prohibited. Article 5 of the Universal Declaration, Article 7 of the ICCPR, Convention against Torture, Declaration against Torture, Principle 6 of the Body of Principles, Article 5 of the African Charter, Article 5(2) of the American Convention, Article XXVI of the American Declaration, Article 3 of the European Convention. (See **Chapter 10.4, Freedom from torture and ill-treatment**.) However, the definition of torture specifically excludes pain and suffering arising from or inherent in or incidental to lawful sanctions. (See **Use of terms**.)

The term "lawful sanctions" used in Article 1 of the Declaration against Torture and Article 1 of the Convention against Torture means sanctions which are lawful under **both** national and international standards. Therefore, although a sanction may be lawful under national law, if it violates international standards, including the absolute prohibition against torture and cruel, inhuman or degrading treatment or punishment, then the sanction is deemed to be prohibited. Any other interpretation would defeat the purpose of international standards which aim to prohibit torture. [See: Report of the Special Rapporteur on torture, UN Doc. E/CN.4 / 1988/17 p.14; E/CN.4/1993/26, p. 131; Nigel Rodley, *The Treatment of Prisoners Under International Law*; Achene Boulesbaa, "Analysis and Proposals for the Rectification of the Ambiguities Inherent in Article 1 of the UN Convention on Torture", *Florida International Law Journal*, Vol. 5, No. 3, Summer 1990, 317; See Karima Bennoune, "A Practice Which Debases Everyone Involved: Corporal Punishment Under International Law", in *20 ans consacrés à la réalisation d'une idée, Recueil d'articles en l'honneur de Jean-Jacques Gautier*, Association for the Prevention of Torture, Geneva, 1997]

Article 2 of the Inter-American Convention on Torture makes clear that the legalization of a practice at the national level does not render such a practice "lawful" if it involves acts or methods prohibited by this treaty.

International standards prohibit the extradition, expulsion or forcible return (*refoulement*) of a person to a state where there are substantial grounds to believe that the person might be subjected to torture or cruel, inhuman or degrading treatment or punishment, including sanctions that amount to such. Article 3 of the Convention against Torture.

> The European Court examined the case of a man facing extradition to the USA who was aged 18 and very possibly suffering mental impairment when the crime of which he was accused was committed. The Court held that his extradition to the USA, where he would be at risk of being sentenced to death and might have to spend six to eight years on death row in harsh conditions, would violate Article 3 of the European Convention prohibiting torture or other cruel, inhuman or degrading treatment or punishment. [*Soering Case,* (1/1989/161/217), 7 July 1989]

25.4 Corporal punishment

Corporal punishment is physical punishment involving blows to the body or mutilation, imposed by judicial order or as an administrative sanction. It includes flogging, caning, whipping, amputation and branding. [See, Karima Bennoune, "A Practice Which Debases Everyone Involved: Corporal

Punishment Under International Law", in *20 ans consacrés à la réalisation d'une idée, Recueil d'articles en l'honneur de Jean-Jacques Gautier,* Association for the Prevention of Torture, Geneva, 1997]

It is clear from statements made by expert and political bodies of the UN and by the European Court that corporal punishment is prohibited by international standards as it violates the absolute prohibition against torture and cruel, inhuman and degrading treatment or punishment. Such treatment or punishment may not be imposed on any person for any reason, no matter how heinous their crime and notwithstanding political instability.

> The Human Rights Committee has stated that the prohibition against torture in the ICCPR extends to a prohibition of corporal punishment and excessive chastisement ordered as punishment for a crime or as an educative or disciplinary measure. [Human Rights Committee General Comment 20, para. 5]
>
> The Human Rights Committee stated that "flogging, amputation and stoning, which are recognized as penalties for criminal offences [in Sudan] are not compatible with the Covenant [ICCPR]".[Concluding Observations of the HRC: Sudan, UN Doc. CCPR/C/79/Add.85, 19 November 1997, para.9] Similarly, based on the conclusion that punishment such as amputation and branding are incompatible with the prohibition against torture, the Human Rights Committee recommended that "the imposition of such punishments [in Iraq] should cease immediately and all laws and decrees for their imposition...should be revoked without delay."[Concluding Observations of the HRC: Iraq, UN Doc. CCPR/C/79/Add.84, 19 November 1997, para.12]
>
> In April 1997, the UN Commission on Human Rights reminded governments that "corporal punishment can amount to cruel inhuman or degrading punishment or even to torture". [Resolution 1997/38, Commission on Human Rights, Report on the Fifty-Third Session (part one), (E/CN.4/1997/150), at 125]
>
> The UN Special Rapporteur on torture stated in 1997 that "corporal punishment is inconsistent with the prohibition of torture and other cruel, inhuman or degrading treatment or punishment..." [Report of the UN Special Rapporteur on torture, UN Doc: E/CN.4/1997/7, at p. 5, para. 6]
>
> The European Court has also held that corporal punishment violates the prohibition against torture and other cruel, inhuman or degrading treatment or punishment. It found that the "birching" (whipping with a wooden rod) of a 15-year-old convicted of assault amounted to degrading punishment. [*Tyrer Case*, Series A 26, 25 April 1978]

The imposition of corporal punishment as a sanction for a criminal or disciplinary offence also violates the right to a fair trial by inflicting a penalty which is prohibited under international law.

International standards prohibit the imposition of corporal punishment for disciplinary offences committed by detainees and prisoners (see **Chapter 10.4**). Rule 31 of the Standard Minimum Rules, Rule 37 of the European Prison Rules.

25.5 Conditions of imprisonment
The conditions in which a convicted prisoner is held must not violate international standards. Rules 56 to 81 of the Standard Minimum Rules set out guiding principles for the treatment of people serving prison sentences. They direct that the prison system shall not aggravate the suffering inherent in the deprivation of liberty. Rule 57 of the Standard Minimum Rules. They require that the regime of the prison should seek to minimize differences between prison life and life at liberty. Rule 60 of the Standard Minimum Rules. See also Rules 64 et seq. of the European Prison Rules, Article 106 of the ICC Statute.

International standards limit the use of prolonged solitary confinement, restraints such as handcuffs and leg-irons, and the use of force by law enforcement officers. (See **Chapter 10.4, Freedom from torture and ill-treatment**.)

BOX:
Rule 57 of the Standard Minimum Rules
"Imprisonment and other measures which result in cutting off an offender from the outside world are afflictive by the very fact of taking from the person the right of self-determination by depriving him of his liberty. Therefore the prison system shall not, except as incidental to justifiable segregation or the maintenance of discipline, aggravate the suffering inherent in such a situation."

Rule 60(1) of the Standard Minimum Rules
"The regime of the institution should seek to minimize any differences between prison life and life at liberty which tend to lessen the responsibility of the prisoners or the respect due to their dignity as human beings.**"**

Rule 61 of the Standard Minimum Rules
"The treatment of prisoners should emphasize not their exclusion from the community, but their continuing part in it. Community agencies should, therefore, be enlisted wherever possible to assist the staff of the institution in the task of social rehabilitation of the prisoners. There should be in connection with every institution social workers charged with the duty of maintaining and improving all desirable relations of a prisoner with his family and with valuable social agencies. Steps should be taken to safeguard, to the maximum extent compatible with the law and the sentence, the rights relating to civil interests, social security rights and other social benefits of prisoners."
END BOX

25.6 Prohibition on collective punishments
Punishment for an offence may be imposed only on the offender; international standards prohibit the imposition of collective punishments. Article 7(2) of the African Charter provides that: "[p]unishment is personal and can be imposed only on the offender". Article 7(2) of the African Charter. Article 5(3) of the American Convention provides that "[p]unishment shall not be extended to any person other than the criminal". Article 5(3) of the American Convention. (See **Chapter 32.5.1 Prohibition on collective punishments**.)

> The European Court concluded that the presumption of innocence requires that criminal liability does not survive the person who has committed a criminal act. The Court held that imposing a fine on relatives of a deceased person who had improperly withheld taxes, after the relatives had already paid from the estate back taxes due, violated the presumption of

innocence. [*A.P., M.P. and T.P. v. Switzerland*, (71/1996/690/882), European Court, 29 August 1997]

Chapter 26 The right to appeal

Everyone convicted of a criminal offence has the right to have the conviction and sentence reviewed by a higher tribunal.

26.1 The right to appeal

Everyone convicted of a criminal offence has the right to have the conviction and sentence reviewed by a higher tribunal. Article 14(5) of the ICCPR, Article 8(2)(h) of the American Convention, Article 2 of Protocol 7 to the European Convention, Paragraph 3 of the African Commission Resolution, Article 24 of the Yugoslavia Statute, Rwanda Statute 23, Article 81(b) of the ICC Statute; see Article 7(a) of the African Charter.

BOX:
Article 14(5) of the ICCPR:
"Everyone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law."
END BOX

Although the European Convention does not expressly set out the right to appeal, decisions of the European Court imply that the right is inherent in the right to a fair trial under Article 6, and the right is expressly guaranteed by Article 2 of Protocol 7 to the European Convention.

The African Commission held that the right to appeal was violated by a decree specifically prohibiting appeals against the decisions of special tribunals created by the decree. The tribunal had jurisdiction to sentence people to death. Sentences imposed by the tribunal were subject to confirmation or disallowance by the Governor, and no appeal was allowed against the Governor's decisions. [*Constitutional Rights Project (in respect of Wahab Akamu, G. Adega and others) v. Nigeria*, (60/91), 8th Annual Activity Report of the African Commission on Human and Peoples' Rights, 1994-1995; see *The Constitutional Rights Project (in respect of Zamani Lakwot and six others) v. Nigeria*, (87/93), 8th Annual Activity Report of the African Commission on Human and Peoples' Rights, 1994-1995, ACHPR/RPT/8th/Rev.I]

The right to have a conviction and sentence reviewed by a higher tribunal is generally applicable to everyone convicted of any criminal offence, regardless of the seriousness of the offence. The Human Rights Committee has stated that "the guarantee is not confined to only the most serious offences". [Human Rights Committee General Comment 13, para. 17]

> The Human Rights Committee held that a charge which involved a one-year sentence was serious enough to warrant a review by a higher tribunal regardless of whether the domestic law classified the offence as "criminal". *[Salgar de Montejo v. Colombia*, (64/1979), 24 March 1982, 1 Sel. Dec. 127, at 129 - 130]

However, Article 2(2) of Protocol 7 to the European Convention provides that the right of 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 his or her acquittal.

26.2 Review by a higher tribunal

The review of the conviction and sentence must take place before a *higher tribunal, according to law*. The right to review ensures that there will be at least two levels of judicial scrutiny of a case, the second of which is by a higher tribunal than the first.

> The Human Rights Committee found that confirmation of a judgment by the original trial judge did not satisfy this requirement. [*Salgar de Montejo v. Colombia*, (64 /1979), 24 March 1982, 1 Sel. Dec.127 at 129 - 130]

Although the Human Rights Committee has stated that Article 14(5) of the ICCPR does not require states to provide for more than one instance of appeal, the words "according to law" mean that, if domestic law provides for more than one instance of appeal as part of the process in criminal cases, the convicted person must be given effective access to each of these instances of appeal. [*Henry v. Jamaica*, (230/1987), 1 November 1991, Report of the HRC, (A/47/40), 1992, at 218, para 8.4.]

26.3 Genuine review

The review by a higher court must be a genuine review of the issues in the case.

> The Inter-American Commission has stated that a state's obligation to guarantee the right to appeal to a higher court requires not only the passage of laws but also measures to ensure the exercise of the right. It considered that excessive formality, unreasonably short time frames for lodging an appeal and long delays in the appeal court rendering a judgment were obstacles to the realization of this right in Panama. [Report on the Situation of Human Rights in Panama, OEA/Ser.L/V/II.44, doc. 38, rev. 1, 1978]

Reviews limited only to questions of law (as opposed to examination of the law and facts) may not satisfy the requirements of this guarantee.

> The UN Special Rapporteur on extrajudicial, summary or arbitrary executions has expressed concern about appeal procedures which review only legal aspects and not facts. He raised these concerns in connection with the review of cassation by the Supreme Court in Algeria. He raised similar concerns about proceedings before the State Security Court in Kuwait where "defendants do not benefit fully from the right to appeal as set forth in the pertinent international instruments, since they are deprived of a stage of appeal which fully reviews the case, both with regard to the facts and legal aspects". [Report of the UN Special Rapporteur on extrajudicial, summary or arbitrary executions, 7 December 1993, UN Doc: E/CN.4/1994/7, at paras 113 and 404; see also, Manfred Nowak, *U.N. Covenant on Civil and Political Rights: CCPR Commentary*, NP Engel, 1993, at 266]

Reviews on appeal must be more than "formal verifications of procedural requirements".

The Inter-American Commission has stated in reference to the right to a fair trial under the American Convention that during the appeals process, courts must examine not only whether or not due process had been observed throughout the judicial proceedings but also the grounds for appeal. [*Case 9850*, Annual Report of the Inter-American Commission, 1990 -1991, OEA/ Ser.L/V/II.79, doc. 12, rev.41,1991, at 74 - 76, (Argentina)]

26.4 Fair trial guarantees during appeals

The rights to a fair and public trial must be observed during appeal proceedings. [See Human Rights Committee General Comment 13, para. 17] Such rights include, among others, 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 within a reasonable time, and the right to a public and reasoned judgment within a reasonable time. [See *Melin v. France* (16/1992/361/435), 22 June 1993, finding no violations but noting certain rights relating to appeal inherent in the notion of a fair trial; *Hadjianastassiou v. Greece*, (69/1991/321/393), 16 December 1992]

The Inter-American Commission stated that appeals to courts which lacked independence or were not qualified to exercise the review function were incompatible with the right to appeal under the American Convention. [Report on the Situation of Human Rights in Chile, OEA/Ser.L/V/II.66, doc.17, 1985; Report on the Situation of Human Rights in Nicaragua, OEA/Ser.L/V/II.45, doc.16, rev.1 1978]

The right to appeal can only be effective if the defendant has been informed of the reasons for the conviction within a reasonable time. This right is therefore linked to the right of the accused to a reasoned judgment. (See **Chapter 24.2, The right to know the reasons for the judgment**.)

The European Court found the accused's rights had been violated in a case where the defendant, a military officer convicted of disclosing military secrets by a military court, appealed to the Courts Martial Appeal Court and then to the Court of Cassation. The Courts Martial Appeal Court rendered its judgment orally in the presence of the defendant, but only in summary fashion. It did not disclose a series of questions considered by the Court. By the time the accused received the full record of its judgment, he was barred from expanding the grounds for his appeal to the Court of Cassation. The European Court stated that national courts (including appeals courts) must indicate with sufficient clarity the grounds on which they base their decision. The failure to do so in time to allow the defendant to fully set out his grounds for review before the Court of Cassation denied him adequate time and facilities to prepare his defence. [*Hadjianastassiou v. Greece*, (69/1991/321/393), 16 December 1992]

The right to have counsel appointed to represent the accused on appeal is subject to similar conditions as the right to have counsel appointed at trial: it must be deemed to be in the interests of justice. (See **Chapter 20.3.3 Right to have defence counsel assigned; right to free legal assistance**. See also **Chapter 28, Death penalty cases**.)

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. The Court considered that the interests of justice required the authorities to appoint counsel for the accused on appeal because the accused was unable to address the court competently on the legal issues without

assistance of counsel and thus could not defend himself effectively. [*Maxwell v. United Kingdom*, (31/1993/426/505), 28 October 1994; see *Boner v. United Kingdom*, (30/1993/425/504), 28 October 1994]

The European Court also 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 on grounds connected with the accused's having 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 at trials in person. [*Poitrimol v. France*, (39/1992/384/462), 23 November 1993]

SECTION C: Special Cases

Chapter 27 Children

Children accused of having infringed penal law are entitled to all the fair trial guarantees and rights which apply to adults, and to some additional special protection.

27.1 Children's rights to a fair trial

Children are entitled to all the fair trial guarantees and rights which apply to adults, and to some additional special protection. This chapter deals only with the extra protection applicable to children on account of their age.

International standards use the terms "juvenile justice" and "juvenile justice systems" to refer to the treatment of children accused or convicted of breaches in the law, whether in justice systems specifically for children, or in justice systems that deal with adults as well. This manual uses the terms in this way. In some countries which have established justice systems specifically for children (as encouraged by international standards, see below), these systems are known as "juvenile justice systems".

Many human rights standards include provisions relating to juvenile justice issues, including: the Convention on the Rights of the Child (particularly Articles 1, 37 and 40), the Declaration on the Rights of the Child, UN Rules for the Protection of Juveniles Deprived of their Liberty, UN Guidelines for the Prevention of Juvenile Delinquency ("The Riyadh Guidelines") and UN Standard Minimum Rules for the Administration of Juvenile Justice ("The Beijing Rules"). See also Articles 10(2)(b), 10(3), 14(4) and 24 of the ICCPR.

BOX:

Article 40(2)(b) of the Convention on the Rights of the Child:

(b) Every child alleged as or accused of having infringed the penal law has at least the following guarantees:

(i) To be presumed innocent until proven guilty according to law;

(ii) To be informed promptly and directly of the charges against him or her, and, if appropriate, through his or her parents or legal guardians, and to have legal or other appropriate assistance in the preparation and presentation of his or her defence;

(iii) To have the matter determined without delay by a competent, independent and impartial authority or judicial body in a fair hearing according to law, in the presence of legal or other appropriate assistance and, unless it is considered not to be in the best interest of the child,
in particular, taking into account his or her age or situation, his or her parents or legal guardians;
(iv) Not to be compelled to give testimony or to confess guilt; to examine or have examined adverse witnesses and to obtain the participation and examination of witnesses on his or her behalf under conditions of equality;
(v) If considered to have infringed the penal law, to have this decision and any measures imposed in consequence thereof reviewed by a higher competent, independent and impartial authority or judicial body according to law;
(vi) To have the free assistance of an interpreter if the child cannot understand or speak the language used;
(vii) To have his or her privacy fully respected at all stages of the proceedings.
END BOX

The Human Rights Committee has stated that "[j]uveniles are to enjoy at least the same guarantees and protection as are accorded to adults under Article 14 [of the ICCPR]". [Human Rights Committee General Comment 13, para 16.]

The Convention on the Rights of the Child makes clear that children are to benefit from any provisions of national or international law which may be more conducive to the realization of their rights. See Article 41 of the Convention on the Rights of the Child.

27.2 Definition of a child
There is an emerging consensus in international law that a child is anyone under the age of 18 and that therefore anyone under the age of 18 is entitled to special protection in relation to trials. The UN Rules for the Protection of Juveniles Deprived of their Liberty define a juvenile as "every person under the age of 18". Rule 11(a) of the UN Rules for the Protection of Juveniles Deprived of their Liberty. The Convention on the Rights of the Child defines a child as everyone aged less than 18, unless majority is attained earlier under national law. Article 1 of the Convention on the Rights of the Child. The age of majority is determined by states, but must not deviate greatly from international norms.

States must establish laws and procedures which set a minimum age below which children will be presumed **not** to have the capacity to infringe the penal law. Article 40(3)(a) of the Convention on the Rights of the Child. The age of criminal responsibility for children should not be fixed too low, bearing in mind the emotional, mental and intellectual immaturity of children. Rule 4 of The Beijing Rules.

States must also establish laws which set a minimum age below which a child may not be deprived of his or her liberty. Rule 11(a) of the UN Rules for the Protection of Juveniles Deprived of their Liberty.

27.3 Guiding principles for the treatment of children in conflict with the law
International standards set out some guiding principles relating to juvenile justice. These are founded on the duty of the state to secure the best interests of each child and the corresponding duty to ensure that measures affecting children who have broken the law are proportional to the gravity of the offence and take into consideration the personal circumstances of the juvenile.

Every child has the right to protection by their family, the state and society as required by their status as a minor. Article 24(1) of the ICCPR, Article 19 of the American Convention, Principle 2 of the Declaration of the Rights of the Child.

The best interests of the child must be a primary consideration in all actions concerning children, including those undertaken by courts of law, administrative or legislative bodies. Article 3(1) of the Convention on the Rights of the Child.

The juvenile justice system must emphasize the well-being of the juvenile and ensure that any reaction to juvenile offenders is always in proportion to the circumstances of both the offender and the offence. Rules 5 and 17(1) of The Beijing Rules.

States should recognize the right of every child accused of a criminal offence to be treated in a manner consistent with the promotion of the child's sense of dignity and worth, taking into account the child's age and the desirability of promoting the child's reintegration and assumption of a constructive role in society. Article 40(1) of the Convention on the Rights of the Child.

Juvenile justice systems should uphold the rights and safety and promote the physical and mental well-being of juveniles and take into account the desirability of rehabilitating the young person. Article 14(4) of the ICCPR, Rule 1 of the UN Rules for the Protection of Juveniles Deprived of their Liberty.

Policies should involve consideration of the fact that: "youthful behaviour or conduct that does not conform to overall social norms and values is often part of the maturation and growth process and tends to disappear spontaneously in most individuals with the transition to adulthood". Article 5(e) of The Riyadh Guidelines.

BOX:
Article 14(4) of the ICCPR:
"In the case of juvenile persons, the procedure shall be such as will take account of their age and the desirability of promoting their rehabilitation;"
END BOX

In accordance with the right of all children to express their own views freely in all matters concerning them, children shall be provided with an opportunity to be heard in any proceedings affecting them, either directly or through a representative. The views of the child must be given due weight in accordance with the age and maturity of the child. Article 12 of the Convention on the Rights of the Child.

27.3.1 Separate systems for juvenile justice

Most international standards encourage – but do not require – states to establish separate or specialized procedures and institutions for handling cases in which children are accused of or found responsible for having committed criminal offences. Article 40(3) of the Convention on the Rights of the Child, Rule 2.3 of The Beijing Rules.

The American Convention, however, requires states to establish specialized tribunals for handling cases of juveniles accused of crimes. Article 5(5) of the American Convention.

27.3.2 Procedures short of trial
States should give consideration, wherever appropriate, to dealing with a juvenile offender without resorting to a formal trial, provided that human rights and legal safeguards are fully respected. Alternative methods include referral to community or other services. Article 40(3)(b) of the Convention on the Rights of the Child, Rule 11 of The Beijing Rules.

27.3.3 Cases involving juveniles must be dealt with speedily
All cases relating to children accused of infringing the law, whether or not they are held in detention, must be handled expeditiously. Article 10(2)(b) of the ICCPR, Article 40(2)(b)(iii) of the Convention on the Rights of the Child, Rule 20 of The Beijing Rules, Article 5(5) of the American Convention.

27.3.4 Privacy
In order to protect the child from stigmatization, the privacy of every child accused of or found to have infringed the penal law must be protected. Article 40(2)(b)(vii) of the Convention on the Rights of the Child, Rules 8 and 21 of The Beijing Rules.

BOX
Rule 8 of The Beijing Rules:
"8.1 The juvenile's right to privacy shall be respected at all stages in order to avoid harm being caused to her or him by undue publicity or by the process of labelling.
"8.2 In principle, no information that may lead to the identification of a juvenile offender shall be published."
END BOX

Records of child offenders must be kept strictly confidential and must not be accessible to other than duly authorized authorities. Rule 21 of The Beijing Rules. Such records may not be used in subsequent proceedings against the offenders when they are adults. Rule 21.2 of The Beijing Rules; see also Rule 19 of the UN Rules for the Protection of Juveniles Deprived of their Liberty.

27.4 Arrest and pre-trial detention
The standards relating to detention of children are founded on the principle that, in most cases, the best interests of a child are protected by not separating them from their parents. See, *inter alia*, Article 9 of the Convention on the Rights of the Child, Principle 6 of the Declaration on the Rights of the Child.

BOX
Article 37(b) of the Convention on the Rights of the Child:
"(b) No child shall be deprived of his or her liberty unlawfully or arbitrarily. The arrest, detention or imprisonment of a child shall be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time;"
END BOX

Arrest, detention or imprisonment of a child should only be used as a measure of last resort, must be in conformity with the law, and for the shortest appropriate time. Article 37(b) of the Convention on the Rights of the Child, Rule 1 of the UN Rules for the Protection of Juveniles Deprived of Their Liberty; see Rule 19 of the Beijing Rules, Article 46 of the Riyadh Guidelines.

Children detained pending trial must be segregated from adults, except where this would not be in the best interests of the child. Article 10(2)(b) of the ICCPR, Article 37(c) of the Convention on the Rights of the Child, Rule 13.4 of The Beijing Rules, Rule 29 of the UN Rules for the Protection of Juveniles Deprived of their Liberty; see Article 5(5) of the American Convention.

> The Special Rapporteur on torture has criticized the detention of minors together with adults because juveniles are vulnerable to physical and sexual exploitation and may experience severe physical and mental suffering. [Report of the UN Special Rapporteur on torture, 12 January 1988, UN Doc. E/CN.4/1988/17, at para. 48]

Article 37(c) of the Convention on the Rights of the Child states that a detained child may be held with adults, including adult members if their own family, if it is in the child's best interests. Article 37(c) of the Convention on the Rights of the Child. Rule 29 of the UN Rules for the Protection of Juveniles Deprived of their Liberty.

When a child suspected of having infringed the law is arrested or apprehended, his or her parents or guardian are to be notified immediately, unless it would be detrimental to the interests of the child. If immediate notification is not possible they are to be notified within the shortest possible time thereafter. Article 9(4) of the Convention on the Rights of the Child, Rule 10.1 of The Beijing Rules; see Rule 22 of the UN Rules for the Protection of Juveniles Deprived of their Liberty.

Contacts between law enforcement officials and children must be conducted in a manner which respects the legal status of the child, avoids harm and promotes the well-being of the child. Rule 10.3 of The Beijing Rules.

Even more than is the case with adults, international standards discourage the pre-trial detention of juveniles. Detention of children, including on arrest and prior to trial, should be avoided whenever possible and is a measure of last resort. When juveniles are detained, their cases are to be given the highest priority and handled as fast as possible to ensure the shortest possible period of detention prior to trial. Article 10(2)(b) of the ICCPR, Article 37(b) of the Convention on the Rights of the Child, Rule 17 of the UN Rules for the Protection of Juveniles Deprived of their Liberty, Rule 13 of The Beijing Rules.

States should establish laws which set a minimum age below which a child may not be deprived of his or her liberty. Rule 11(a) of the UN Rules for the Protection of Juveniles Deprived of their Liberty.

BOX
Article 10(2)(b) of the ICCPR:
"Accused juvenile persons shall be... brought as speedily as possible for adjudication."

Rule 17 of the UN Rules for the Protection of Juveniles Deprived of their Liberty:
"Detention before trial shall be avoided to the extent possible and limited to exceptional circumstances. Therefore, all efforts shall be made to apply alternative measures. When preventive detention is nevertheless used, juvenile courts and investigative bodies shall give the highest priority to the most expeditious processing of such cases to ensure the shortest possible duration of detention...."

Rule 13(1) and (2) of The Beijing Rules:

"13.1 Detention pending trial shall be used only as a measure of last resort and for the shortest possible period of time.
"13.2 Whenever possible, detention pending trial shall be replaced by alternative measures, such as close supervision, intensive care or placement with a family or in an educational setting or home."
END BOX

Article 10(2)(b) of the ICCPR, which requires juveniles to be brought "as speedily as possible for adjudication", goes beyond the requirement of trial within a reasonable time guaranteed by Article 9(3) of the ICCPR (see **Chapter 7, The right to trial within a reasonable time or to release from detention**) and trial without undue delay guaranteed by Article 14(3)(c) of the ICCPR (see **Chapter 19, The right to be tried without undue delay**). Its aim is to keep pre-trial detention for juveniles as short as possible. This objective can be obtained either by releasing them quickly from pre-trial detention or by bringing them quickly for adjudication. The term "adjudication" covers not only decisions by criminal courts but also decisions by special, non-judicial organs empowered to deal with crimes by juveniles. [Manfred Nowak, *U.N. Covenant on Civil and Political Rights: CCPR Commentary*, NP Engel, 1993, at 190-191]

Like adults, children who are detained are entitled to prompt access to legal assistance and to challenge the lawfulness of their detention (see **Chapter 3, The right to legal counsel before trial** and **Chapter 6, The right to challenge the lawfulness of detention**). Decisions regarding the release or the continuation of detention are to be made without delay. Article 37(d) of the Convention on the Rights of the Child, Rule 10.2 of The Beijing Rules.

BOX:
Article 37(d) of the Convention on the Rights of the Child:
"Every child deprived of his or her liberty shall have the right to prompt access to legal and other appropriate assistance, as well as the right to challenge the legality of the deprivation of his or her liberty before a court or other competent, independent and impartial authority, and to a prompt decision on any such action."
END BOX

Juveniles are entitled to care, protection and assistance if detained prior to trial. Rule 13.5 of The Beijing Rules, Rule 18 and Section IV (D) of the UN Rules for the Protection of Juveniles Deprived of their Liberty.

BOX:
Rule 13(3) and (5) of The Beijing Rules:
"13.3 Juveniles under detention pending trial shall be entitled to all rights and guarantees of the Standard Minimum Rules for the Treatment of Prisoners adopted by the United Nations...
"13.5 While in custody, juveniles shall receive care, protection and all necessary individual assistance - social, educational, vocational, psychological, medical and physical - that they may require in view of their age, sex and personality."
END BOX

Detained children are entitled to correspond with and to receive visits from their family, save in exceptional circumstances. Article 37(c) of the Convention on the Rights of the Child.

Like adults, all children who are detained are to be treated with respect for the inherent dignity of the human person. Torture and cruel, inhuman or degrading treatment are absolutely prohibited. Article 37(a) and (c) of the Convention on the Rights of the Child, Principle 54 of the Riyadh Guidelines. In addition, detained children are to be treated in a manner which takes into account the needs of people of their age. Article 37(c) of the Convention on the Rights of the Child. (See also **Chapters 4 and 10**.)

BOX:
Article 37(a) and (c) of the Convention on the Rights of the Child:
"States Parties shall ensure that:
(a) No child shall be subjected to torture or other cruel, inhuman or degrading treatment or punishment. Neither capital punishment nor life imprisonment without possibility of release shall be imposed for offences committed by persons below eighteen years of age;

"(c) Every child deprived of liberty shall be treated with humanity and respect for the inherent dignity of the human person, and in a manner which takes into account the needs of persons of his or her age..."
END BOX

27.5 Trial
Procedures applicable to juveniles, including trials, must uphold the rights and safety of the child and must take into account the age of the child and the desirability of promoting the child's rehabilitation. Article 14(4) of the ICCPR, paragraph 1 of the UN Rules for the protection of Juveniles Deprived of their Liberty. Such requirements are based on the precepts that children should be spared the stigma of crime as far as possible, and that infractions of the law by children should be addressed by educational measures rather than punishment. [See Manfred Nowak, *U.N. Covenant on Civil and Political Rights: CCPR Commentary*, NP Engel, 1993, at 265-66]

BOX:
Article 14(4) of the ICCPR:
"In the case of juvenile persons, the procedure shall be such as will take account of their age and the desirability of promoting their rehabilitation."

Rule 14(1) and (2) of The Beijing Rules:
"14.1 Where the case of a juvenile offender has not been diverted (under Rule 11) she or he shall be dealt with by the competent authority (court, tribunal, board, council, etc.) according to the principles of a fair and just trial.
"14.2 The proceedings shall be conducive to the best interests of the juvenile and shall be conducted in an atmosphere of understanding, which shall allow the juvenile to participate therein and express herself or himself freely."
END BOX

To protect the privacy of children, trials involving juveniles should be closed to the public and press, as one of the permissible exceptions to the right to a public hearing (see **Chapter 14.3, Permissible exceptions to a public hearing**). Article 40(2)(b)(vii) of the Convention on the Rights of the Child, Article 6(1) of the European Convention, see Article 14(1) of the ICCPR. See also **27.3.4, Privacy**, above.

Throughout the proceedings juveniles have the right to be represented by counsel. Article 40(2)(b)(ii) of the Convention on the Rights of the Child, Rule 15 of The Beijing Rules. In addition children capable of forming their own views are to be provided an opportunity to express their views in any judicial or administrative proceedings pertaining to them, either directly or through a representative. Article 12 of the Convention on the Rights of the Child.

27.6 Judgments
To avoid stigmatizing children, and to protect their privacy, judgments in juvenile cases are generally not public. Article 14(1) of the ICCPR provides an exception to the requirement that judgments be made public, when the interests of juveniles so require. Article 14(1) of the ICCPR, see Article 40(2)(b)(vii) of the Convention on the Rights of the Child. See **Chapter 24, Judgments**.

27.7 Punishments
The best interests of the child are to be a primary consideration in the disposition or imposition of penalties on juveniles found to have infringed the criminal law. Any disposition or penalty should take into account the juvenile's well-being and needs and the objective of promoting rehabilitation. Article 40(4) of the Convention on the Rights of the Child, Rule 17 of The Beijing Rules. See Article 14(4) of the ICCPR, Article 40(1) of the Convention on the Rights of the Child, Principle 7 of the Declaration of the Rights of the Child.

Any penalty must be proportional to the gravity of the offence and the circumstances of the young person. Article 40(4) of the Convention on the Rights of the Child, Rules 5 and 17(1) of The Beijing Rules.

BOX:
Article 40(4) of the Convention on the Rights of the Child:
"A variety of dispositions, such as care, guidance and supervision orders; counselling; probation; foster care; education and vocational training programmes and other alternatives to institutional care shall be available to ensure that children are dealt with in a manner appropriate to
their well-being and proportionate both to their circumstances and the offence."

Rule 17(1) of The Beijing Rules:
"The disposition of the competent authority shall be guided by the following principles:
(a) The reaction taken shall always be in proportion not only to the circumstances and the gravity of the offence but also to the circumstances and the needs of the juvenile as well as to the needs of the society;
(b) Restrictions on the personal liberty of the juvenile shall be imposed only after careful consideration and shall be limited to the possible minimum;

Rule 26.1 of The Beijing Rules:
"[t]he objective of training and treatment of juveniles placed in institutions is to provide care, protection, education and vocational skills, with a view to assisting them to assume socially constructive and productive roles in society."
END BOX

Imprisonment of a juvenile found to have infringed the law must be a measure of last resort in exceptional cases. Rule 17(1)(c) of the Beijing Rules provides that a juvenile should not be imprisoned

"unless the juvenile is adjudicated of a serious act involving violence against another person or of persistence in committing other serious offences and unless there is no other appropriate response". If imposed, the maximum term of imprisonment should be set by a judicial authority and should be as short as possible. Article 37(b) of the Convention on the Rights of the Child, Rules 1 and 2 of the UN Rules for the Protection of Juveniles Deprived of their Liberty, Rules 17 and 19 of The Beijing Rules.

27.7.1 Prohibited punishments
Juveniles may not be subject to corporal punishment. Rule 17.3 of The Beijing Rules.

> The Committee on the Rights of the Child has stated that corporal punishment contravenes the Convention on the Rights of the Child. [*Committee on the Rights of the Child, Concluding Observations, Australia*, UN Doc. CRC/C/15/Add.79, 1997, para.15]

Instruments of restraint and force can be used to constrain juveniles only in exceptional cases, where all other control methods have been exhausted and failed, and only as explicitly authorized and specified by law and regulation. They should not cause humiliation or degradation, and should be used restrictively and only for the shortest possible period of time. Rule 64 of the UN Rules for the Protection of Juveniles Deprived of their Liberty. (See also **Chapter 10**.)

Sentences of life imprisonment may not be imposed on people who were under the age of 18 at the time the crime was committed. Article 37(a) of the Convention on the Rights of the Child.

Regardless of the age of majority set by national law, or the age of the accused at the time of trial or sentencing, the death penalty may not be imposed on people who were under the age of 18 at the time that the crime was committed. Article 6(5) of the ICCPR, Article 37(a) of the Convention on the Rights of the Child, Paragraph 3 of the Death Penalty Safeguards, Rule 17.2 of The Beijing Rules, Article 4(5) of the American Convention. (See **Chapter 28**, **Death penalty cases**.) The prohibition against executing people who were under the age of 18 at the time the crime was committed applies at all times and in all circumstances: it is non-derogable. Article 4 of the ICCPR, Article 27 of the American Convention.

27.8 Imprisoned children
Children in prison should, in general, be segregated from adults and must be afforded treatment which is appropriate to their age and legal status. Article 10(3) of the ICCPR, Article 37(c) of the Convention on the Rights of the Child, Rules 28 and 29 of the UN Rules for the Protection of Juveniles Deprived of their Liberty, Rule 26.3 of the Beijing Rules. See also Rule 11(4) of the European Prison Rules.

No child should be subjected to torture or other cruel, inhuman or degrading treatment. This prohibition extends to harsh or degrading correction or punishment in any institution. Principle 54 of the Riyadh Guidelines. (See **Chapter 10**.)

Disciplinary measures constituting cruel, inhuman or degrading treatment are strictly prohibited, including corporal punishment, placement in a dark cell, closed or solitary confinement, reduction of diet, restriction or denial of contact with family members, collective sanctions, or any other punishment that may compromise the physical or mental health of the
juvenile. Rule 67 of the UN Rules for the Protection of Juveniles Deprived of their Liberty.

Instruments of restraint may only be used in exceptional circumstances as a last resort, and only according to law or regulation. Rule 64 of the UN Rules for the Protection of Juveniles Deprived of their Liberty.

Children deprived of their liberty have the right to maintain contact with their family through correspondence and visits, save in exceptional circumstances. Article 37(c) of the Convention on the Rights of the Child. They also have the right to education. Article 28 of the Convention on the Rights of the Child, Principle 7 of the Declaration of the Rights of the Child.

Chapter 28 Death penalty cases
Amnesty International opposes the death penalty in all cases, on grounds that it is the ultimate cruel, inhuman or degrading punishment and violates the right to life. 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 additional safeguards are not, however, a justification for retention of the death penalty.

28.1 Abolition of the death penalty
Amnesty International opposes the death penalty in all cases, on grounds that it is the ultimate cruel, inhuman or degrading punishment and violates the right to life.

Torture and other cruel, inhuman or degrading treatment or punishment are absolutely prohibited, at all times and in all circumstances (see **Chapter 10.4**).

The right to life is fundamental and absolute. Article 3 of the Universal Declaration, Article 6 of the ICCPR, Article 6 of the Convention on the Rights of the Child, Article 4 of the African Charter, Article 1 of the American Declaration, Article 4 of the American Convention, Article 2 of the European Convention. It may never be suspended. Article 4(2) of the ICCPR, Article 27(2) of the American Convention. See **Chapter 31, Fair trial rights during states of emergency**.

International human rights standards encourage abolition of the death penalty. See Article 6(6) of the ICCPR, Articles 4(2) and 4(3) of the American Convention.

The international community has also adopted treaties specifically aiming at abolition of the death penalty. The Second Optional Protocol to the ICCPR, the Protocol to the American Convention on Human Rights to Abolish the Death Penalty and Protocol No. 6 to the European Convention prohibit executions and require the abolition of the death penalty in peacetime. Second Optional Protocol to the

ICCPR, Protocol to the American Convention on Human Rights to Abolish the Death Penalty, Protocol No. 6 to the European Convention.

BOX:
Article 6(6) of the ICCPR:
"Nothing in this article shall be invoked to delay or to prevent the abolition of capital punishment by any State Party to the present Covenant."

Articles 4(2) and 4(3) of the American Convention:
"2. In countries that have not abolished the death penalty, it may be imposed only for the most serious crimes and pursuant to a final judgment rendered by a competent court and in accordance with a law establishing such punishment, enacted prior to the commission of the crime. The application of such punishment shall not be extended to crimes to which it does not presently apply.
"3. The death penalty shall not be re-established in states that have abolished it."
END BOX

International and regional bodies and human rights experts encourage abolition of the death penalty.

> The UN General Assembly has stated that "...the main objective to be pursued in the field of capital punishment is that of progressively restricting the number of offences for which the death penalty may be imposed with a view to the desirability of abolishing this punishment..."[Resolution 32/61, adopted on 8 December 1977, Resolutions and Decisions adopted by the General Assembly, (A/32/45), 1978, at 136]
>
> The Human Rights Committee has stated that Article 6 of the ICCPR "[r]efers generally to abolition in terms which strongly suggest... that abolition is desirable. The Committee concludes that all measures of abolition should be considered as progress in the enjoyment of the right to life..." [Human Rights Committee General Comment 6, para 6.]

In 1997 and 1998 the UN Commission on Human Rights called upon all states that had not yet abolished the death penalty to establish a moratorium on executions with a view to completely abolishing the death penalty. [Resolution 1997/12, Commission on Human Rights, E/CN.4/1997/150; Resolution 1998/8, Commission on Human Rights, Fifty-fourth session, E/CN.4/1998/L.12]

In establishing the International Criminal Tribunals for the former Yugoslavia and for Rwanda, the UN Security Council excluded the death penalty from the punishments which these courts are authorized to impose, even though these courts have jurisdiction over the most heinous crimes, such as genocide, other crimes against humanity or war crimes. [UN Security Council Resolutions 825 of 25 May 1993 and 955 of 8 November 1994, respectively.] Similarly, the ICC Statute does not permit the ICC to impose the death penalty.

28.2 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 at the time the crime was committed. Article 6(2) of the ICCPR, Paragraph 2 of the Death Penalty Safeguards, Article 4(2) of the American Convention; see Article 2(1) of the European Convention.

> The UN Special Rapporteur on extrajudicial, summary or arbitrary executions has stated that in his opinion, Article 6(2) of the ICCPR does not allow for the reinstatement of the death penalty after it has been abolished or for the expansion of the scope of the death penalty. [Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions on his mission to the USA, UN Doc. E/CN.4/1998/68/Add.3, 22 January 1998, p. 3]

A penalty heavier than the one applicable at the time the crime was committed may not be imposed. Article 11 of the Universal Declaration, Article 15 of the ICCPR, Article 9 of the American Convention, Article 7 of the European Convention. See Article 7 of the African Charter. See **Chapter 25.2 What penalties can be imposed?**

However, a person convicted of a crime should benefit when a change of law imposes a lighter penalty for that crime. Article 15(1) of the ICCPR, Article 9 of the American Convention. So a person under sentence of death should benefit from the lighter penalty if the law is reformed at any time after their conviction. Paragraph 2 of the Death Penalty Safeguards.

BOX:
Article 15(1) of the ICCPR:
"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. 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."
END BOX

The American Convention expressly prohibits states from extending the application of the death penalty to any further crimes than those for which it was a penalty when the Convention became applicable to that state. It also prohibits the reintroduction of the death penalty by a state party which has abolished it. Article 4 of the American Convention. [See also, Annual Report of the Inter-American Court, Advisory Opinion OC-3/83, 8 September 1983, OAS/Ser.L/V/III.10 doc.13, 1984]

28.3 Scope of crimes punishable by death
In countries which have not yet abolished the death penalty, sentence of death may be imposed only for the most serious crimes. Article 6(2) of the ICCPR, Article 4(2) of the American Convention, Paragraph 1 of the Death Penalty Safeguards.

> 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". [Human Rights Committee General Comment 6, para. 7]

> Crimes punishable by death should "not go beyond intentional crimes with lethal or other extremely grave consequences". Paragraph 1 of the Death Penalty Safeguards. The UN Special Rapporteur on extrajudicial, summary or arbitrary executions "considers that the term ['intentional'] should be equated to premeditation and should be understood as deliberate intention to kill". [Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions on his mission to the USA, UN Doc. E/CN.4/1998/68/Add.3, 22 January 1998, p. 7]

> The UN Special Rapporteur on extrajudicial, summary or arbitrary executions has stated that "the death penalty should be eliminated for crimes such as economic crimes and drug related offences". [Report of the UN Special Rapporteur on extrajudicial, summary or arbitrary executions, UN Doc: E/CN.4/1996/4, at para. 556]
>
> The Human Rights Committee has stated that making apostasy, illicit sex, embezzlement by officials, theft by force, a third homosexual act or repeated evasion of military service punishable by death is incompatible with Article 6 of the ICCPR, which restricts application of the death penalty to the most serious crimes. [Concluding Observations of the HRC: Sudan, UN Doc. CCPR/C/79/Add.85, 19 November 1997, para.13]
>
> The Human Rights Committee expressed concern about the "excessive number of offences punishable by the death penalty" in a number of states in the USA, the reestablishment of the death penalty in certain states, and stated that it "deplores the recent expansion of the death penalty under federal [US] law." The Committee urged the authorities to revise federal and state law with a view to restricting the number of offences punishable by death strictly to the most serious crimes. [Observations of the HRC: USA, UN Doc. CCPR/C/79/Add.50, 7 April 1995, para.16,31]

The American Convention expressly prohibits the death penalty as a punishment for political offences or related common crimes. Article 4(4) of the American Convention.

28.4 People who may not be executed

International standards restrict the imposition of the death penalty on people in certain categories, including people under the age of 18 at the time the offence was committed, people over the age of 70, pregnant women and new mothers, the mentally impaired and the mentally ill.

28.4.1 Juveniles

People who were under the age of 18 at the time the crime was committed may not be sentenced to death, regardless of their age at the time of trial or sentencing. Article 6(5) of the ICCPR, Article 37(a) of the Convention on the Rights of the Child, paragraph 3 of the Death Penalty Safeguards, Rule 17.2 of The Beijing Rules, Article 4(5) of the American Convention. [Article 6(4) of Additional Protocols I and II to the Geneva Conventions of 1949 prohibit the death penalty being pronounced on people aged less than 18 years at the time the crime was committed.]

> The Inter-American Commission has stated that the prohibition on the execution of children is emerging as a norm of international customary law, in view of the number of states which have ratified the American Convention and ICCPR, and have modified their national legislation in accordance with those treaties. [Resolution No. 3/87 (United States) Case 9647, Annual Report of the Inter-American Commission, 1986-1987, OEA/Ser.L/V/II.71, doc. 9 rev.1, 1987, para. 60. The Commission considered that the USA had violated provisions of the American Convention when it executed two juvenile offenders, even though having signed the Convention it had not yet ratified it.]
>
> The Human Rights Committee deplored provisions in legislation in a number of states in the USA which allow the death penalty as a punishment for people under 18 at the time the crime was committed and the execution of such people. The Committee exhorted the authorities to

ensure that people are not sentenced to death for crimes committed before they were 18. [Observations of the HRC: USA, UN Doc. CCPR/C/79/Add.50, 7 April 1995, para.16]

28.4.2 The elderly
The execution of people over the age of 70 is prohibited by Article 4(5) of the American Convention. Article 4(5) of the American Convention.

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". [ECOSOC Resolution 1989/64, adopted on 24 May 1989, UN Doc: E/1989/INF/7, 127 at 128]

28.4.3 The mentally disabled
The execution of people who are mentally ill is prohibited. Paragraph 3 of the Death Penalty Safeguards. This prohibition includes people who have become insane since being sentenced to death. [See also, Report of the UN Special Rapporteur on extrajudicial, summary or arbitrary executions, UN Doc. A/51/457, at para. 115]

The UN Economic and Social Council has recommended that states eliminate the death penalty "for persons suffering from mental retardation or extremely limited mental competence, whether at the stage of sentence or execution". [ECOSOC Resolution 1989/64, adopted on 24 May 1989, UN Doc: E/1989/INF/7]

The Human Rights Committee expressed regret that "in some cases [in the USA], there appears to have been a lack of protection of those mentally retarded." [Observations of the HRC: USA, UN Doc. CCPR/C/79/Add.50, 7 April 1995, para.16]

28.4.4 Pregnant women and new mothers
The death penalty may not be imposed on pregnant women. Article 6(5) of the ICCPR, Article 4(5) of the American Convention. Nor may it be imposed on "recent mothers". Paragraph 3 of the Death Penalty Safeguards. [See Report of the UN Special rapporteur on extrajudicial, summary or arbitrary executions, (A/51/457), 7 October 1996, at para. 115]

28.5 Strict compliance with all fair trial rights
In view of the irreversible nature of the death penalty, trials in capital cases must scrupulously observe all the international and regional standards protecting the right to a fair trial. All safeguards and due process guarantees set out in international standards applicable during pre-trial, trial and appellate stages must be fully respected. Amnesty International believes that all executions constitute violations of the right to life. Although this view is not universally accepted, international human rights bodies and experts agree that it would be a violation of the right to life to execute a person after an unfair trial.

No one may be deprived of their life arbitrarily. Article 6(1) of the ICCPR, Article 4 of the African Convention, Article 4(1) of the American Convention.

The Human Rights Committee has explained that the prohibition on the arbitrary deprivation of life in Article 6(1) of the ICCPR requires that the law must strictly control and limit the circumstances in which a person may be deprived of life by the state. [Human Rights Committee General Comment 6, para. 3]

> The Human Rights Committee has stated that the imposition of a sentence of death upon conclusion of a trial in which the provisions of the ICCPR had not been respected, which could no longer be remedied by appeal, would constitute a violation of the right to life. [UN Doc. CCPR/C/47/D/282, para.10.6, *Kelly v. Jamaica*, (253/1987), 8 April 1991, Report of the HRC, (A/46/40), 1991, paras.7 and 5.14]

The Human Rights Committee has stated that in death penalty cases, "[t]he procedural guarantees [in the ICCPR] must be observed, including the right to a fair hearing by an independent tribunal, the presumption of innocence, the minimum guarantees for the defence, and the right to review by a higher tribunal. These rights are applicable in addition to the particular right to seek pardon or commutation of the sentence."See Article 6(2) of the ICCPR. [Human Rights Committee General Comment 6, para. 7]

BOX:
Article 6(2) of the ICCPR:
" In countries which have not abolished the death penalty, sentence of death may be imposed only for the most serious crimes in accordance with the law in force at the time of the commission of the crime and not contrary to the provisions of the present Covenant and to the Convention on the Prevention and Punishment of the Crime of Genocide. This penalty can only be carried out pursuant to a final judgement rendered by a competent court."
END BOX

The death penalty may be imposed only when the guilt of the accused person "is based upon clear and convincing evidence leaving no room for an alternative explanation of the facts". Paragraph 4 of the Death Penalty Safeguards. The death penalty "...may only be carried out pursuant to a final judgment 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 ICCPR], 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". Paragraph 5 of the Death Penalty Safeguards

> The UN Special Rapporteur on extrajudicial, summary or arbitrary executions has stated that "proceedings leading to the imposition of capital punishment must conform to the highest standards of independence, competence, objectivity and impartiality of judges and juries, as found in the pertinent international legal instruments. All defendants facing the imposition of capital punishment must benefit from the services of a competent defence counsel at every stage of the proceedings. Defendants must be presumed innocent until their guilt has been proved beyond a reasonable doubt, in strict application of the highest standards for the gathering and assessment of 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 other than those who dealt with the case at the first instance. The defendant's right to seek pardon, commutation of sentence or clemency must also be ensured". [Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, UN Doc. A/51/457, 7 October 1996, at para. 111]

The following sub-sections (**28.5.1** to **28.5.4**) do not repeat all the guarantees for fair trial which apply to everyone accused of a criminal offence, which are described in this manual. They cover only

provisions whose interpretation in death penalty cases has provided extra protection or where additional guarantees apply.

28.5.1 Right to effective counsel

Everyone detained or accused of a criminal offence has the right to counsel during detention, at trial and on appeal. Article 14(3)(d) of the ICCPR, Principle 1 of the Basic Principles on the Role of Lawyers, Article 7(1)(c) of the African Charter, Article 8(2)(d) and (e) of the American Convention, Article 6(3)(c) of the European Convention. See **Chapter 3, The right to legal counsel before trial** and **Chapter 20.3, The right to be defended by counsel.**

A person who faces charges punishable by death, and who chooses not to represent him or herself, must be represented by counsel at all stages of the proceedings.

> The UN Economic and Social Council has stated that a person facing the death penalty should be provided "adequate assistance of counsel at every stage of the proceedings, above and beyond the protection afforded in non-capital cases". [ECOSOC Resolution 1989/64, 24 May 1989, UN Doc: E/1989/INF/7, at 128; see also Death Penalty Safeguards]
>
> The Human Rights Committee has stated that "it is axiomatic that legal assistance should be made available to a convicted prisoner under sentence of death. This applies to all stages of the judicial proceedings [including appeal]". [*Kelly v. Jamaica*, (253/1987), 8 April 1991, Report of the HRC, (A/46/40), 1991, at 241]
>
> The UN Special Rapporteur on extrajudicial, summary or arbitrary executions, has stated that, at all stages, defendants charged with capital offences must benefit from "an adequate provision for State-funded legal aid by competent defence lawyers". [Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, UN Doc: E/CN.4/1996/4, at para. 547]

Capital cases should not proceed unless the accused is assisted by competent and effective counsel.

> In a case where a court proceeded to try, convict and sentence to death an accused whose defence counsel had withdrawn, with the judge apparently rendering assistance to the accused, the Human Rights Committee stated that the accused's right to a fair trial had been violated. The Human Rights Committee held that the case should **not** proceed if the accused was not represented by counsel in capital cases. [*Robinson v. Jamaica*, (223/1987), 30 March 1989, Report of the HRC, (A/ 44/40), 1989, at 241; see *Abdool Saleem Yasseen and Noel Thomas v. Guyana*, 30 March 1998, UN Doc. CCPR/C/62/D/676/1996, para 78, finding violations of Article 14 where one of the accused was not represented for the first four days of a retrial of the case.]

Like all people charged with a criminal offence, a person charged with a capital offence has the right to be represented by counsel of choice at trial and on appeal. If counsel is appointed to represent the accused free of charge, the accused is not entitled to an absolute right of choice. However, in death penalty cases, the Human Rights Committee has expressed the view that the state should give preference to appointing counsel chosen by the accused, including for the appeal.

> The Human Rights Committee stated that the accused in a death penalty case should be represented by counsel of choice, even if it requires adjournment of the hearing. [See *Pinto v. Trinidad and Tobago*, (232/1987), 20 July 1990, Report of the HRC, Vol. II, (A/45/40), 1990, at 69]

The state has a particular obligation in death penalty cases to take measures to ensure that appointed counsel is effective. If the authorities are notified that appointed counsel is not effective, or if counsel's ineffectiveness is manifest, they must cause counsel to perform his or her duties, or replace him or her. [See *Artico Case*, 13 May 1980, European Court, 37 Ser.A 16, para.33]

> In a case where the accused's lawyer had displayed no interest in the case and failed to challenge prosecution evidence at trial and the court appointed the same lawyer for the appeal, despite the accused's request for a different named lawyer, the Human Rights Committee stated that the accused's right to counsel was violated. [See *Pinto v. Trinidad and Tobago*, (232/1987), 20 July 1990, Report of the HRC, Vol. II, (A/45/40), 1990, at 69, *Kelly v. Jamaica*, (253/1987), 8 April 1991, Report of the HRC, (A/46/40), 1991]

> Similarly, in a case where the accused's appointed counsel conceded at the appeal hearing that there was no merit to the appeal, without prior notice or consultation with the accused, the Human Rights Committee found that there was a violation of the accused's rights. The Committee stated that he should have been informed that his state-funded counsel was not going to argue in support of his appeal, so that he could have considered any options remaining open to him. *[Burrell v. Jamaica*, (546/1993), 18 July 1996, UN Doc. CCPR/C/57/D/546/1993, 1996]

28.5.2 Right to adequate time and facilities to prepare a defence

All people charged with a criminal offence have the right to adequate time and facilities to prepare a defence. Article 14(3)(b) of the ICCPR, Article 8(2)(c) of the American Convention, Article 6(3)(b) of the European Convention and paragraph 2(E)(1) of the African Commission Resolution. See **Chapter 8, The right to adequate time and facilities to prepare a defence**.

In death penalty cases, this right is especially critical.

The Human Rights Committee stated that "[i]n cases in which a capital sentence may be pronounced on the accused, it is axiomatic that sufficient time must be granted to the accused and his counsel to prepare the defence for the trial".[*Kelly v. Jamaica*, (253/1987), 8 April 1991, Report of the HRC, (A/46/40), 1991, at 241]

28.5.3 Right to completion of proceedings without undue delay

Proceedings in criminal cases, including investigation, trial and appeal, must be completed without undue delay. 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. See **Chapter 7, The right to trial within a reasonable time or to release from detention,** and **Chapter 19, The right to be tried without undue delay**.

The Human Rights Committee has stated that "in all cases, and in particular in capital cases, the accused is entitled to trial and appeal proceedings without undue delay".

The Human Rights Committee 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 (in violation of Article 9(3) of the ICCPR); holding the accused in detention for 16 months before trial (in violation of Article 9(3) of the ICCPR); and a delay of 31 months between trial and dismissal of the appeal. [*McLawrence v. Jamaica*, UN Doc. CCPR/C/60/D/702/1996, 29 September 1997, para. 5.6]

28.5.4 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 tribunal. Article 14(5) of the ICCPR, Article 8(2)(h) of the American Convention, Article 2 of Protocol 7 to the European Convention, Paragraph 3 of the African Commission Resolution; see Article 7(a) of the African Charter. See **Chapter 26, The right to appeal.**

Anyone sentenced to death has the right to appeal to a court of higher jurisdiction, and steps should be taken to ensure that such appeals shall become mandatory. Paragraph 6 of the Death Penalty Safeguards.

The UN Special Rapporteur on extrajudicial, summary or arbitrary executions has stated that in capital cases "proceedings must guarantee the right of review of both factual and legal aspects of the case by a higher tribunal, composed of judges other than those who dealt with the case at the first instance." [Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, UN Doc. E/CN.4/1997/60, para. 82]

28.6 Right to seek pardon and commutation

Anyone sentenced to death has the right to seek pardon or commutation of their sentence. Article 6(4) of the ICCPR, Paragraph 7 of the Death Penalty Safeguards, Article 4(6) of the American Convention.

BOX

Article 6(4) of the ICCPR:

"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."

Article 4(6) of the American Convention:

"Every person condemned to death shall have the right to apply for amnesty, pardon, or commutation of sentence, which may be granted in all cases. Capital punishment shall not be imposed while such a petition is pending decision by the competent authority."

END BOX

28.7 No executions while appeals or clemency petitions are pending

The death penalty may not be carried out until all rights to appeal have been exhausted, or the time limits for filing such appeals have run, **and** recourse proceedings, including applications to international bodies, have been completed and requests for pardon and commutation have been exhausted.

The death penalty may **only** be carried out **after** a final judgment by a competent court. Article 6(2) of the ICCPR, Paragraphs 5 of the Death Penalty Safeguards, Article 4(2) of the American Convention.

An execution may not be carried out pending any appeal or other recourse procedure or other proceeding relating to pardon or commutation of the sentence. Paragraph 8 of the Death Penalty Safeguards, Article 4(6) of the American Convention; see Articles 14(5) and 6(4) of the ICCPR. In the view of Amnesty International, this provision applies not only to appeals to national courts, but to review by international bodies such as the Human Rights Committee, the Inter-American Commission on Human Rights, the Inter-American Court of Human Rights, the European Commission of Human Rights and the European Court of Human Rights.

> The UN Economic and Social Council called on UN member states in which the death penalty may be carried out "to ensure that officials involved in decisions to carry out an execution are fully informed of the status of appeals and petitions for clemency of the prisoner in question". [ECOSOC Resolution 1996/15, adopted on 23 July 1996]
>
> Further, officials responsible for carrying out an execution should not only be fully informed about any recourse proceedings, but "also should be instructed not to carry out an execution while any appeal or other recourse procedure or other proceeding relating to pardon or commutation of the sentence is still pending", according to the UN Special Rapporteur on extrajudicial, summary or arbitrary executions. [Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, UN Doc: E/CN.4/1996/4, at para.553]

28.8 Adequate time between sentence and execution
States should allow adequate time between sentence and execution for the preparation and completion of appeals, as well as petitions for clemency. [ECOSOC Resolution 1996/15, adopted on 23 July 1996]

The UN Special Rapporteur on extrajudicial, summary or arbitrary executions has recommended a period of at least six months before a death sentence imposed by a court of first instance can be carried out, so as to allow adequate time for the preparation of appeals to a court of higher jurisdiction and petitions for clemency. [Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, UN Doc: E/CN.4/1996/4, at para. 553]

28.9 Conditions of imprisonment for prisoners under sentence of death
Conditions of imprisonment for prisoners 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. (See **Chapter 10, The right to humane conditions of detention and freedom from torture**, and **Chapter 25.5, Conditions of imprisonment**.)

The UN Economic and Social Council has urged states which retain the death penalty to "effectively apply the (UN) Standard Minimum Rules for the Treatment of Prisoners, in order to keep to a minimum the suffering of prisoners under sentence of death and to avoid any exacerbation of such suffering". [ECOSOC Resolution 1996/15, adopted on 23 July 1996]

> In several death penalty cases, the Human Rights Committee has reaffirmed that Article 10 of the ICCPR, obliging states to treat individuals with respect for the inherent dignity of the human person, encompasses, among other things, the duty to provide adequate medical care, basic sanitary facilities, adequate food and recreational facilities for people held under sentence of death. [*Kelly v. Jamaica*, (253/1987), 8 April 1991, Report of the HRC, (A/46/40), 1991, at 241; *Henry and Douglas v. Jamaica*, (571/1994), 25 July 1996, UN Doc. CCPR/C/37/D/571/1994, at para.3.8; *Linton v. Jamaica*, (255/1987), 22 October 1992, Report of the HRC, (A/48/40), part II, 1993]

Notwithstanding national jurisprudence to the contrary, [See, for example, *Pratt and Morgan v. Jamaica*, Judgment of the Lords of the Judicial Committee of the Privy Council of the United Kingdom, 2 November 1993] the Human Rights Committee's current view is that spending a lengthy period of time on death row, in and of itself, does not violate the rights of prisoners. This decision is in view of the fact that the ICCPR does not prohibit the death penalty, that one of the objects and purposes of the ICCPR is to reduce recourse to the death penalty, and concern that setting a maximum time limit would encourage states to carry out executions before the cut-off date. The Committee stated: "The first, and most serious, implication [of holding the length of detention on death row, *per se*, to be in violation of the ICCPR] is that if a State party executes a condemned prisoner after he has spent a certain amount of time on death row, it will not be in violation of its obligations under the Covenant, whereas if it refrains from doing so, it will violate the Covenant." [*Robinson LaVende v. Trinidad and Tobago*, (554/1993), 29 October 1997, UN Doc. CCPR/C/61/D/554/1993, paras 5.3, 5.4] It should be noted that five members of the Human Rights Committee disagreed with this view and issued a separate opinion, stating that the *per se* rule lacks flexibility and instead, each case should be examined "in order to determine whether, in a given case, prolonged detention on death row constitutes cruel, inhuman or degrading treatment or punishment".

> In an earlier case, the Human Rights Committee stated that "[w]hile a period of detention on death row of well over 11 years is certainly a matter of serious concern, it remains the jurisprudence of this Committee that detention for a specific period of time does not amount to a violation of articles 7 and 10(1) [of the ICCPR] in the absence of some further compelling circumstances". [*Johnson v. Jamaica*, (588/1994), 22 March 1996, UN Doc. CCPR/C/56/D/588/1994]

The Human Rights Committee found that notifying two men of a stay of execution just 45 minutes before the time of their scheduled execution, 20 hours after the stay had been granted, constituted cruel and inhuman treatment in violation of Article 7 of the ICCPR. [*Pratt and Morgan v. Jamaica*, (210/1986 and 225/1987), 6 April 1989, Report of the HRC, (A/44/40), 1989, at 222]

Chapter 29 Special courts and military courts
Fair trial rights apply to trials in all courts, including special courts or tribunals, and military courts.

29.1 Special or extraordinary courts or tribunals

Special or extraordinary courts or tribunals have been set up in many countries to try certain offences, generally without following all the procedures of the ordinary court system. Examples of these special or extraordinary courts or tribunals include Robbery and Firearms Tribunals, Special Criminal Courts and revolutionary courts.

Often the procedures in special courts offer fewer guarantees of fair trial than the ordinary courts, and as noted by the Human Rights Committee "quite often the reason for the establishment of such courts is to enable exceptional procedures to be applied which do not comply with normal standards of justice". [Human Rights Committee General Comment 13, para. 4]

The Human Rights Committee has made clear, however, that the provisions of Article 14 of the ICCPR apply to trials in all courts, whether ordinary or special. [Human Rights Committee General Comment 13, para. 4]

The UN Working Group on Arbitrary Detention has stated that: "one of the most serious causes of arbitrary detention is the existence of special courts, military or otherwise, regardless of what they are called. Even if such courts are not in themselves prohibited by the International Covenant on Civil and Political Rights, the Working Group has none the less found by experience that virtually none of them respects the guarantees of the right to a fair trial enshrined in the Universal Declaration of Human Rights and the said Covenant." [Report of the Working Group on Arbitrary Detention, UN Doc. E/CN.4/1996/40, at 26]

> The Human Rights Committee expressed concern about anti-terrorist laws in France which grant jurisdiction to a centralized court with prosecutors who have special powers of arrest and search and which allow detention in police custody for four days (twice the normal period). Under these laws the accused does not have the same rights as in the ordinary courts. In addition, the accused has no right to contact a lawyer during the first 72 hours' detention in police custody and no right of appeal against a decision of the special court. [Concluding Observations of the HRC: France, UN Doc. CCPR/C/79/Add.80, 4 August 1997 para. 23]

> The Inter-American Commission recommended the elimination of special courts trying people charged with terrorist offences, in which the identities of judges and prosecutors were withheld and secret proceedings were conducted to introduce and take testimony from witnesses. [Second Report on the Situation of Human Rights in Colombia, OEA/Ser.L/V/II.84, doc.39, 1993]

Analysis of the fairness of proceedings in a special or extraordinary court generally focuses on: whether the court is established by law; whether the jurisdiction of the court violates the guarantees of non-discrimination and equality; whether the judges are independent of the executive and other authorities in deciding cases; whether the judges are competent and impartial; and whether the procedures in such courts conform to the minimum procedural guarantees of fair trial set out in international standards.

Where special or extraordinary courts fall short of international standards, Amnesty International calls for them to be reformed or abolished. Where it appears that they have been created in order to violate human rights, and do so systematically, Amnesty International calls for their abolition.

29.2 Specialized courts

In many countries specialized courts have been established to try people with special legal status, such as juveniles, or particular categories of offences. The latter include, for example, courts which deal with labour disputes, disputes involving the law of the sea or matrimonial issues.

Specialized courts may not be created to try groups of people for criminal offences 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 principle of non-discrimination. Articles 2, 7 and 10 of the Universal Declaration, Articles 2 and 14 of the ICCPR, Articles 2 and 3 of the African Charter, Articles 1 and 8 of the American Convention, Article 14 of the European Convention. (See **Chapter 11, The right to equality before the law and courts**.)

However, the creation of specialized courts to try certain groups of people on the basis of other categories may be permissible. For example, juvenile courts may try juveniles and military courts may try members of the armed forces for military offences, so long as fair trial guarantees are fully observed.

Military courts – one type of specialized court – raise particular fair trial issues, particularly when they are used to try civilians, or to try military personnel for criminal offences such as human rights violations (see below).

29.3 Right to fair trial in all courts

Most international standards do not prohibit *per se* the establishment of special courts. What is required, however, is that such courts are competent, independent, and impartial, and that they afford applicable judicial guarantees so as to ensure that the proceedings are fair.

The Human Rights Committee has clarified that while the ICCPR does not prohibit trials of civilians in special or military courts, “the trying of civilians by such courts should be very exceptional and take

place under conditions which genuinely afford the full guarantees stipulated in Article 14 [of the ICCPR]". [Human Rights Committee General Comment 13, para.4]

The Basic Principles on the Independence of the Judiciary prohibit the creation of special courts that do not use the duly established procedures of the legal process and displace the jurisdiction of ordinary courts. They guarantee that everyone has the right to be tried by ordinary courts, using established legal procedures. Principle 5 of the UN Basic Principles on the Independence of the Judiciary.

> The European Court held that the European Convention does not guarantee an individual the right to trial in any specific domestic court. It found that two accused who had been convicted by a Special Criminal Court had not been denied their right to trial by an independent and impartial tribunal established by law. [*X and Y v Ireland*, (8299/78), 10 October 1980, 22 DR 51 at 72 -3]

29.4 Jurisdiction established by law

The requirement that the jurisdiction of all courts be established by law (Article 14(1) of the ICCPR, Article 8 of the American Convention, Article XXVI of the American Declaration, Article 6(1) of the European Convention) applies equally to special courts, military courts and *ad hoc* courts or tribunals. [See R. B. Lillich, "Civil Rights" in T. Meron, ed., *Human Rights in International Law: Legal and Policy Issues*, 1984, at p, 141] (See **Chapter 12.2, The right to be heard by a tribunal established by law**.)

The Human Rights Committee has stated that the jurisdiction of special courts should be strictly defined by law. [Concluding Observations of the HRC: Iraq, UN Doc. CCPR/C/79/Add.84, 19 November 1997]

> The Committee expressed concern that in addition to the list of offences which were triable in special courts in Iraq, the Minister of the Interior and the Office of the President had discretionary authority to refer any other cases to these courts. [Concluding Observations of the HRC: Iraq, UN Doc. CCPR/C/79/Add.84, 19 November 1997]

The European Commission has stated that a court or tribunal is considered to have the status of a pre-existing court if its structure and the arrangements governing its actual composition have been pre-determined. [*Crociani et al v. Italy*, (8603/79, 8722/79, 8723/79,8729/79), 18 December 1980, 22 DR 147, at 221]

29.5 Independence and impartiality

As with ordinary courts, a special or extraordinary court must be independent from the executive. Its decision-makers must be impartial. See **Chapter 12, The right to trial by a competent, independent and impartial tribunal established by law**.

> The African Commission found a violation of Article 7(1)(d) of the African Charter where a special tribunal was set up in Nigeria by the Robbery and Firearms (Special Provisions) Act whose judges were mainly people without legal expertise who belonged to the executive branch of government, the same branch that passed the Robbery and Firearms Act. [*Constitutional Rights Project (in respect of Wahab Akamu, G.Adega and others) v. Nigeria*, (60/91)]

In a similar case, the African Commission found that a trial by a special tribunal established by the Civil Disturbances (Special Tribunal) Act violated the African Charter because the tribunal consisted of one judge and four members of the armed forces. The Commission noted that "the tribunal is composed of persons belonging largely to the executive branch of government, the same branch that passed the Civil Disturbances Act." It concluded that "[r]egardless of the character of the individual members of such tribunals, its composition alone creates the appearance, if not actual lack of impartiality. It thus violates Article 7(1)(d) [of the African Charter]." [*The Constitutional Rights Project (in respect of Zamani Lakwot and six others) v. Nigeria*, (87/93), 8th Annual Activity Report of the African Commission on Human and Peoples' Rights, 1994-1995, ACHPR/RPT/8th/Rev.I]

The Inter-American Commission considered that special courts with jurisdiction over terrorism-related charges in Colombia and Peru, in which the identities of prosecutors and judges were not disclosed and witnesses gave evidence in secret, violated principles of justice and guarantees of competence, independence, impartiality and due process set out in the American Convention. [Second Report on the Situation of Human Rights in Colombia, OEA/Ser.L/V/II.84, doc.39, 1993, p. 249 ; Annual Report of the Inter-American Commission, 1996, OEA/Ser.L/V/II.95. doc.7, 1997, pp. 736-737]

29.6 Military courts

Military courts have been established in many countries to try military personnel. In some countries, civilians have also been tried in military courts. Whether trying members of the military or civilians, trials in military courts must afford the accused all guarantees of the right to a fair trial set out in international standards.

Analysis of whether proceedings in a military court are fair often covers issues including whether the judges are competent, independent and impartial; whether the tribunal is free from interference by superiors or outside influence; whether the court has jurisdiction over the accused; and whether the tribunal has the judicial capacity for the proper administration of justice.

29.6.1 Competence, independence and impartiality

The requirement that courts and tribunals be competent, independent and impartial applies to all courts, including military courts and tribunals. See **Chapter 12, The right to trial by a competent, independent and impartial tribunal established by law**.

Judges in military tribunals are often serving members of the military. In some countries military judges have had training in military or civilian law; in others they have not. The main issues in assessing the independence and impartiality of military courts are whether the judges have had appropriate training or qualifications in law and whether, in exercising their duties as judges, they are subordinate to or independent of their superiors.

The Inter-American Commission has stated that replacing the normal jurisdiction of the courts with military justice has generally meant seriously undermining the guarantees to which all accused are entitled, because military judges are less well trained in law than civilian judges. [Annual Report of the Inter-American Commission, 1973, OEA/Ser.L/V/II.32 doc.3 rev.2, 1974, at 34]

> The Inter-American Commission raised concern in 1985 about the independence and impartiality of those who exercised jurisdiction in military courts in Chile, considering that they completely lacked legal training or tenure. [Report on the Situation of Human Rights in Chile, OEA/Ser.L/V/II.66, doc 17 at p. 185, 27 September 1985]

The key question in assessing the independence of military judges is whether they are subordinate to military authority in their role in administering justice. Military judges have been deemed to be independent if they are autonomous of their superiors in their **judicial** capacity, notwithstanding the fact that they have been appointed by their superiors and remain subject to the hierarchical authority of their superiors in all but the administration of justice.

> The Inter-American Commission has stated that military judges, who are often current members of the military, are not independent in some countries, as they are subordinate to superior orders in the administration of justice. [See Report on the Situation of Human Rights in Chile, OEA/Ser.L/V/II.66 Doc.17, 1985, at 183-185]

> The Inter-American Commission stated that a Special Military Court in Peru was not "a competent, independent, and impartial tribunal" since it came under the Ministry of Defence, making it a special court subordinated to an organ of the executive. [Annual Report of the Inter-American Commission, 1994, OEA/Ser.L/V/II.88 Doc.9 rev.1995, 17 February 1995, at 125, (Peru)]

> The European Commission examined the independence of a divisional military tribunal and a military Court of Cassation. The divisional tribunal was composed of a senior judge, a military law officer and six assessors appointed by the government for three years. The Commission found that, although they remained on active service and subject to the authority of their hierarchical superiors in their respective units, when they sat as judges these officers and soldiers were not answerable to anyone in the way they administered justice. The Commission also found that there was nothing to indicate that the judges could be dismissed from their office. It concluded therefore that there was no violation of the right to a trial by an independent and impartial tribunal. [*Sutter v. Switzerland*, (8209/78), 1 March 1979, 16 DR 166]

29.6.2 Trials of military personnel in military courts

Military courts generally exercise jurisdiction over military personnel. Trials of military personnel for military code offences (those which involve military discipline but not crimes under ordinary law) by military courts are not considered incompatible with international standards, as long as guarantees for a fair trial are fully respected.

Trials of military personnel by military courts for ordinary crimes and human rights violations, however, have often not been impartial, and have resulted in impunity for the offender. Both the Human Rights Committee and the Inter-American Commission have recommended that such offences be tried in ordinary courts.

> The Inter-American Commission has stated that the extension of military jurisdiction to include common crimes solely on the ground that such crimes have been committed by military personnel does not offer the guarantees of an independent and impartial court as laid

down in Article 8(1) of the American Convention. [Annual Report of the Inter-American Commission, 1993, OEA/Ser.L/V/II.85 doc.9 rev.1994, at 462, Nicaragua; Report on the Situation of Human Rights in Chile, OAS/Ser.L/V/II.66, doc.A, 1995, p.183]

The UN Special Rapporteur on extrajudicial, summary or arbitrary 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. By contrast, the Special Rapporteur welcomed jurisprudence in Brazil which established that cases involving crimes against children are to be tried by civilian tribunals, even if the alleged perpetrators are military officers. [Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, UN Doc. A/51/457, at para 125, 7 October 1996]

The Human Rights Committee called on Lebanon to transfer competence of military courts in all cases concerning the violation of human rights by members of the military to ordinary courts. [UN Doc. CCPR/C/79/Add.77, para.131]

The Inter-American Commission called on Colombia "to ensure that cases of human rights violations are not tried in the military justice system". [Annual Report of the Inter-American Commission, 1996, OEA/Ser.L/V/II.95, doc.7, 1997]

International standards specifically prohibit trials in military or special courts of members of the security forces or other officials accused of participating in "disappearances". Article 16 of the UN Declaration on Disappearance, Article IX of The Inter-American Convention on Disappearance.

BOX:
Article 16 of the UN Declaration on Disappearance:
"Persons alleged to have committed any of the acts referred to in article 4, paragraph 1, above, [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."
END BOX

29.6.3 Trials of civilians by military courts
In many countries, military courts have jurisdiction to try civilians charged with committing offences on military property. In some countries, civilians charged with crimes against state security are tried in military courts.

The practice of trying civilians in military courts, while not expressly prohibited by international standards, raises fair trial issues. Both the Human Rights Committee and the Inter-American Commission have called for the removal of military court jurisdiction over civilians.

The Human Rights Committee has stated that "[i]n some countries such military and special courts do not afford the strict guarantees of the proper administration of justice in accordance with the requirements of article 14 which are essential for the effective protection of human rights." [Human Rights Committee General Comment 13, para. 4]

The Human Rights Committee called on Lebanon to transfer the competence of military courts in all trials concerning civilians to the ordinary courts. [UN Doc. CCPR/C/79/Add.77, April 1997, at para 13]

In 1981 the Inter-American Commission recommended that trials of civilians in military courts in Colombia should either be eliminated or limited to crimes that truly affect state security. [Inter-American Commission, Report on the Situation of Human Rights in Colombia, OEA/Ser.L/V/II.53 doc.22, 30 June 1981, at 222] In 1993, the Commission concluded that "the justice system must be removed from under the influence of military justice ". [Second Report on the Situation of Human Rights in Colombia, OEA/ Ser.L/V/II.84, doc 39, 1993, p. 108]

In 1985 the Inter-American Commission stated that in Chile the continuing expansion of the military courts' jurisdiction over civilians and members of the security forces accused of common crimes was gradually eroding the jurisdiction of the ordinary courts and adversely affected the exercise of the right to a fair trial. [Report on the Situation of Human Rights in Chile, OEA/Ser.L/V/II.66, doc.A, 1985, p.183]

The Inter-American Commission stated that placing civilians under the jurisdiction of the military courts is contrary to Articles 8 and 25 of the Inter-American Convention and that military courts are special and purely functional courts designed to maintain discipline in the military and police and ought therefore to apply exclusively to those forces. [Annual Report of the Inter-American Commission, 1993, OEA/Ser.L/V/II.85 doc.9 rev.1994, at 507, (Peru)]

Chapter 30 The right to compensation for miscarriages of justice
People who have been convicted as a result of a miscarriage of justice have the right to reparation.

30.1 The right to compensation for miscarriages of justice
Victims of miscarriages of justice have the right to compensation from the state. Article 14(6) of the ICCPR, Article 10 of the American Convention, Article 3 of Protocol 7 to the European Convention, Article 75 of the ICC Statute. This right is distinct from the right to compensation for unlawful detention (see **Chapter 6.5 Right to reparation for unlawful arrest or detention)**.

BOX:
Article 14(6) of the ICCPR:
"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."

Article 10 of the American Convention:
"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."

END BOX

30.2 Miscarriages of justice
A miscarriage of justice is "some serious failure in the judicial process involving grave prejudice to the convicted person". [Council of Europe, Explanatory report on Protocol No. 7 to the Convention for the Protection of Human Rights and Fundamental Freedoms, 1985]

According to Article 14(6) of the ICCPR and Article 3 of Protocol 7 to the European Convention, in order to qualify for such compensation, the person must have been:

a. finally convicted of a criminal offence (including petty offences).
A conviction is considered to be final when no further judicial reviews or appeals are available; such remedies have been exhausted or their time limits have passed.[D.J. Harris, M. O'Boyle, C. Warbrick, *Law of the European Convention on Human Rights*, Butterworths (1995) at 586]

and b. subjected to punishment as a result of the conviction.
The punishment may be a sentence of imprisonment or any other type of punishment.

and c. 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.

> Under these standards states are not obliged to pay compensation if it is proved that the untimely disclosure of information was attributable in whole or part to the accused. The burden of proving this rests with the state.

Article 14(6) of the ICCPR, Article 3 of Protocol 7 to the European Convention.

These standards do not expressly require a state to pay compensation if a charge has been dismissed or an accused person is acquitted by a trial court or by a higher court on appeal. However, under some national systems compensation is payable in such circumstances.

The requirement that compensation is to be granted "according to law" means that states must enact laws which provide compensation to victims of miscarriages of justice. [Human Rights Committee General Comment 13, para. 18] 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 governing compensation for miscarriages of justice. The state remains bound by international standards.

In the event that the miscarriage of justice has resulted from a violation of human rights, Amnesty International believes that the victim, in addition to compensation, has rights to other forms of reparation which may include restitution, rehabilitation, satisfaction and guarantees of non-repetition. [See Draft Basic Principles and Guidelines on the Right to Reparation for Victims of [Gross] Violations of Human Rights and International Humanitarian Law, UN doc.: E/CN.4/1997/104]

See also **Chapter 6.5, Right to reparation for unlawful arrest or detention.**

Chapter 31 Fair trial rights during states of emergency
Some human rights are absolute and may never, in any circumstances, be suspended. However, states may suspend certain fair trial rights in emergencies under the terms of several international human rights treaties.

31. 1 Derogation
Some human rights may never be suspended in any circumstances. However, several international human rights treaties allow states to derogate from (suspend or restrict) certain human rights guarantees in narrowly defined circumstances, but only to the extent strictly required by the situation. Such derogation clauses recognize the right of states to avoid exceptional, irreparable damage resulting from war, unrest or natural catastrophes. In practice, however, derogation clauses have often been misused to illegitimately deny people their rights under the cloak of a threat to national security.

In proclaiming a state of emergency, a government is still bound by the rule of law and should not become a law unto itself. Too often governments ignore the strict limits laid down in national and international law on the circumstances in which a state of emergency can be proclaimed, the procedural formalities and the permissible scope of emergency powers. Some of the worst violations of human rights occur frequently during a state of emergency.

Among the rights which may be suspended under certain human rights treaties are some fair trial guarantees. Derogation must not, however, conflict with the state's other international law obligations, including humanitarian law treaties which guarantee the right to fair trial during armed conflict -- the supreme emergency facing the nation (see **31.4.2**, below). Derogation clauses also contain important procedural requirements which must be satisfied.

Under the ICCPR, states may suspend certain human rights obligations in times of a public emergency which threatens the life of the nation. Article 4 of the ICCPR allows a government to suspend certain human rights as long as:
a) the exigencies of the situation strictly require such a suspension;
b) the suspension does not conflict with the nation's other international obligations;
and c) the state of emergency is officially proclaimed and the government immediately informs the UN Secretary-General about what rights have been suspended and why.
The only rights that are not subject to suspension are those specified in Article 4 (see **31.3** below), which does not specifically include fair trial rights, but may imply those rights. Article 4 of the ICCPR. [*The administration of justice and the Human Rights of Detainees, The right to a fair trial,* S. Chernichenko and W. Treat, UN Doc. E/CN.4/Sub.2/1994/24 (1994), para.128]

> The Human Rights Committee has observed: "If States parties decide in circumstances of public emergency as contemplated by article 4 [of the ICCPR] to derogate from normal [fair trial] procedures required under article 14 [of the ICCPR], they should ensure that such derogations do not exceed those strictly required by the exigencies of the actual situation, and respect the other conditions in paragraph 1 of article 14." [UN Doc.A/39/40, (1984) page 144, para 4]
>
> More recently, the Human Rights Committee implied that the fair trial provisions of the ICCPR are non-derogable, stating that: "a State may not reserve the right . . . to arbitrarily arrest and detain persons, . . . to presume a person guilty unless he proves his innocence, . . . And while reservations to particular clauses of Article 14 may be acceptable, a general reservation to the right to a fair trial would not be." [UN Doc. CCPR/C/21/Rev.1/Add.6 (1994)]

The Human Rights Committee has gradually evinced, through its comments on the periodic reports of states on implementation of the ICCPR and its conclusions on individual cases, the view that some of the core fair trial rights in Article 14(1) and the right to *habeas corpus* should be considered non-derogable.

The African Charter contains no emergency clause, and therefore allows no derogation from the rights it enshrines. The American Convention allows derogation in times of "war, public danger, or other emergency that threatens the independence or security of a State Party", but extends non-derogable status to "judicial guarantees essential for the protection of [non-derogable] rights" (see **31.3.1** below). The European Convention allows derogation in time of war or other public emergency threatening the life of the nation. Each treaty contains a different catalogue of rights which may never be suspended (see **31.3**, below).

BOX:
Article 4 of the ICCPR:
"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 I 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."
END BOX

Some human rights, such as the right to life and the right to freedom from torture and other cruel, inhuman or degrading treatment or punishment, may never be suspended in any circumstances (see **31.3** below). These non-derogable rights include some – but not all – guarantees of a fair trial.

There is a developing international consensus that *habeas corpus* and *amparo* should be considered to be non-derogable. The UN Commission on Human Rights has called on all states "to establish a procedure such as *habeas corpus* or a similar procedure as a personal right not subject to derogation, including during states of emergency." [Commission Resolution 1994/32] The Inter-American Court has ruled that *habeas corpus* and *amparo* are non-derogable (see below).

It is precisely in times of national crisis that states are most likely to trample on the rights of their citizens. The declaration of an emergency generally lies exclusively with the executive, which often has the power to introduce emergency orders or regulations without reference to the normal judicial process. Wider powers of arrest and detention and special tribunals and summary trial procedures are often introduced. Amnesty International believes that guarantees of a fair trial are vital to the protection of human rights during states of emergency, and that therefore they should never be suspended. It is also all the more important during a state of emergency that the judiciary remain independent and enjoy unhindered authority to act according to national and international law.

31.2 Necessity and proportionality

Any suspension of fair trial rights by a state must be strictly required by the situation. The principle of proportionality requires that the suspension of obligations must be reasonable in light of what is necessary to address an emergency threatening the life of the nation. It also requires that the necessity of the derogation must be reviewed at regular intervals by the legislative and executive branches.

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". [Manfred Nowak, *UN Covenant on Civil and Political Rights: CCPR Commentary*, NP Engel, 1993, at 84]

The European Court has held 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 on human rights to solve the problem. In addition, the measure must be likely to contribute to the solution of the problem. [*Lawless v. Ireland*, A 3 (1961)]

> In a case where the government of the United Kingdom(UK) had withdrawn its notice of derogation in Northern Ireland, but continued to hold people in detention without bringing them promptly before a judge or other judicial authority, on the ground that this measure was necessitated by the situation in Northern Ireland, the European Court held that detainees' rights had been violated. [*Brogan and others. v. United Kingdom*, 29 November 1988, 145-b Ser. A 30 -34, paras 55-62] Following this judgment, the UK Government submitted another notice of derogation, stating that it was necessary because of "the overriding need to bring terrorists to justice". This justification was challenged unsuccessfully, on the grounds, *inter alia*, that the lack of judicial control over detention was not strictly required by the exigencies of the situation. [*Brannigan and McBride v. United Kingdom*, 26 May 1993, A 258-b (1993) at 55] (Amnesty International had 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.)

> The Inter-American Court has stated that any action which goes beyond what is strictly required by the situation "would also be unlawful notwithstanding the existence of the emergency situation". [Annual Report of the Inter-American Court, 1987, OEA/Ser.L/V/III/doc.13 rev.1987, at 28]

31.2.1 Is there a state of emergency?

Under international law a state of emergency can only be declared 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.

By definition, a state of emergency is a temporary legal response to such a threat. A perpetual state of emergency is a contradiction in terms. Unfortunately, a state of emergency sometimes becomes virtually permanent because it is proclaimed once and never lifted, or repeatedly renewed, or because special measures are entrenched in ordinary laws which survive after the emergency ends.

The European Court has held, however, that states parties to the European Convention have a "wide margin of appreciation" in deciding whether there is a state of public emergency threatening the life of the nation.

> The European Court has stated: "It falls in the first place to each Contracting State, with its responsibility for 'the life of [its] nation', to determine whether that life is threatened by a 'public emergency' and, if so, how far it is necessary to go in attempting to overcome the emergency. By reason of their direct and continuous contact with the pressing needs of the moment, the national authorities are in principle in a better position than the international judge to decide both on the presence of such an emergency and on the nature and scope of derogations necessary to avert it. In this matter Article 15(1) [of the European Convention] leaves those authorities a wide margin of appreciation". [*Ireland v. United Kingdom,* 18 January 1978, A25 para 207; see also *Brannigan and McBride v. United Kingdom,* 26 May 1993, A 258-b, at 49 para. 43]

Despite this "wide margin of appreciation", the European Commission and Court do assess whether the declaration of a state of emergency is reasonable.

> The European Commission has stated that it makes its own assessment of whether or not there is a public emergency, "albeit [a] limited [one]". [*Brannigan and McBride v. United Kingdom,* 26 May 1993, A 258-b (1993) at 80 para. 45]

31.3 Rights that may never be restricted

It is well established in human rights treaties and in customary international law that some rights may never be suspended under any circumstances. Some of these are particularly relevant to a fair trial, such as the right to life, the right to freedom from torture and other cruel, inhuman and degrading treatment or punishment, and the right not to be prosecuted for an offence that was not a crime at the time it was committed.

Under the ICCPR, the following may never be suspended: the right to life (Article 6); the prohibition of torture (Article 7); the prohibition of slavery and servitude (Article 8, paragraphs 1 and 2); the prohibition of detention for debt (Article 11); the prohibition of retroactive criminal laws (Article 15);

the recognition of legal personality (Article 16); and freedom of thought, conscience, religion and belief (Article 18). Article 4(2) of the ICCPR. Any suspension of rights must not involve discrimination on grounds of race, colour, sex, language, religion or social origin.

The European Convention contains a list of non-derogable rights comprising the prohibition of torture, slavery, servitude and retroactive criminal laws, and the right to life (except in respect of deaths resulting from lawful acts of war). Article 15 of the European Convention.

The American Convention contains a catalogue of non-derogable rights that, in addition to those in Article 4(2) of the ICCPR, includes the right to participate in government, rights of the child and the family, rights to a name and nationality and judicial guarantees essential for the protection of non-derogable rights. Article 27 of the American Convention.

31.3.1 Judicial guarantees under the Inter-American system

Although the American Convention does not expressly list all fair trial rights as non-derogable, Article 27(2) of the American Convention prohibits suspension of the judicial guarantees essential for the protection of non-derogable rights such as the right to life and to humane treatment. Article 27(2) of the American Convention.

BOX
Article 27 of the American Convention:
"1. In time of war, public danger, or other emergency that threatens the independence or security of a State Party, it may take measures derogating from its obligations under the present Convention to the extent and for the period of time strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law and do not involve discrimination on the ground of race, color, sex, language, religion, or social origin.

2.The foregoing provision does not authorize any suspension of the following articles: Article 3 (Right to Juridical Personality), Article 4 (Right to Life), Article 5 (Right to Humane Treatment), Article 6 (Freedom from Slavery), Article 9 (Freedom from Ex Post Facto Laws), Article 12 (Freedom of Conscience and Religion), Article 17 (Rights of the Family), Article 18 (Right to a Name), Article 19 (Rights of the Child), Article 20 (Right to Nationality), and Article 23 (Right to Participate in Government), or of the judicial guarantees essential for the protection of such rights."
END BOX

These "judicial guarantees"which may not be suspended have been defined by the Inter-American Court as guarantees "designed to protect, to ensure or to assert the entitlement to a [non-derogable] right or the exercise thereof." The determination as to what judicial remedies are essential for the protection of rights which may not be suspended "will differ depending on the rights that are at stake"."The guarantees must not only be essential but also judicial...Implicit in this conception is the active involvement of an independent and impartial judicial body having the power to pass on the lawfulness of measures adopted in a state of emergency". [Inter-American Court, Advisory Opinion OC-8/87, 30 January 1987, *"Habeas Corpus* in Emergency Situations", at 25, 26] The Court also stated that these "judicial guarantees should be exercised within the framework and the principles of

due process of law, expressed in Article 8 of the Convention". [*Judicial Guarantees in States of Emergency*, Advisory Opinion OC-9/87, 6 October 1987, OAS/Ser.L/V/III.19 doc.13, 1988]

The "judicial guarantees" include the right to *habeas corpus* and *amparo*.

> The Inter-American Court has stated that while *habeas corpus* is designed mainly to protect the derogable right to liberty, it has become an essential instrument for the protection of prisoners' non-derogable rights to life and to freedom from torture. [Inter-American Court of Human Rights, Advisory Opinion OC-8/87, 30 January 1987, "*Habeas Corpus* in Emergency Situations", at 27] The Court therefore held that the right to the remedies of *habeas corpus* and *amparo* may never be suspended since they are "among those judicial remedies that are essential for the protection of various rights whose derogation is prohibited by Article 27(2)". [Inter-American Court of Human Rights, Advisory Opinion OC-8/87, 30 January 1987, "*Habeas Corpus* in Emergency Situations", at 29]

31.4 Standards that do not allow suspension of fair trial rights
A number of international standards relevant to the right to fair trial do not allow suspension of any fair trial guarantees.

31.4.1 Human rights treaties
Several human rights treaties do not allow suspension of the rights they recognize. For example, there is no derogation from fair trial rights guaranteed by the Convention against Torture, the Convention on the Rights of the Child, the Convention on the Elimination of All Forms of Discrimination against Women, the International Convention on the Elimination of All Forms of Racial Discrimination and the African Charter.

The Convention against Torture states: "No exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture". Article 2(2) of the Convention against Torture. Under this treaty, the accused person possesses a non-derogable right to be free from torture at all times during the criminal process, including interrogation, detention, trial, sentencing and punishment. Accordingly, evidence obtained as a result of torture may never be admitted, except in proceedings against alleged perpetrators. [*The administration of justice and the Human Rights of Detainees, The right to a fair trial*, S. Chernichenko and W. Treat, UN Doc. E/CN.4/Sub.2/1994/24 (1994), para. 132] See **Chapter 10.4 Freedom from torture and ill-treatment** and **Chapter 17, Exclusion of evidence elicited as a result of torture or other compulsion**.

The African Charter does not allow for derogation from any of its provisions, including fair trial guarantees, under any circumstances. The African Commission on Human and Peoples' Rights has held that in an emergency situation, the government has a continuing responsibility to "secure the safety and liberty of its citizens". A national emergency does not allow the suspension of any of the rights the government is obliged to secure according to its treaty obligations. [(74/92), Ninth Annual Activity Report of the African Commission on Human and Peoples' Rights, 1995/96, AHG/207, Annex VIII] African Charter.

31.4.2 Non-treaty standards

Fair trial rights are also protected by a wide range of international non-treaty standards, such as the UDHR, 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. These standards represent the consensus of the international community on good principle and practice. They do not recognize the possibility that lower standards might be acceptable in times of an emergency.

31.4.3 Humanitarian law

The Geneva Conventions and their two Additional Protocols, which apply during armed conflict, do not allow derogation. As a result, during international and non-international armed conflicts, fair trial rights under humanitarian law are in force. See **Chapter 32, Fair trial rights in armed conflict.**

The four Geneva Conventions of 1949 and Additional Protocol I apply in international armed conflicts. Article 75 of Additional Protocol I provides fundamental fair trial guarantees for any person detained for actions related to an international armed conflict. A person may not be found guilty of a penal offence related to the armed conflict except by a court "respecting the generally recognized principles of regular judicial procedure".

Common Article 3 of the Geneva Conventions and Additional Protocol II apply when the armed conflict is not international. Common Article 3, which concerns people taking no active part in hostilities, prohibits the passing of sentences and the carrying out of executions without previous judgment by a regularly constituted court "affording all the judicial guarantees which are recognized as indispensable by civilized peoples". Since it allows no derogation from this provision, the right to these judicial guarantees during a non-international armed conflict is an inalienable right under humanitarian law.

Common Article 3 is regarded as customary law which all members of the international community must abide by, whether or not they are bound by treaty.

The Geneva Conventions guarantee protection under exceptional circumstances, but the humanitarian considerations that lie behind them are equally valid in times of peace. [*Seguridad del Estado, Derecho Humanitario y Derechos Humanos*, Informe Final, Comité Internacional de la Cruz Roja, Instituto Interamericano de Derechos Humanos, San José, 1984, at 61] The UN Special Rapporteur on states of siege or emergency has argued that since the right to a fair trial may not be suspended under humanitarian law, it should be considered non-derogable at all times, on the grounds that it would be "paradoxical if the guarantees in peace-time were weaker than those in war-time". [Special Rapporteur on states of siege or emergency, *Study of the implications for human rights of recent developments concerning situations known as states of siege or emergency*, UN Doc. E/CN.4/Sub.2/1982/15, at 20]

31.5 Compliance with international obligations

Any suspension of the rights recognized in the ICCPR, the American Convention and the European Convention must be consistent with the state party's other obligations under international law, including humanitarian law. This means that when the Geneva Conventions and their Additional Protocols apply - during international and non-international armed conflict - the right to a fair trial under humanitarian law is in force. This also means that if the state is party to other human rights

treaties which provide more extensive protection of non-derogable rights, these other obligations must be respected. To the extent that customary law imposes non-derogable obligations, those also prevail over any power under the treaty to derogate.

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 international wars and internal conflict, including civil wars.

32.1 International humanitarian law

International humanitarian law governs conduct during armed conflict. The safeguards set forth in the four Geneva Conventions of 1949 and their Additional Protocols protect various categories of people, defined as protected persons, in specified circumstances. The safeguards include guarantees of a fair trial for people charged with criminal offences.

If the armed conflict is international in character, prisoners of war are protected under the Third Geneva Convention and civilians are protected under the Fourth Geneva Convention. The safeguards in Additional Protocol I of 1977 apply to “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.

In non-international armed conflicts, including civil wars, the safeguards in Article 3 common to the four Geneva Conventions (“common Article 3”) and in Additional Protocol II apply. The principles in common Article 3 are now considered to apply at all times.

Fair trial rights under international humanitarian law must be respected in all circumstances - 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, which means that those responsible must be tried by the state where

they are found or be extradited to another state for trial, or transferred to an international criminal court.

Because fair trial guarantees under humanitarian law apply only in specified circumstances and to specific classes of people, 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 (see below).

32.1.1 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 Additional Protocol I. 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. [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, which are found in Articles 89 to 97 of the Third Geneva Convention.]

Provisions guaranteeing a fair trial to civilian residents in occupied territory are spelled out 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.

32.1.2 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 Additional 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".

Additional Protocol II has a more limited scope. It applies to armed conflicts involving "dissident armed forces or other organized armed groups" which exercise such control over territory "as to enable them to carry out sustained and concerted military operations and to implement this Protocol". Additional Protocol II does not, 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". See also **Chapter 31, Fair trial rights during states of emergency**.

32.1.3 Non-discrimination

Humanitarian law contains two types of non-discrimination provision relevant to trials. People held by one party to the 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. [However, they may be subjected to disciplinary punishments in such cases. Third Geneva Convention, Art. 82, para. 2]. 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. Article 102 of the Third Geneva Convention.

In addition, discriminatory treatment is prohibited 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, whether the relevant conflict is international or non-international. Article 75(1) of Additional Protocol I, Article 2(1) of Additional Protocol II respectively.

32.1.4 Duration of protection

Humanitarian law fair trial provisions apply not only during armed conflict, but also in certain cases after hostilities have ceased. The guarantee of the right to fair trial in Additional 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". Article 75(6) of Additional 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 provisions guaranteeing fair trial. 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". Article 6 of the Fourth Geneva Convention.

The guarantee of the right to fair trial in Article 6 of Additional 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.

32.1.5 Fair trial rights

When there is no express provision concerning a particular aspect of the right to fair trial in a humanitarian law treaty, that does not mean that 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 described in this manual, and they specify only the minimum requirements to be respected in all circumstances.

BOX:

Common Article 3 of the Geneva Conventions (non-international 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...."

Article 75(4) of Additional Protocol I (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...."

Art 6(2) of Additional Protocol II (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..."
END BOX

During international armed conflicts, Article 75(4) of Additional 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 Additional 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".

The right to fair trial in non-international armed conflict is similarly broadly defined. Common Article 3 states that trials must afford "all the judicial guarantees which are recognized as indispensable by civilized peoples". Article 6(2) of Additional Protocol II requires that the court offer "the essential guarantees of independence and impartiality" and contains a short, but non-exhaustive, list of guarantees.

32.2 Before the trial hearing

32.2.1 Notification
Anyone deprived of their liberty or accused of a criminal charge in connection with an international armed conflict has certain rights to information.

Notification of rights
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". Article 105, paragraph 1 of the Third Geneva Convention.

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. Article 75(3) of Additional Protocol I.

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". Article 75(4)(a) of Additional Protocol I.

A prisoner of war and his or her counsel must be informed "in good time before the opening of the trial" of the "[p]articulars of the charge or charges . . . in a language which he understands". Article 105, paragraph 1 of the Third Geneva Convention.

Civilians in occupied territory charged with a criminal offence by the Occupying Power "shall be promptly informed, in writing, in a language which they understand, of the particulars of the charges preferred against them". Article 71(2) of Fourth Geneva Convention.

Right to have family and friends notified
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 of 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. Article 71, paragraphs 2 and 3, of the Fourth Geneva Convention. In addition, although Article 76 of the Fourth Geneva Convention does not provide for access to families and friends, it guarantees 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..." Article 76, paragraph 6 of the Fourth Geneva Convention.

32.2.2 Presumption of innocence
In both international and non-international conflicts, the presumption of innocence must be respected.This right applies at all stages of proceedings until judgment. In both international and non-international conflicts, "anyone charged with an offence is presumed innocent until proved guilty according to law".Article 75(4)(d) of Additional Protocol I, Article 6(2)(a) of Additional Protocol II.

32.2.3 Right to be free from compulsion to confess
In international conflicts, "no one shall be compelled to testify against himself or to confess guilt". Article 75(4)(f) of Additional Protocol I. "No moral or physical coercion may be exerted on a prisoner of war in order to induce him to admit himself guilty of the act of which he is accused". Article 99 of the Third Geneva Convention. In non-international conflicts, "no one shall be compelled to testify against himself or to confess guilt". Article 6(2)(f) of Additional Protocol II.

32.3 Rights in pre-trial detention

Presumption of release before trial
Pre-trial confinement 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". Article 103, paragraph 1 of the Third Geneva Convention.

Right to be free from torture and ill-treatment
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". Article 130 of the Third Geneva Convention. Committing such acts on a civilian in occupied territory is a grave breach of the Fourth Geneva Convention. Article 147 of the Fourth Geneva Convention.

Prisoners of war may not be subjected to "corporal punishments, imprisonment in premises without daylight and, in general, any form of torture or cruelty". Article 87, paragraph 3, of the Third Geneva Convention.

Right to medical examination and treatment
Civilians who have been detained on criminal charges by the Occupying Power "shall receive the medical attention required by their state of health". Article 76, paragraph 2, of the Fourth Geneva Convention.

Rights to make complaints about conditions of detention
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. Article 78 of the Third Geneva Convention. If the conditions amount to torture or other cruel, inhuman and degrading treatment, the detention itself may be unlawful.

Right of access to family and outside world
Prisoners of war have certain limited rights to communicate with the outside world, directly and through the Protecting Power.Article 103, paragraph 3, 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". Article 103, paragraph 3, of the Third Geneva Convention

32.3.1 Women in detention
Women in detention during international armed conflicts are entitled to special protection. Article 76(1) of Additional Protocol 1. Women should generally be held separately from men and should be under the supervision of women. However, where possible, detained families should be held together. Article 75(5) of Additional Protocol 1.

BOX
Article 75(5) of Additional Protocol I:
"Women whose liberty has been restricted for reasons related to the armed conflict shall be held in quarters separated from men's quarters. They shall be under the immediate supervision of women. Nevertheless, in cases where families are detained or interned, they shall, whenever possible, be held in the same place and accommodated as family units".
END BOX

Women prisoners of war "undergoing disciplinary punishment shall be confined in separate quarters from male prisoners of war and shall be under the immediate supervision of women". Article 97 of the

Third Geneva Convention. This provision also applies to women prisoners of war “whilst in confinement awaiting trial”. Article 103, paragraph 3, of the Third Geneva Convention.

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”. Article 76, paragraph 4, of the Fourth Geneva Convention.

32.3.2 Children in detention

Children are entitled to special protection during international armed conflicts. Articles 77(1) to (3) and (5) of Additional Protocol 1. In addition, “[p]roper regard shall be paid to the special treatment due to minors” who have been detained by the Occupying Power. Article 76, paragraph 5 of the Fourth Geneva Convention. Except where families are accommodated together, children should be held in quarters separate from adults. Article 77(4) of Additional Protocol 1.

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 Additional Protocol 1, which requires “an impartial and regularly constituted court”.Article 75(4) of Additional Protocol 1. Courts trying prisoners of war must be independent and impartial. Prisoners of war must be tried by military courts, unless members of the armed forces of the Detaining Power would be tried for the same crimes in civilian courts. Article 84 of the Third Geneva Convention.

BOX:
Article 84 of the Third Geneva Convention:
"...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...."
END BOX

The guarantees of competence, independence and impartiality of courts trying civilians in occupied territory are limited. 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”. Article 64, paragraph 1, of the Fourth Geneva Convention.

There is some, limited 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. Article 54 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”. Article 64, paragraph 2, of the Fourth Geneva Convention. 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. Article 66 of the Fourth Geneva Convention.

For non-international conflicts, "[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". Article 6(2) of Additional Protocol II.

32.4.2 Trial within a reasonable time

Prisoners of war are entitled to prompt trials. "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."Article 103, paragraph 1, of the Third Geneva Convention. Civilians in occupied territory being prosecuted by the Occupying Power "shall be brought to trial as rapidly as possible". Article 71, paragraph 2, of the Fourth Geneva Convention.

32.4.3 Defence rights

Right to defend oneself

The right to defend oneself is guaranteed by Additional Protocol 1 (international armed conflicts), which requires that "the procedure . . . shall afford the accused before and during his trial all necessary rights and means of defence". Article 75(4)(a) of Additional Protocol 1.

"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."Article 99 of the Third Geneva Convention.

For civilians in occupied territory, the Fourth Geneva Convention guarantees "the right to present evidence necessary to their defence", and in particular, the right to call witnesses. Article 72 of the Fourth Geneva Convention.

For non-international conflicts, Additional Protocol II provides that the procedure "shall afford the accused before and during his trial all necessary rights and means of defence". Article 6(2)(a) of Additional Protocol II.

BOX:
Article 75(4)(a) of Additional Protocol I (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;"

Article 6(2)(a) of Additional Protocol II (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;"
END BOX

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”. Article 75(4)(e) of Additional Protocol 1, Article 6(2)(e) of Additional Protocol II.

Right to counsel
A prisoner of war facing a criminal charge 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”. Article 105 of the Third Geneva Convention.

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”. Article 105 of the Third Geneva Convention.

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”. Article 75(4)(g) of Additional Protocol 1.

A prisoner of war charged with a crime “shall be entitled . . . to the calling of witnesses”. Article 105, paragraph 1 of the Third 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”. Article 105, paragraph 1, of the Third Geneva Convention.

Right to public trial and judgment
In international conflicts, “anyone prosecuted for an offence shall have the right to have the judgement pronounced publicly”. Article 75(4)(I) of Additional Protocol 1.

Although the Third Geneva Convention does not expressly provide for a public trial for prisoners of war, it does require that representatives of the Protecting Power should be able to attend, unless, exceptionally, this is held *in camera* in the interest of state security. Article 105 of the Third Geneva Convention.The judgment and sentence, and information about any right to appeal, must be immediately reported to the Protecting Power, to the prisoner’s representative and, in a language he or she understands, to the prisoner of war. Article 107 of the Third Geneva Convention.

Right to appeal
Prisoners of war have the same right of appeal as members of the armed forces of the Detaining Power and they must be informed of that right. Article 106 of the Third Geneva Convention.

Although Additional Protocol 1 does not guarantee the right of appeal, 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”. Article 75(4)(j) of Additional Protocol 1. For non-international

conflicts, Additional Protocol II contains an identically worded guarantee. Article 6(3) of Additional Protocol II.

32.4.4 Protection against double jeopardy

Additional Protocol 1 (international armed conflicts) provides that "no one shall be prosecuted or punished by the same Party for an offence in respect of which a final judgement acquitting or convicting that person has been previously pronounced under the same law and judicial procedure". Article 75(4)(h) of Additional Protocol 1. 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." Article 86 of the Third Geneva Convention.

32.4.5 Protection against retrospective prosecutions or punishments

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...". Article 75(4)(c) of Additional Protocol 1.

Prisoners of war may not be tried for an act which was not criminal under national law or international law at the time it occurred. Article 99, paragraph 1, of the Third Geneva Convention.

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." Article 65 of the Fourth Geneva Convention.

Courts in occupied territory "shall apply only those provisions of law which were applicable prior to the offence". Article 67 of the Fourth Geneva Convention.

Additional Protocol II, applying to 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".Article 6(2)(c) of Additional Protocol II.

32.5 Sentencing in non-death penalty cases

Prisoners of war 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". Article 87 of the Third Geneva Convention.

"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." Article 87 of the Third Geneva Convention.

"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". Article 103 of the Third Geneva Convention.

Prisoners of war who have been prosecuted under the laws of the Detaining Power for offences committed prior to capture continue to benefit from the protection of the Third Geneva Convention. Article 85 of the Third Geneva Convention. Those who have served their sentence may not be treated differently from other prisoners of war. Article 88 of the Third Geneva Convention.

For civilians in occupied territory, the Fourth Geneva Convention provides that 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". Article 67 of the Fourth Geneva Convention.

Both Additional Protocol 1 (international conflicts) and Additional Protocol II (non-international conflicts) provide that 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. Article 75(4)(c) of Additional Protocol 1, Article 6(2)(c) of Additional Protocol II.

32.5.1 Prohibition of collective punishments

Additional Protocol 1 (international armed conflicts) provides that "no one shall be convicted of an offence except on the basis of individual penal responsibility". Article 75(4)(b) of Additional Protocol 1. The Third Geneva Convention prohibits "[c]ollective punishment for individual acts" on prisoners of war. Article 87 of the Third Geneva Convention.

In non-international armed conflicts, "no one shall be convicted of an offence except on the basis of individual penal responsibility". Article 6(2)(b) of Additional Protocol II.

For civilians in occupied territory, "No 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." Article 33 of the Fourth Geneva Convention.

32.6 Death penalty cases

In states which have not yet abolished the death penalty, humanitarian law strictly limits the circumstances under which a person may be sentenced to death and the sentence carried out. 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 statutes of the two ad hoc International Criminal Tribunals for the former Yugoslavia and for Rwanda and of the ICC all exclude the death penalty for genocide, other crimes against humanity and serious violations of humanitarian law.

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.

"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". 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. Article 100 of the Third Geneva Convention.

The Detaining Power may not extend the scope of the death penalty without the concurrence of the Protecting Power. Article 100 of the Third Geneva Convention. This constitutes a guarantee for prisoners of war against *ad hoc* legislation enacted by the Detaining Power which could worsen their position.

Today, any extension of the scope of the death penalty would be inconsistent with the 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 on Human Rights. (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. The presiding judge "must see to it that this imperative provision is respected"; "[o]therwise, there would be grounds to appeal for the court's findings to be set aside". [*ICRC Commentary on the Third Geneva Convention*, p. 475]

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. Article 101 of the Third Geneva Convention. Article 107 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." [*ICRC Commentary on the Third Geneva Convention*, p. 475]

Prohibition of the death penalty on certain types of people

Additional Protocol 1, applying to 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". Article 77(5) of Additional Protocol 1. Additional Protocol II, applying to 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". Article 6(4) of Additional Protocol II.

Additional Protocol 1, 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."Article 76(3) of Additional Protocol 1.

Additional Protocol II (non-international armed conflicts) provides that “[t]he death penalty shall not be carried out on pregnant women or mothers of young children”. Article 6(4) of Additional Protocol II.