



Trial Observation Manual for Criminal Proceedings



Practitioners Guide No. 5



INTERNATIONAL
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OF JURISTS

A fair trial is essential, not only for protecting the human rights of the accused and those of victims but also to ensure proper administration of justice, which is a key component of the rule of law.

In this context trial observation can be a crucial tool in efforts to defend human rights and the primacy of the rule of law. The right to observe trials stems from the general right to promote and secure the protection and realisation of human rights.

This Practitioners Guide provides the prospective trial observer with practical advice on how to carry out a trial observation. It outlines the various criteria and operational aspects that need to be borne in mind when preparing for, and conducting, a trial observation. It also provides a systematic overview of the international norms and standards relating to fair trial and due process in criminal proceedings.



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® Trial Observation Manual for Criminal Proceedings –
Practitioners Guide No. 5

ISBN: 978-92-9037-141-2

Geneva, 2009

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INTERNATIONAL
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OF JURISTS

This Guide was written by Paul Richmond and Federico Andreu-Guzmán. Samir Alla, Front Line and Marion Marshrons provided translated material in Arabic, English and Spanish. Saïd Benarbia, Ravi Naïk, Samantha Stark, Priyamvada Yarnell and José Zeitune assisted with editing and production. Leah Hctor and Priyamvada Yarnell coordinated the production process.

This Guide is available in Arabic, English and Spanish.

Cover photographs of the *Trial for the Murder of Jesuits in El Salvador, 1991*. The ICJ is grateful to *Universidad Centroamericana “José Simeón Cañas”*, El Salvador for providing the photographs that are reproduced in this publication. *Universidad Centroamericana “José Simeón Cañas”* holds copyright of these photographs.

The ICJ is particularly grateful to Front Line, The International Foundation for the Protection of Human Rights Defenders, for its collaboration and partnership, and without whose initiative and vision the Project on Trial Observation, of which this Guide is one part, would not have been possible.

This publication was made possible due to the financial support of the Foreign Office of the Federal Republic of Germany.



Federal Republic of Germany
Foreign Office

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Introduction

The right to be tried for a criminal offence by an independent, impartial and competent court in which due process guarantees are observed is a universally recognised and protected right. It is the touchstone for the proper administration of justice. The right to a fair trial is a long standing universally recognised human right and applies in relation to all criminal offences regardless of their heinous nature. Indeed as pointed out by the United Nations International Law Commission, the principle that a person charged even with crimes under international law has the right to a fair trial was underscored by the Nuremberg Tribunal after the Second World War and since then the principles relating to the treatment to which any person accused of any crime is entitled, and to the procedural conditions under which his/her guilt or innocence can be objectively established have been enshrined and developed in a number of international and regional human rights treaties and instruments.¹ For this right to be realised, it is not sufficient that judicial bodies meet the required levels of independence, impartiality and competence or that the procedural guarantees necessary for the due process of law are met. It is also necessary for the fundamental principles of contemporary criminal law concerning the legality of offences, the non-retroactivity of criminal law and individual or subjective criminal responsibility to be observed. Today, all of the above constitute what is known as the right to a fair trial.

International courts and bodies responsible for human rights protection have determined the scope, nature and content of this right. International jurisprudence now considers it to be a fundamental right that only a court of law can try and sentence somebody for a criminal offence. The United Nations Human Rights Committee has taken the view that the right to be tried by an independent, impartial and competent court is an absolute right from which there may be no exception. Similarly no exceptions are permitted with regard to the majority of substantive and procedural guarantees that are intrinsic to the due process of law. However, those facing trial in a criminal court are not the sole holders of the right to a fair trial. The victims of crimes against humanity and gross human rights violations as well as their relatives also have rights in criminal proceedings. International jurisprudence has reaffirmed that they have a right to justice, including the right to a fair trial; though the scope of the latter differs from that applicable in the case of the accused. It is intimately linked with the right to an effective remedy, to obtain reparation and to know the truth, as well as with the obligation incumbent on States to combat impunity.

A fair trial is essential, not only from the perspective of protecting the rights of the accused and those of victims but also to ensure the proper administration of justice, which is a key component of the rule of law. A fair trial therefore forms

1. International Law Commission, "Draft Code of Crimes against the Peace and Security of Mankind" in *Yearbook of the International Law Commission, 1996, Vol. II (Part Two)*, p. 34 (<http://www.un.org/law/ilc/>).

a protective wall against the misuse of authority and “summary justice”. In this context, the observation of criminal trials is crucial to the defence of human rights and the primacy of the rule of law. The right to observe trials stems from the general right to promote and secure the protection and realisation of human rights and fundamental freedoms.

Since its creation in 1952, the International Commission of Jurists (ICJ) has, as an essential part of its mandate, conducted numerous trial observations in all regions of the world. It has sent missions to observe criminal proceedings concerning different types of cases, ranging from trials of alleged perpetrators of gross human rights violations, crimes against humanity and genocide; to trials of parliamentarians, judges, lawyers, human rights defenders, journalists and political or social opposition figures.

In order to systematise its own experiences and evaluate its trial observation activities the ICJ has written this *Trial Observation Manual for Criminal Proceedings* as part of its *Practitioners Guide* series.

This Practitioners Guide provides a systematic overview of the international norms and standards relating to fair trial and due process in the criminal domain. Its main sources are international norms, standards and jurisprudence developed by human rights protection bodies at the universal and regional level. In some instances the text of the relevant standards referred to is directly reproduced.

The Guide begins by outlining the various criteria and operational aspects that need to be borne in mind when carrying out a trial observation. These include factors relating to the choice of trials to be observed, the preparation and carrying out of the observations and the compilation of trial observation reports (Chapters I, II and III). It also systematically sets out the international standards applicable to fair trial and due process, in particular the right to a fair trial before an independent, impartial and competent court (Chapter IV), arrest and pre-trial detention (Chapter V), the trial or hearing itself, (Chapter VI), and matters relating to the rights of minors who come into conflict with the criminal law, the death penalty, special courts and procedures, military courts and states of emergency (Chapter VII). It also sets out the international standards relevant to the rights of victims in the context of criminal proceedings (Chapter VIII) and to the question of combating impunity through the administration of criminal justice (Chapter IX). Lastly, it addresses the right for anyone who has been accused, prosecuted or convicted in criminal proceedings, and who has had their right to a fair trial and due process violated, to have access to an effective remedy and to obtain reparation (Chapter X). For ease of reference, tables matching the standards with corresponding instruments are provided at the end of Chapters IV, V and VI.

The Guide is aimed at lawyers, human rights defenders and human rights organisations and institutions who are conducting or wish to conduct trial observations. It is also addressed to judges, prosecutors, lawyers and other law officers in so far as it

provides a systematic overview of international fair trial standards. The intention of the International Commission of Jurists in publishing this Guide is to help strengthen human rights protection and promotion through the observation of criminal trials as well as to further the proper administration of justice.

I. Practical Preparation Before the Trial Observation

The effectiveness of any trial observation depends directly upon the quality of the research and preparation that is undertaken in advance of it. This section provides guidance on the steps that should be undertaken by both observers and sending organisations prior to commencing a trial observation.

1. Identification of Objectives

At an early stage in the planning process, the sending organisation should identify the general objectives of its proposed trial observation mission. Whilst each organisation will have its own interests, some of the key general goals of trial observation may be summarised as follows:

- to make known to the court, the parties to the proceedings, the authorities of the country and to the general public the interest in, and concern for, the fairness of the trial in question in order to encourage the court or judge to provide a fair trial;
- to make the participants – particularly the court or judge and prosecutor – aware that they are under scrutiny and thereby encourage them to act, in the proceedings, according to fair trial standards;
- to ensure that the accused receives a fair trial and that his/her judicial guarantees are respected;
- to ensure that justice is done, that the rights of victims are respected and perpetrators of human rights violations or abuses are punished;
- to obtain more information about the conduct of the trial, the nature of the case against the accused and the legislation under which he/she is being tried;
- to collect general background information about the political and legal circumstances leading to the trial and possibly affecting its outcome;
- to inform the government and the general public of possible irregularities in criminal procedure and to prompt action to bring practice into line with international human rights standards;
- to collect and verify information on fairness of the trial for campaigning and advocacy purposes.

The identification of objectives is important because the choice of objectives may substantially affect the choice of trial to be observed, the selection of the trial observer and other steps in the preparation for and conduct of the trial observation.

When formulating objectives, sending organisations should carefully consider each step in the trial observation process so as to minimise the potential for a conflict of objectives.

2. Selection of a Trial

The choice of trial to be observed is likely to depend upon the sending organisation's general field of activity, its priorities and the interest that it has in a particular case. However, sending organisations should endeavour to select trials that will be of value in protecting the rights of the accused or in otherwise advancing the cause of human rights in the country where the trial is taking place.

There can be no exhaustive list of criteria that may influence the choice of trial to be observed but the following factors, or any combination of them, provide examples of relevant matters to be considered:

- the political or human rights significance of the proceedings;
- the representative nature of the trial;
- anticipated irregularities in the proceedings;
- the historical relevance of the trial;
- the media attention generated by the case;
- the status of the parties (accused and/or victim) to the trial;
- the nature of the charge.

Sending organisations should also consider the possible negative effects of conducting a trial observation. For example, State authorities may use the presence of a trial observer to impose harsher measures than normal for the offence at issue.

3. Selection of a Trial Observer

The effectiveness of the trial observation will depend upon both the objectivity and the legal experience of the trial observer. For this reason, when selecting a trial observer, the sending organisation must be careful to select an observer whose independence, impartiality, legal skills and experience of international human rights law (particularly relating to fair trial standards) can be guaranteed.

In addition to independence, impartiality, knowledge and experience of international human rights standards, other factors to be considered when selecting a trial observer should include:

- experience of practising as a judge, prosecutor or lawyer;

- professional prestige;
- experience of the relevant system of law (i.e. common law or civil law as well as adversarial or inquisitorial proceedings);
- knowledge of the legal system of the country where the trial observation will be held, including the structure and functioning of the judiciary;
- previous experience in conducting fact-finding missions and trial observations;
- knowledge of the language the trial will be conducted in;
- sound political and legal judgment;
- promptness with deadlines;
- ability to work as part of a team;
- availability at short notice;
- ability to enter a particular country with or without a visa;
- nationality, ethnicity or gender.

When selecting an observer, sending organisations are presented with a choice of either utilising a local lawyer/human rights defender to observe a domestic trial or engaging an international expert. Both options have their advantages and disadvantages and there is no standard practice amongst sending organisations in this regard. Local lawyers/human rights defenders are likely to know the legal system and background of a case very well, but this may be perceived as potentially tainting their assessment of the fairness of the proceedings and give rise to claims of bias. Foreign lawyers are initially less open to such charges; however they are unlikely to command such a detailed knowledge of the legal system of the country in which the trial is scheduled to take place and may be unfamiliar with the local language. Sending organisations may consider that the most effective arrangement is to appoint a foreign expert to lead the trial observation, with assistance being provided by one or more local lawyers/human rights defenders.

4. Mandate and Briefing of the Trial Observer

Before undertaking any observation mission, an observer should be fully briefed by the sending organisation. The briefing should aim to clarify the terms of reference of the trial observation and share with the observer all relevant legal and factual information pertaining to the trial to be observed. A typical briefing pack might include:

- i. an *Ordre de Mission*: a formal authorisation issued by the sending organisation stating the purpose of the mission and presenting the observer as a

representative of the sending organisation. The *Ordre de Mission* is designed primarily to encourage the host government to co-operate with the mission; it may also be necessary to submit an *Ordre de Mission* in support of any visa application;

- ii. a *Description of the Observer's Mandate*: an official statement issued by the sending organisation defining the observer's duties and responsibilities. The *Description of the Observer's Mandate* is designed primarily for the benefit of the observer to ensure that the scope of his/her task is clearly defined. In particular, it should provide the observer with precise guidelines on the making of public statements prior to, during and after the conclusion of the trial observation;
- iii. an explanation of the approach, policies and methods of the sending organisation;
- iv. information on the trial to be observed – the background of the case, identity of the accused and/or the victim or plaintiff, nature of the charge, location of the trial, identity of the tribunal/judge, any press reports etc.;
- v. copies of relevant national legislation (for example, the State's Constitution, Criminal Code and Code of Criminal Procedure, statutes on the establishment of the judiciary, etc.) and relevant prior judicial decisions relating to the trial being observed and/or legal issues which are expected to be raised during the trial;
- vi. list of binding international instruments, principles and guidelines (United Nations and Regional systems) applicable to the proceedings (extracts of important international standards should be annexed);
- vii. background information on the history, politics, law, administration of justice, and general human rights conditions of the country where the observation will take place;
- viii. details of any previous fact-finding and/or trial observation missions in the country where the trial will take place;
- ix. contact information of persons or organisations with which the sending organisation has relations in the country where the trial will take place (for example, local bar associations, human rights associations, interpreters, etc.);
- x. details of the means by which the observer will maintain communication with the sending organisation while on the mission. In particular, the sending organisation should inform the observer of possible procedures relating to the security of information and notes and concerning when and how to communicate with the sending organisation. The recommendations can vary

according to the security situation of the country where the trial observation will take place;

- xi. guidelines on the mission's expenses and accounts;
- xii. a copy of this Trial Observation Manual for Criminal Proceedings.

Sending organisations should endeavour to provide the observer with as much relevant information as possible. In addition, sending organisations should undertake a detailed study of the information contained within the Briefing Pack to ensure that the trial observation briefing is as objective as possible.

Short notice of a forthcoming hearing may prevent full briefing. Observers should therefore be aware that it might be necessary for them to undertake further research in order to supplement the information contained within the Briefing Pack.

5. Research by the Trial Observer

A trial observation consists of one or more missions of a few days during which an observer will be engaged in both observing proceedings within the courtroom and conducting meetings outside the courtroom. However, the overall trial observation can potentially last weeks or months depending on the judicial system and the difficulty of the case. There is usually very little opportunity for an observer to undertake detailed research or preparation during the course of the mission(s). Therefore, in order to accomplish a successful trial observation, it is essential that the trial observer is well prepared *before* commencing their observation.

The starting point for an observer's pre-observation research should be the Briefing Pack provided by the sending organisation. However, it may be necessary for the trial observer to undertake further research to supplement the information contained in the Briefing Pack.

Before commencing a trial observation, trial observers should ensure that they have fully researched at least the following issues:

- i. Information about the trial to be observed:
 - An observer should find out information such as specific events which led to the trial, the identity of the accused, the nature of the charge, the location of the trial, the identity of the tribunal/judge, any press reports etc. The observer should also know exactly what type of proceedings he/she will be observing, as differences may exist regarding the application of certain fair trial guarantees.

ii. Information about previous fact-finding and trial observation missions in the country:

- An observer should ascertain whether either the sending organisation or any other NGO has previously undertaken any fact-finding or trial observation mission in the country where the trial is to be observed and, if so, obtain copies of any relevant reports.

iii. Information about domestic law and procedure in the country:

- An observer should analyse the State's Constitution (especially its provisions on human rights and the judicial system); its Criminal Code and Code of Criminal Procedure; its statutes on the establishment and jurisdiction of the courts and on the Prosecutor's office and any landmark judicial decisions pertaining to human rights or addressing legal issues which may be raised during the course of the trial.

iv. Information about applicable international law:

- An observer should obtain a list of international human rights instruments (treaties, principles and guidelines) relevant to the proceedings to be observed. Information on which human rights treaties have been ratified by the state in which the trial observation is to be held can be found on the internet at:
 - UN Treaties: <http://untreaty.un.org/English/treaty.asp>
 - UN Human Rights Treaties: Webpage of the UN High Commissioner for Human Rights: <http://www.ohchr.org/EN/Pages/WelcomePage.aspx>
 - European Human Rights Treaties: Webpage of the European Court of Human Rights: <http://www.echr.coe.int/echr> and webpage of the Council of Europe: <http://conventions.coe.int/Default.asp> <http://www.coe.int/t/e/human%5Frightrights/>
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 - African Human Rights Treaties: Webpage of the African Commission on Human and Peoples' Rights: <http://www.achpr.org/>

Observers should always check for reservations and/or relevant interpretative declarations in the country where the trial will take place. Observers should also always check whether a state of emergency has been officially declared and, if so, whether any derogations have been made to fair trial rights.

- If a treaty to which the State is a party contains a complaint or individual communication mechanism, then an observer should collect any recent judgments and/or decisions relating to either fair trial proceedings in the country where the observation is scheduled to take place or legal issues which may be raised during the trial.
 - If a treaty to which the State is a party contains a monitoring mechanism then an observer should collect any recent country reports and/or concluding observations on the country where the observation is scheduled to take place, in particular on fair trial proceedings or legal issues which may be raised in the trial.
 - An observer should obtain information on relevant non-binding international instruments (e.g. *UN Basic Principles on the Independence of the Judiciary* and *UN Basic Principles on the Role of Lawyers*. If observing a trial in Africa, see also the *Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa*). These non-binding standards will be especially useful if the State has not ratified any of the binding human rights instruments.
- v. Information about the history, politics, law and human rights conditions of the country where the trial observation is to be held:
- An observer should obtain recent country reports and press releases from reputable NGOs (e.g. Amnesty International, Human Rights Watch, International Federation of Human Rights) and inter-governmental organisations (e.g. Council of Europe, Organisation of American States). Copies of any recent State reports submitted to international human rights bodies (such as the UN Human Rights Committee) and reports or concluding observations of these bodies may also be instructive.
- vi. The names of people who can serve as contacts and informants in the location where the trial will occur:
- An observer should obtain contact information for any person or organisation with which the sending organisation has relations in the country where the trial will take place (for example, local bar associations, human rights associations, interpreters, etc.). The sending organisation should instruct the observer on the necessity or not of

keeping this information confidential and on how to approach these stakeholders. The guidelines of the sending organisation may vary according to the organisation's policy and to the security situation of the country where the trial observation will take place (on this see also paragraph 10).

vii. Contact details of the sending organisation:

- During the trial observation, the observer may need to consult with the sending organisation on certain policy issues or inform the sending organisation of an urgent matter requiring the organisation's prompt reaction. It is very important to establish the means of communication between the observer and the sending organisation beforehand.

6. Informing State Bodies about the Observation

In an effort to encourage official cooperation with trial observations, it is now standard practice for the sending organisation to notify appropriate governmental bodies in the country where the trial is to be held that an observer will be attending to monitor the proceedings. The appointment of an observer may be communicated to, for example, the Office of the President, the Ministry of Justice, the Ministry of Interior, the Ministry of Foreign Affairs, the Supreme Court and/or the General Prosecutor's Office. Equally, national human rights institutions should be informed. Notification of the trial observation should be accompanied by a request that the trial observer be extended the usual facilities and cooperation.

Organisations sending trial observers have generally moved away from requesting permission to send an observer to simply notifying the state authorities that an observer will be attending a certain trial, subject to compliance with any visa requirements. There is no need to wait for permission to observe the trial in question since the trial will generally be public and government silence after a reasonable lapse of time is taken as assent.

Although most criminal trials will take place in open proceedings, with members of the public afforded a right of access (in accordance with the right to a fair and public hearing), international standards do however permit courts to exclude the public, completely or partially, in certain exceptional, strictly defined circumstances. In addition, in disregard of international standards, some countries have established proceedings *in camera* for certain types of criminal offences. Trial observers who encounter either situation may require formal permission in order to observe the trial. The sending organisation's decision as to whether to notify the government and the court or formally request permission in such circumstances should be guided by the need to ensure that the observer will in fact be allowed to enter the courtroom during proceedings.

The sending organisation should supply the observer with several copies of an *Ordre de Mission* stating the purpose of the mission, the identity and qualifications of the observer and requesting the cooperation of the authorities. The trial observer can then present the *Ordre de Mission* to the state authorities during the course of the observation mission if necessary.

The sending organisation may also consider preparing an Information Brochure on the trial monitoring project for the observer to distribute in court if necessary. Observers may also attempt to distribute such Information Brochures through local NGOs.

Where the trial observer is travelling from abroad, he/she should notify his/her own diplomatic mission in the country where the trial observation will be held and indicate at which hotel he/she will be staying.

7. Translators and Interpreters

Ideally, the trial observer should have a good command of the local language to be used at trial. As this language ability is not always possible, however, observers often need translators or interpreters to aid in the observation process.

It is preferable for the sending organisation to organise the services of a translator/interpreter before the arrival of the trial observer in the locality of the trial. The choice of translator/interpreter will substantially affect the independence, impartiality, effectiveness and impact of the observer. Therefore, the translator/interpreter should be selected with great care. The translator/interpreter should be knowledgeable, trustworthy, and familiar with legal terminology. He or she should also be impartial and perceived as such. The observer must not therefore rely on the services of a government translator/interpreter and similarly should not utilise a translator/interpreter who has a connection with an organisation, political party, or group to which the defendant belongs. Where an interpreter is to be used, he or she should be capable of simultaneous interpretation *sotto voce* (whispering interpretation).

8. Travel and Accommodation

If the trial observer has to travel to the place where the trial is to be held, arrangements should be made for him/her to be assisted upon arrival by a person not involved in the proceedings who can provide him/her with an initial briefing.

The observer should preferably stay in a hotel, or other type of accommodation, that is reasonably close to the court. The observer must not accept offers to be hosted by persons involved in the proceedings or their supporters, as this may cause his/her impartiality to be questioned. For example, in order to avoid being visibly identified with either side, the observer should not stay in the same hotel or residence as the defence or the prosecutor.

If a trial is being observed abroad, it would be logical to select as an observer a person who does not need a visa to enter the country of destination or who already has one. If a visa is required, an *Ordre de Mission* should be furnished along with the visa application, stating that the purpose of the visit is to attend the trial in question on behalf of the sending organisation. As a general rule, an observer should not enter the country on a tourist visa. The type of visa required varies from country to country. Some countries issue business visas to trial observers. Failure to comply with immigration requirements may result in deportation.

Where there are concerns about an observer's access to the country, the sending organisation should arrange for a person to meet the observer at the airport. The sending organisation is responsible for identifying this person and requesting his/her assistance. He/she could be a prominent lawyer, a member of the sending organisation, affiliated organisation or someone with a good reputation who could influence immigration personnel to allow the observer to enter the country. It is also recommended that the observer inform his/her Ministry of Foreign Affairs and a representative of the Embassy of their home country about their travel arrangements and mission. In the case of detention at the airport or refusal to allow the observer to enter the country, the person meeting the observer can be useful in informing the sending organisation of the situation. The sending organisation will then be able to respond immediately and make all efforts to ensure the observer's entry. If questioned as to the purpose of the visit, the observer should indicate his/her terms of reference and avoid making any additional comments.

It is also important to ensure that all vaccinations are up to date when travelling to a developing country. The observer should consult with his/her doctor as early as possible prior to departure.

9. Public Statements to the Media before the Trial Observation

There is no standard practice amongst sending organisations regarding the advance announcement of trial observation missions through the use of press releases or public statements. In every case, the decision on whether to issue a public statement announcing the mission should be at the discretion of the sending organisation which will need to weigh the expected usefulness of a public statement against its possible consequences.

A public statement may be required at the beginning of a visit in order to explain the purpose of the trial observation to a domestic audience unfamiliar with the practice. If there are risks to the safety of the observer, the sending organisation may choose to issue a press release in order to bring international attention to the matter and put pressure on the government to guarantee the observer's security. Conversely, it may be considered that advance announcement of the trial observation may make it harder for the observer to attend the trial. The matter must be approached on a

case-by-case basis, with the sending organisation carefully weighing the expected benefits of a pre-observation public statement against the possible drawbacks.

10. Security Risk Assessment

In some countries, there may be security risks for human rights defenders, including trial observers. Although the sending organisation cannot guarantee the safety of the trial observer, the sending organisation should always undertake a security risk assessment prior to the trial observation. In any case, the observer should be informed of potential security risks.

The risk assessment might recommend measures to improve the observer's security. These could include, for example, the establishment of a list of emergency contact details including telephone numbers of the observer while on mission, of the observer's relatives and of staff members of the sending organisation. It is important to designate one person within the sending organisation as a security link, who could be contacted by both the observer or partner organisations in the country where the trial will take place. Another possible measure would be the establishment of a system of daily communication between the observer and the sending organisation. If the situation so requires, the sending organisation may consider sending two observers, instead of one, or ensure that the observer is accompanied by an independent local lawyer or a staff member of a local human rights organisation.

If the risks are not reasonably manageable, the sending organisation should not send an observer. If measures to improve the observer's security are to be taken, the sending organisation should advise the observer as to the appropriate security measures to be taken. The sending organisation should provide as much assistance as possible to the trial observer but the observer should be aware that he or she has overall responsibility for his/her personal security.

II. Conducting the Trial Observation

This section provides guidance and practical advice on how to conduct a trial observation. Although there are no definitive rules on how to carry out a trial observation, observers must be capable of using their own judgment to respond to different situations as they arise. The following basic guidelines will help observers to guarantee respect for the principle of impartiality and ensure that the trial observation is conducted as effectively as possible.

1. Access to the Court Building and Courtroom

The right to observe trials is primarily an expression of the general right to promote and secure the protection and realisation of the human rights and fundamental freedoms guaranteed in the UN *Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms* (United Nations Declaration on Human Rights Defenders).² In furtherance of this general right to defend human rights, the UN General Assembly has expressly recognised the right of trial observers “[t]o attend public hearings, proceedings and trials so as to form an opinion on their compliance with national law and applicable international obligations and commitments”.³

Secondly, the right to observe trials is related, in part, to the right to a fair and public hearing, as enshrined both in international law⁴ and the Constitutions of most States. Trial observers have a right of free access to court buildings and courtrooms for the purpose of observing trials since it is an established legal principle, with few exceptions, that trials should be held in public.

The Rules of Procedure and Evidence of the International Tribunal for the Former Yugoslavia (Rule 11, Bis (D) (IV)) and the International Criminal Tribunal for Rwanda (Rule 11, Bis (D) (IV)) also allow the Prosecutor to “send observers to monitor the proceedings in the national courts on her behalf”.

In furtherance of their underlying commitment to ensuring the right to a fair trial, all States participating in the Organization for Security and Cooperation in Europe (OSCE) have also committed to allowing non-governmental organisations to observe trials.⁵ For its part, the European Union (EU), in a document entitled “*Ensuring*

2. Adopted by United Nations General Assembly resolution 53/144 of 9 December 1998.

3. Article 9(3)(b) of the UN Human Rights Defenders Declaration.

4. See, for example, article 14 (1) of the *International Covenant on Civil and Political Rights*, Article 6 (1) of the *European Convention on Human Rights*; Article 8 (5) of the *American Convention on Human Rights*; and Article 13 (2) of the *Arab Charter on Human Rights*.

5. Paragraph 12 of the Document of the Copenhagen Meeting of the *Conference on the Human Dimension of the Conference on Security and Cooperation in Europe* (Copenhagen 1990).

Protection – European Union Guidelines on Human Rights Defenders” have agreed that EU Missions can “attend[...] and observ(e)[...], where appropriate, trials of human rights defenders”.⁶

Read together, these international legal standards mean that “the practice of sending and receiving trial observers is today so widespread and accepted that it may already constitute a norm of customary international law”.⁷

Whether this international standard is met in practice is likely to be one of the first aspects of the fairness of a trial that an observer is able to assess. In order to ensure an accurate assessment, observers should attempt, wherever possible, to access court buildings and courtrooms without distinguishing themselves from the general public.

Should problems regarding access to the court building arise, observers should request a meeting with the President of the Court or his/her representative (in the case of a bench of judges) or the trial judge (in the case of a single-judge court) in order to explain the purpose of the trial observation.

If observers are denied access to the courtroom, they should ask to be allowed to explain to the President of the Court or the trial judge why they are seeking to observe the trial. When meeting with the President of the Court or trial judge, observers should ensure that they maintain a polite and dignified demeanour throughout. During the meeting observers should:

- present the President of the Court or trial judge with a copy of the *Ordre de Mission*;
- present the President of the Court or trial judge with a copy of any credentials provided by the sending organisation;
- inform the President of the Court or trial judge of the purpose of the trial observation mission – this should be limited to the observer’s terms of reference and seek to emphasise the independent and impartial nature of the trial observation; observers should not state their views about the proceedings, the case or the criminal justice system in general;
- if necessary, remind the President of the Court or trial judge of national and international guarantees relating to the right to a public hearing and the right to observe trials.

If observers are refused access to a hearing by the President of the Court or the trial judge, they should record the reasons and immediately inform the sending

6. Paragraph 10.

7. Lawyers Committee for Human Rights, *What is a Fair Trial? A Basic Guide to Legal Standards and Practice*, March 2000, p. 27.

organisation. They should under no circumstances demand access to the trial and should remain composed and courteous at all times.

2. Access to the Case File

In order to gain a full understanding of the trial to be observed, observers should obtain copies of the key documents to be used in it, especially during the public hearings. This is particularly important in countries that apply systems based on the Roman legal tradition (also known as “Roman law”, “civil law” or “continental law”) where a file (dossier) prepared by an examining magistrate or a public prosecutor is at the very crux of the trial. In common law countries observers should endeavour to obtain as much documentation as possible on the prosecution and defence cases.

Ideally, observers should attempt to gain access to the case file before the public hearings begin. This will enable them to have a better understanding of the proceedings. The defence lawyer and the legal representative of the victim and/or his/her relatives should have access to the file and should be able to provide any documents that may be necessary. Failing that, the examining magistrate or prosecutor as well as the clerk of the court should make sure that the case file is available for the observer to consult. Even if the case file is not publicly accessible, trial observers should request access to it as their quasi-judicial task is to verify that the proceedings are being conducted in accordance with the rules of due process.

3. Location in the Courtroom

Having entered the courtroom, trial observers should be attentive to where they choose to sit. Since each courtroom has a different seating arrangement, it is not possible to give precise advice as to where observers should sit. They should be able to clearly observe, hear and follow all aspects of the proceedings. However, when choosing where to sit in the courtroom, two further considerations need to be borne in mind:

- i. they should sit in a prominent place – they should choose a place in the courtroom that optimises the impact of their presence;
- ii. they should sit in a neutral position – they should choose a place in the courtroom that preserves their impartiality.

The need for observers to be seen as impartial means that the place where they choose to sit should not lead to them being identified with anyone who is participating in the proceedings. Observers should therefore be careful not to sit next to the defence counsel or public prosecuting authorities (prosecutor or examining magistrate) or any of the other parties to the proceedings (private prosecutor, *partie civil*, etc.). Equally, it would be inadvisable for them to sit next to witnesses or the family members of the accused or victims or their supporters.

One possibility would be to sit near other local lawyers who are not involved in the proceedings. This would demonstrate the observer's prestige and at the same time avoid identification with any of the parties to the proceedings. If this is not possible, then they should request a special seat in the courtroom in a position that preserves the appearance of impartiality and enables them to observe the trial. Such a request should be made to the President of the Court or the trial judge or the competent authorities.

It is generally not advisable to sit in the section of the courtroom reserved for the general public as, in a crowded courtroom, the impact of the observer's presence may not be maximised. In addition, sitting in the public gallery may make it difficult to observe the proceedings. Where sitting in the public gallery is the only option, observers should endeavour to locate themselves in a prominent position, for example, in the front row, at a suitable distance from all the parties to the proceedings.

It is not unusual for public hearings to be held in places other than court buildings, especially if the number of defendants is large or there are – real or spurious – security grounds. In such cases, the above-mentioned considerations should be borne in mind.

4. Introduction of the Observer to the Court

In certain circumstances, trial observers may ask to be publicly introduced by the court officials at the start of proceedings in order to ensure that their presence is officially recognised by the participants and the public. Whether the observer is to be introduced or not is for the sending organisation and the observer to decide and depends also on whether the court allows it to be done.

If trial observers are not publicly introduced by the court officials, they should ensure that their impartiality is maintained by asking to be introduced by a neutral party, such as the president of the local bar association. It is not advisable for them to be introduced by either the defence counsel or the prosecutor or examining magistrate, or by any of the other parties to the proceedings.

If a trial observer only intends to observe part of a trial, in other words, just some of the hearings, then it would be inappropriate to have a public introduction as it would draw attention to his/her subsequent absence.

5. Interpreters and Translators

If an observer is not proficient in the language in which the trial is to be conducted, then he or she will need an interpreter during the trial observation. The choice of interpreter/translator will substantially affect the independence, impartiality, effectiveness and impact of the mission. The interpreter/translator should therefore be selected with great care. He or she should be competent, trustworthy and familiar

with legal terminology. He or she should also be impartial and perceived to be such. The observer should not therefore rely on the services of a government interpreter/translator and similarly should not use an interpreter/translator who is connected with any organisation, political party or group to which the defendant or any of the parties to the proceedings belong.

Before the start of the trial, the observer should ascertain whether he or she is allowed to use an interpreter during the proceedings. In many countries, it is not permissible for people other than the parties to the proceedings to speak in the courtroom while the proceedings are going on. If that is the case, the observer should try to obtain permission for an exception to be made to that rule. This may require a meeting with the President of the Court or the trial judge.

During the trial, the interpreter should be seated next to the observer in the courtroom, in a location where he or she is able to observe, hear and follow all aspects of proceedings well. The interpreter should provide simultaneous *sotto voce* interpretation (known as “whispering interpretation”).

6. Taking Notes

During the trial observation, observers should make notes on what is happening during the proceedings. This is not only important for compiling the subsequent mission report but also because they should be seen to be taking notes. It indicates that close attention is being paid to the trial and that the conduct of both the court or judge and the prosecutor or examining magistrate are under scrutiny.

Before beginning to take notes, however, trial observers should first ascertain whether they are allowed to do so during the proceedings. In some countries, people other than the participating lawyers and the media are forbidden from taking notes. If that is the case, the observer should ask for an exception to be made to that rule. This may require a meeting with the President of the Court or the trial judge.

Even where note-taking is permitted, observers should assess the risk of their notes being confiscated or looked at by the police or other authorities. The confiscation of notes taken during a trial observation, or of notes taken in meetings outside of the trial hearings, may lead to confidential information, such as the name of interviewees, being revealed, thereby posing possible security risks. People who are observing trials in places where security is a problem should take only rough notes and avoid recording sensitive information or anything that might put other people at risk. They can supplement the notes later once they are in a more secure location.

7. Non-intervention in the Trial Process

It is a fundamental principle of trial monitoring that observers should demonstrate respect for the independence of the judicial process. Accordingly, trial observers

should never interfere with or attempt to influence trials in any way. In accordance with the principle of non-intervention, observers should:

- Refrain from interrupting the proceedings. If asked a question by one of the parties to the proceedings, observers should explain their role and the principle of non-intervention, and decline to comment;
- Never make recommendations to the parties to the proceedings with regard to substantive or procedural aspects of the case. If an observer has concerns over the conduct of any of the parties, this information should be included in the trial observation report. Observers should avoid getting into arguments or discussions concerning the substantive or procedural aspects of the case with the parties to the proceedings, including court officials.
- Never publicly express views on the substantive or procedural aspects of a case being observed, either inside or outside of the courtroom.

8. Focus on Procedural Aspects of the Trial

In principle, any trial observation should focus on matters relating to the effective observance of the judicial guarantees intrinsic to due process and a fair trial and not on the substance or merits of the case in question. Accordingly, observers should confine their work to assessing whether the legislation applied in the trial and the manner in which the proceedings are being conducted comply with international standards on the implementation of due process by an independent, impartial and competent court. Trial observers generally have no role in evaluating the evidence and arguments put forward by the parties or in weighing up the guilt or innocence of the accused. While observers should not evaluate the evidence under discussion in the proceedings, they should nevertheless examine two specific points relating to evidence. They should first of all observe whether the evidence has been lawfully obtained and presented at trial (the principle of legal evidence) in accordance with procedural norms and/or by people or officials who are authorised to do so. Secondly, they should examine whether or not the evidence submitted at trial has been obtained using methods that are prohibited under international law (the principle of the legitimacy of evidence), such as torture or death threats.

While the purpose of the trial observation is to determine whether the standards relating to due process have been met in a particular case, in some types of trials and under certain circumstances the mission may also examine and assess matters relating to the substance and merits of the case. The following are some of the grounds or circumstances which may require observers to also look into such matters:

- Trials of those allegedly responsible for gross human rights violations, war crimes, crimes against humanity, genocide and other crimes against inter-

national law.⁸ In such cases, the mission should determine, among other things: that the charges brought and the offences involved effectively correspond to the unlawful conduct allegedly committed and not to other lesser offences;⁹ that international standards relating to the criminal responsibility of a superior and/or subordinate are observed; whether clauses that exonerate people from criminal responsibility or justify the deeds that took place and which are unacceptable under international law have been applied; and the proportionality of the sentences imposed. In short, the mission should assess whether the trial has been organised or conducted with a view to removing criminal responsibility for such crimes from the defendants, thereby ensuring impunity.¹⁰

- Proceedings brought against human rights defenders, journalists and political or social opponents for the legitimate and peaceful exercise of their rights to promote and strive for the protection and realisation of human rights,¹¹ their political rights and/or their freedom of conscience, expression and association. Generally speaking, such proceedings are brought for reasons of political persecution (political trials) rather than to impart justice.¹²
- Proceedings in which there is such a complete and blatant absence of proof against the defendant that the proceedings as a whole may be unfair. These kinds of proceedings are usually initiated for reasons other than the proper administration of justice. In such situations, trial observers will, as part of their assessment, need to evaluate whether sufficient evidence was presented by the prosecution.

Even in these cases, however, the primary focus of the trial observation must be compliance with the judicial guarantees of due process.

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8. The International Commission of Jurists has carried out several trial observations of this kind. See, *inter alia*: *The Trial of Macías in Equatorial Guinea*, International Commission of Jurists, 1979; *El Salvador – Trial for the Murder of Jesuits*, International Commission of Jurists, 1991; and *Report of the Observation of the Trial of Alberto Fujimori (23 to 29 March 2007, Lima, Peru)*, International Commission of Jurists, 2007.
 9. For example, those allegedly responsible for torture or enforced disappearances are often tried for lesser offences such as bodily injury or arbitrary detention.
 10. See also: *The Right to a Remedy and to Reparation for Gross Human Rights Violations*, Practitioners' Guide Series, No. 2, International Commission of Jurists, 2006; and *Impunidad y graves violaciones de derechos humanos (Impunity and Gross Human Rights Violations)*, Practitioners Guide Series, No. 3, International Commission of Jurists, 2008.
 11. Article 1 of the *Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms*, adopted by General Assembly resolution 53/144 of 9 December 1998.
 12. The International Commission of Jurists has carried out several trial observations of this kind. See, *inter alia*: *Report on the Re-Trial of Leyla Zana and Three Other Former Kurdish Parliamentarians* (in *Yearbook of the International Commission of Jurists – 2004*, ICJ/Intersentia, 2004).

In order to avoid possible challenges to the legal nature of the standards employed during the trial observation, observers should refer only to norms whose legal foundation is undisputed. These are:

- i. the applicable national law (including the Constitution, legislation and jurisprudence) of the country in which the trial is being held;
- ii. the human rights treaties to which that country is a party;
- iii. international standards on human rights and the administration of justice that are declarative in nature (Principles, Declarations, Rules, etc.); and
- iv. norms of customary international law.

In order to fully understand the scope and content of international standards, including both treaties and declarative instruments, it is necessary to refer to the jurisprudence and doctrine developed by the courts, treaty bodies and special procedures of both the United Nations and regional human rights systems.

Both international and national law should be used as benchmarks for assessing whether the trial being observed satisfies the standards relating to due process. However, given that States cannot invoke their national laws as a justification for failing to comply with their international obligations¹³, for example, the obligation to guarantee a fair trial, it is international standards that form the main benchmark for making any such assessment. This is particularly relevant when national legislation does not accurately reflect the State's obligations under international law. Where more or broader guarantees are provided in national law, these should be borne in mind when evaluating the trial. If during the trial observation there is evidence that national law fails to reflect or effectively guarantee international standards on due process, observers should include this in their report and make any recommendations concerning amendments to national legislation or other matters that may be required.

9. Meetings and Interviews at the Place of Trial

Although the observer's primary obligation is to observe the trial, meetings and interviews outside the courtroom with parties to the proceedings are often crucial to the overall success of the trial observation. They provide an opportunity for trial observers to familiarise themselves with the background to the case, to increase

13. It is a general universally recognised principle of international law that States must perform treaties and the international obligations that flow from them in good faith (the *pacta sunt servanda* principle). The corollary of this general principle of international law is that the authorities of a country cannot cite obstacles under domestic law as grounds for discharging them from their international commitments. Neither the existence of constitutional, legislative or regulatory norms nor decisions by national courts can be invoked as justification for failing to comply with international obligations or to change the way in which they are performed. The *pacta sunt servanda* principle and its corollary have been codified in Articles 26 and 27 of the Vienna Convention on the Law of Treaties.

the impact of their presence on the proceedings and to simply facilitate practical arrangements for the observation, such as entry to the courtroom and their location within it.

The decision to hold meetings and conduct interviews must be taken by the sending organisation and will depend on the specific nature of each trial as well as the sending organisation's strategy in sending the mission. In any event, the sending organisation should give clear instructions to the observer in this regard.

Before arriving at the trial location, observers should identify people they wish to interview and have basic information about each of them. The people they should meet will vary according to the circumstances but attention should be paid to maintaining balance and impartiality at all times. As a general rule, observers should, as a minimum, meet with the President of the Court or the trial judge, the prosecutor or examining magistrate and, when it is appropriate and depending on the nature of the case or trial, the defence lawyer or the legal representatives of the victim and/or his/her relatives. In countries where other officials are involved in legal proceedings as parties to the action, for example, Attorney-Generals' offices, offices of judicial oversight or representatives of the Ombudsman's Office, it is important for observers to meet with them also. Other relevant people might include representatives of the local bar association, members of local NGOs or the National Institution for Human Rights (Ombudsman). If it is a very important case, the Minister of Justice and/or the head of the national body responsible for public prosecutions (the Prosecutor General, Attorney-General, Director of Public Prosecutions, etc.) may also be useful sources of information. During such interviews, however, observers should be careful to introduce themselves as observers and not as representatives of the sending organisation and should maintain their impartiality at all times.

Depending on the nature and specific features of each case and the trial observation strategy of the sending organisation, observers may endeavour to make contact with the President of the Court or the trial judge, the prosecutor or examining magistrate, the lawyer representing the accused and the legal representative(s) of the victim(s) and/or their relatives before the proceedings begin. If this is not possible, then meetings could be arranged during breaks in proceedings or at the conclusion of the court day.

Trial observers should be aware that they may encounter different responses and attitudes on the part of the people with whom they will need to meet. These may range from, for example, frank and open cooperation to the provision of false or misleading information. Observers have to be prepared for different responses and be capable of handling the situation carefully while seeking to obtain as much reliable information as possible.

i. Meeting with the President of the Court or the trial judge

Meeting with the President of the Court or the trial judge is an important opportunity for observers to increase the impact of their presence on the proceedings. Observers should maintain a polite, composed and dignified demeanour throughout the meeting. They should not comment on the procedural aspects or merits of the case but use the meeting to:

- introduce themselves and inform the President of the Court or the trial judge of their role (a copy of the *Ordre de Mission* could be provided to them);
- emphasise the independent and impartial nature of the assessment;
- secure permission to enter the court where the trial hearings are to be held if the proceedings are not open to the public;
- arrange to have a specific seat in the courtroom;
- indicate that they will be taking notes during the trial;
- request permission to have whispering interpretation, if necessary; and
- ask a few questions to familiarise themselves with the case proceedings.

Even if the President of the Court or the trial judge is averse to a meeting or refuses to meet with the observer, the very fact that he or she is aware of the trial observer's request may be enough to influence his/her conduct during the trial.

ii. Meeting with the defence lawyer

If deemed appropriate by the sending organisation, trial observers should meet with the defence lawyer. They should request any such meeting as soon as they arrive in the place where the trial is to be held. Except for trials for gross human rights violations and other crimes against international law, the defence lawyer is usually the person most likely to be able to provide them with copies of important documents from the case file. He or she may also be able to answer any questions they may have about the national procedural norms applicable to the trial they are going to observe as well as provide information on background to the case that does not feature in the case file.

iii. Meeting with the prosecutor or examining magistrate

If observers have met with the defence lawyer or have plans to do so, in order to maintain balance and impartiality, they should always request a meeting with the State official responsible for the prosecution (prosecutor, prosecuting attorney or examining magistrate). Observers should not comment on the procedural aspects or merits of the case but should use the meeting to:

- introduce themselves and inform the prosecutor, prosecuting attorney or examining magistrate of their role (a copy of the *Ordre de Mission* could be given to them);
- emphasise the independent and impartial nature of the trial observation;
- ask questions to familiarise themselves with the case proceedings.

Holding a meeting with the State official responsible for the prosecution (prosecutor, prosecuting attorney or examining magistrate), regardless of whether a meeting with the defence lawyer is planned, is particularly important when the criminal proceedings being observed involve the trial of an alleged perpetrator of human rights violations. When observing a trial of that nature, meeting with the prosecutor, prosecuting attorney or examining magistrate should be viewed as a valuable opportunity for exploring the wide range of issues discussed in detail in the chapters of this Guide on “The Rights of Victims in Criminal Proceedings” and “Combating Impunity”.

iv. Meeting with the defendant

Depending on the nature and specific features of the case, it may be advisable to interview the defendant. However, often it is not necessary to do so as his/her lawyer will be able to provide information on any procedural irregularities that may have affected the fairness of the proceedings so far as the defendant is concerned. However, where the sending organisation considers it necessary to observe the physical and/or mental state of the defendant or the conditions of his/her detention first hand, then a meeting may be beneficial. Likewise, if, while attending the trial, observers receive reliable reports that the defendant may have been subjected to ill-treatment or inhuman conditions of detention, they should, in consultation with the sending organisation, seek to meet with the defendant. It is a good idea to meet the defence lawyer and the defendant together since there is no reason to believe that the lawyer is not fully representing his/her client’s interests. Any such meeting should be held in a location that permits maximum confidentiality. If the purpose of the mission is to observe criminal proceedings for human rights violations, it is best to meet only with the defence lawyer and to avoid any direct contact with the defendant.

v. Meeting with the legal representative of the victim and/or his/her relatives and/or the victim and his/her relatives

The legislation and jurisprudence of many States guarantees legal standing in the judicial process to any wronged party. In some countries, it allows any person and/or NGO that has a legitimate interest in the case to become a party to the proceedings. This legal standing entitles the victims of crime, their relatives and third parties to take part in criminal proceedings. The involvement of victims and/or their relatives as parties to the proceedings is extremely important: not only does it give them the

opportunity to be heard during the trial, it also allows them to assert their rights to justice, truth and reparation. In some countries, NGOs are also permitted to have legal standing in criminal proceedings.¹⁴ This is particularly important in the case of gross human rights violations because fear, among other things, often makes it impossible for the victims of such crimes including enforced disappearance or sexual violence, and/or their relatives, to take action before the courts. Experience has shown that non-governmental human rights organisations not only have a legitimate interest in criminal proceedings but that they also help to push trials and investigations forward.

The nature of the procedures available to enable victims, their relatives or a third party to participate in proceedings vary according to the national legislation of each country. They may take the form of, for example: a private prosecution (*acción privada; acusación privada*), prosecution in the name of the people (*acusación popular*), a criminal complaint (*plainte pénale; demanda penal; querrela particular*), a civil claim (*partie civile, parte civil*) or a complaint by a third party.

In countries where such mechanisms for allowing the involvement or participation of victims, their relatives or third parties exist, a meeting with their legal representatives may be extremely important, especially if the criminal proceedings to be observed entail the trial of an alleged perpetrator of gross human rights violations. In such cases, the legal representative of the victim and/or *his/her* relatives will usually be the person best able to provide the observer with copies of important documents contained in the case file.

However, in order to maintain an image of balance and impartiality, it is advisable for observers to also request a meeting with the defence lawyer.

Meeting with the legal representative of the victim and/or *his/her* relatives (and/or the victim and/or their relatives themselves) should be seen as an extremely valuable opportunity to discuss topics covered in the chapters of this Guide entitled “Combating Impunity” and “The Rights of Victims in Criminal Proceedings”.

14. The participation of non-governmental organisations in criminal proceedings is provided in the national legislation of many countries under a variety of forms. For example, in France, the Code of Criminal Procedure expressly allows not-for-profit associations whose goal is to ensure that crimes against humanity, racism and sexual violence, among others, are punished to join proceedings relating to such offences as a civil party for that purpose. In Spain, criminal procedural law allows non-governmental organisations to be complainants and to bring prosecutions in the name of the people. In Guatemala, the Code of Criminal Procedure (Decree N° 51-92, Article 116) states that “any citizen or association of citizens” can be joint complainants “against public officials or employees who have directly violated human rights”. In Belgium, the law of 13 April 1995 (Article 11.5) on the sexual abuse of minors allows not-for-profit organisations to join criminal proceedings as civil parties. In Argentina, jurisprudence has accepted that non-governmental organisations can be complainants in criminal proceedings. In Portugal, Law N° 20/96 authorises non-governmental human rights organisations to become parties to criminal proceedings for racist or xenophobic acts or acts of discrimination.

10. Public Statements During the Trial Observation

The basic briefing pack provided to trial observers should contain a clear statement of the sending organisation's policy with regard to the making of public statements during the trial observation mission.

Although each sending organisation is free to determine its own policy on the making of public statements during trial observations, it is generally recognised as good practice for observers to refrain from making public comments about their observation or findings with regard to the proceedings or the substance of the case, or about the criminal justice system in general, while the trial is going on.

This principle is very important as public statements made by observers while the trial is still unfolding may jeopardise their mission and appearance of neutrality, or even his/her safety and that of the people with whom they have held meetings. Practice has also shown that, even once the proceedings have come to an end, it is better for observers as well as for their image of impartiality that, if a statement is to be issued, it is done once they have returned home rather than for them to comment on the trial while still in the place where it was held.

During the trial observation, however, observers should, unless the sending organisation has decided otherwise, be free to approach the media in order to inform them of their presence, the purpose of the mission and the fact that a report will be issued once the trial observation has come to an end. They should also be prepared to explain why they are unable to comment on the substance of the observation at that stage and to refer the journalists to the sending organisation if they need further information.

If there is an urgent need to make a public statement on the proceedings before they have been concluded – for example, because of problems with the judicial process – observers should contact the sending organisation to obtain instructions on how to proceed.

At the end of the mission the sending organisation may decide to issue a public statement or press release to report on the preliminary findings and announce the next steps to be taken.

11. Security Risks

The conduct of observers has a potential impact on security risks during trial observation missions. Observers should not take any action that may be detrimental to their security, they should consistently demonstrate their impartiality and they should make it clear that their role is solely to observe.

The level of risk as reflected in the sending organisation's pre-mission risk assessment may well change in the course of the mission and, at that stage, it will be the

observer who is best placed to evaluate any changes. Therefore, and depending on the specific circumstances, trial observers should:

- Report any incidents that put their security at risk to the sending organisation;
- Adopt security measures to suit the change in circumstances (move to different accommodation, change the route they take to go to the trial, etc.) and inform the sending organisation of these details;
- If the security risks are very high, consider suspending the trial observation mission after obtaining the consent of the sending organisation;
- Avoid all contact with the parties to the proceedings if it is thought it may affect the security of the observer.

Trial observers must remember that, although the sending organisation will provide as much assistance as possible before and during the mission, overall responsibility for their security lies with themselves.

III. The Trial Observation Report

This chapter offers some general guidance on the timing, content and publication of trial observation reports. It also sets out a list of topics and issues that should be addressed in a typical trial observation report. However, it is worth pointing out that not all trial observations necessarily require the publication of a report afterwards. That is for the sending organisation to decide. In the event that the sending organisation decides not to make public the report on a trial observation, it is nevertheless important for the observer to prepare a report on his/her mission and the trial that has been observed for the sole use of the organisation.

1. Guidelines for Writing the Report

i. Timing

- The report must be prepared and submitted to the sending organisation without delay while the national authorities are still sensitive to authoritative and independent criticism;
- If the trial is protracted and the observer attends only part of the proceedings, he or she should send an immediate report to the sending organisation and add to it later, in the form of a supplement commenting on the verdict reached at the end of the trial. The observer should then arrange for the official text of the court's judgment to be sent to the sending organisation either directly or by delivering it to them him/herself;
- If there are major security risks, it is advisable not to start writing the report until the observer is in a secure location.

ii. Content

- The report must be independent, objective and impartial;
- The report must be detailed;
- The report must link their findings with regard to the trial observed to specific national and international fair trial standards;
- The report must assess the trial proceedings observed and their compliance/consistency with international fair trial standards;
- The report must include examples of compliance with international fair trial standards as well as any possible breaches or inconsistencies noticed during the trial observation;

- Most of the information contained in the trial observation report should be based on the observer’s direct observations. However, the report may include quotations from interviews that illustrate systemic problems or exemplify practices (quotations must be accurately referenced with the name and status of the interviewee);
- The report may include recommendations to the government and/or the relevant authorities on how to rectify any irregularities observed in the trial and/or recommendations to the sending organisation on what action it might take to achieve that goal;
- The report should include copies of important case materials such as the charge sheet, trial transcripts, court rulings and the verdict (if it is possible to copy them).

iii. Publication

- The report should remain confidential until the sending organisation decides otherwise;
- The sending organisation should decide whether the report is to be sent to the government in question or any other relevant national authority for comment and response before it is made public. This is a matter of policy that will depend on the circumstances of the case, the purpose and focus of the report and the government’s anticipated reaction to it. If the report is first sent to the government or other relevant national authority, it should contain precise time limits for sending a response prior to its publication;
- The sending organisation should consider issuing a press release on completion of the mission as well as on completion of the trial observation report.

2. Structure and Content of the Report

The exact structure of the trial observation report will depend upon the circumstances of the case that has been observed. However, a typical trial observation report should include the following information as a minimum:

Executive Summary

A brief overview of the key facts, issues and conclusions addressed in detail in the report. In the space of a few paragraphs, the executive summary should:

- i. briefly describe the general political and human rights background of the country in so far as it is relevant to the case, as well as the case itself;
- ii. identify the trial that was observed, explain why it was chosen for observation and state the purpose of the mission;

- iii. introduce the trial observer and any other relevant professionals, together with their qualifications and/or experience;
- iv. explain the observer's instructions or terms of reference;
- v. briefly describe the basic elements of the trial that was observed: the judicial authority responsible for the trial (tribunal/court), the type of criminal proceedings pursued and the offences that were the subject of the trial;
- vi. Give a brief description of the defendant, the charges, the victim, the civil parties or other third parties (if there were any) and the factual background to the alleged offence;
- vii. describe the location of the trial, the dates of the hearings (including any pre-trial hearings) and the dates of the hearings attended by the trial observer;
- viii. Summarise the trial proceedings, the final judgment reached by the judge or court and the sentence imposed (if any);
- ix. give a clear and concise summary of the mission's main findings, describing the key areas of both compliance and non-compliance with the relevant fair trial guarantees.

Part I: General information and background

This part of the report should contain basic information on the political and historical background to the trial that was observed, the justice system and the international human rights commitments entered into by the State concerned. Part I should cover:

- i. The general political and human rights background of the country. This is especially relevant if the trial observed involves the prosecution of a political opposition figure or an alleged perpetrator of gross human rights violations;
- ii. Basic information on the country's criminal justice system;
- iii. The binding international and/or regional human rights treaties to which the State is a party and other international human rights standards;
- iv. Background information on the defendant, including his or her political affiliation, profession and mental/physical state, and/or on the victims. This is particularly relevant in the case of trials of alleged perpetrators of gross human rights violations.

Part II: The Trial

This part of the report should contain a detailed description of the events that are the subject of the trial as well as the procedures and key issues involved. Part II should address the following issues:

i. The judge or court:

- identify the tribunal or court, as well as whether it is independent and competent under national law to conduct the proceedings;
- identify its position within the structure of the justice system, whether it has ordinary jurisdiction, special jurisdiction, etc. and the procedure, whether at first instance, second instance, etc.;

ii. the legal basis for the case against the defendant:

- describe the facts of the case and the charges against the defendant and identify the relevant article(s) of the Penal Code or other criminal legislation, for example, state of emergency legislation;
- give the exact wording of the relevant article(s) of the Penal Code;
- describe in simple language the specific elements of the offence;
- give the details of the alleged offence as described in the indictment. In other words, a brief statement of the conduct which the prosecution alleged constituted the offence;

iii. a description of the legal proceedings, including the pre-trial or investigation phase, if relevant. Reference should be made to the criminal procedure legislation used in the case:

- identify the procedural legislation and any other national legislation relevant to the proceedings, i.e. the Code of Criminal Procedure, decrees, Professional Regulations, etc.;
- give the exact wording of the relevant legal provisions, decrees or regulations and explain their relevance to the proceedings.

iv. The case for the prosecution:

- identify the prosecuting body or official (the Public Prosecutor's Office, Attorney-General's Office, examining magistrate), their legal status and their judicial role and powers in the proceedings;
- summarise the facts of the case and the legal arguments adduced as presented at trial by the prosecution; and
- describe the main actions of the prosecuting body or official during the trial.

v. The case for the defence:

- identify the defendant and his or her lawyer as well as his or her powers during the trial as a party to the proceedings;
- summarise the facts of the case and the legal arguments adduced as presented at trial by the defence;
- describe the main actions of the defendant and/or his or her lawyer during the trial.

vi. Other parties to the proceedings:

When victims, their relatives or other parties to the proceedings other than the prosecution and the defence are involved in the trial, it is important to:

- identify each of the parties and their powers during the trial;
- summarise the factual and legal arguments put forward by them during the trial; and
- describe their main actions during the trial.

vii. The trial:

- describe what happened at the trial, particularly during the hearings that were observed;
- give a brief account of the different interventions during the hearings (the prosecution, the defence, other parties to the proceedings, witnesses, experts and specialists, etc.) as well as the different procedural issues raised; and
- describe how the hearings and legal debates were conducted by the tribunal or court.

viii. The verdict:

Describe the verdict, if any. If the verdict is not yet known, then give the date on which it is expected. Give a brief but accurate account of:

- the facts that the tribunal or court found to be proven;
- the offences and criminal responsibility the tribunal or court found to be established or not, including any grounds for exemption from responsibility, justification for what happened, mitigating or aggravating circumstances and the reasons for conviction or acquittal; and
- the sentences imposed by the tribunal or court.

ix. Appeal proceedings:

If relevant, provide information on the possibilities for lodging an appeal or seeking some other form of judicial remedy (request for reversal, reconsideration, review, setting aside, etc.). Information should be given on:

- the appeal procedure or other remedies available;
- those entitled to pursue such remedies; any time limitations for lodging appeals; the procedures and subject matter of any such appeal;
- the subject matter which can be addressed in any such appeal, the facts, points of law, etc.;
- the effect of any such appeal, whether or not the trial court's decision is held in abeyance while it is being heard;
- the court(s) that are authorised to hear any such appeal(s); and
- the powers of the court that is authorised to rule on the appeal.

Part III: Evaluation of the Trial

Part III should be a detailed study of the extent to which the trial complied with national and international fair trial standards and should include the following:

- i. description of the legal framework which forms the benchmark for evaluating whether the trial observed satisfied, fully or partially, the requirements of due process and a fair trial. In order to avoid possible difficulties with regard to the legal nature to the standards used when observing and evaluating the trial, observers should refer only to standards whose foundation in law is indisputable, such as:
 - a. the national laws of the country in which the trial is being held, including the Constitution, legislation and jurisprudence;
 - b. the international and/or regional treaties to which that country is a party; and
 - c. international and/or regional human rights standards; and
 - d. the norms of customary international law.
- ii. An evaluation of whether or not the proceedings satisfied the national and international standards referred to in point (a) above. It is important to assess, on the one hand, whether or not the legal procedures established under national legislation were observed and, on the other, even if national

standards and procedures were satisfied, whether international fair trial standards were fully or partially observed during the trial. This two-part assessment should evaluate in particular:

- a. The independence of the court or judge, at the institutional as well as at the personal level (see Chapter IV of this Guide);
 - b. The impartiality of the court or judge, both objective and subjective, with regard to both the case itself and the conduct of the trial (see Chapter IV of this Guide);
 - c. The jurisdictional authority of the court or judge to hear and rule on the case that is the subject of the trial (see Chapter IV of this Guide);
 - d. Observance of the principle of the presumption of innocence (see Chapter VI of this Guide);
 - e. Observance of the principles of the legality of offences, the non-retroactivity of criminal law and the application of the most favourable criminal law (see Chapter VI of this Guide);
 - f. The conduct of the State prosecuting body, the prosecutor, prosecuting attorney or examining magistrate. In particular, whether their duties were performed impartially and in a way that respected human dignity, human rights and due process; whether they used evidence that was obtained using unlawful procedures or prohibited methods (such as torture) (see Chapter IV of this Guide);
 - g. Observance of the rights and judicial guarantees to which the defendant was entitled: the right to be informed without delay of the nature and reasons for the charges brought against him/her; the right to a public hearing; the right of defence; the principle of equality of arms; the right to present evidence and to examine and cross-examine witnesses; the right to be tried without undue delay; the right to appeal the conviction; etc. (see Chapters V and VI of this Guide); and
 - h. Observance of the rights and judicial guarantees to which the victims and/or their relatives were entitled in the trial (see Chapter VIII of this Guide).
- iii. An evaluation of the application of the principles, norms and standards of criminal law, both national and international, to the case in question and, in particular, the judgment reached by the court or judge. This part of the evaluation is not concerned with whether or not the standards related to procedural guarantees were satisfied (these were dealt with in the previous point) but with whether the application of substantive criminal law was

observed. This part of the report is particularly relevant in certain types of trial observations such as proceedings brought against human rights defenders, journalists and political or social opponents for the legitimate and peaceful exercise of their rights and fundamental freedoms, the trials of alleged perpetrators of gross human rights violations, war crimes, crimes against humanity, genocide and other crimes against international law, and trials involving minors. The purpose of this part of the evaluation is to establish to what extent the criminal law applied in the context of the case as a whole was fair. For example, it may be unlawful for the State to punish conduct that amounts to the legitimate and peaceful exercise of freedom of expression. On the other hand, it might be unlawful for the State not to apply the principles of criminal legislation to alleged perpetrators of serious human rights violations. Such an evaluation is also relevant in trials in which the accused may be sentenced to death.

- iv. An evaluation of the penalties imposed. In particular, whether the penalties handed down in the court judgment:
 - a. conform to the requirements of the principle of the legality of penalties;
 - b. conform to the principle of the proportionality of penalties; or
 - c. amount to penalties that are prohibited under international law.
- v. Conclusions. The conclusions should settle the question of whether or not the trial observed satisfied, fully or partially, the relevant fair trial standards and must reflect the assessments made in relation to each of the above-mentioned points.
- vi. Recommendations. These can be of three kinds:
 - a. Specific recommendations to rectify any irregularities or breaches of due process that were found in the case in question and to guarantee the rights of the people which were violated during the trial, (for example, mistrial, re-trial, etc.);
 - b. General recommendations on possible reforms to rectify the irregularities and breaches of due process identified during the trial observation (for example, changes to the structure of the judiciary, reform of the Code of Criminal Procedure, etc.); and
 - c. Possible actions that the sending organisation could take with regard to the aforementioned recommendations (for example, follow-up to the trial observation, research missions, etc.).

Part IV: Appendices

The trial observation report should, if possible, include the following information as an appendix to the report:

- i. a copy of the *Ordre de Mission*;
- ii. a copy of the *Description of the Observer's Mandate*;
- iii. a brief description of the socio-political conditions and human rights background and situation of the country;
- iv. copies of relevant national legislation (for example, the Constitution, Criminal Code, Code of Criminal Procedure, laws establishing the judiciary, and jurisprudence that sets important precedents which were not included in the briefing pack);
- v. copies of the main documents from the trial, such as: the charge sheet, the defence arguments, and the judgment handed down by the court or judge. If any of these documents were not available soon after the trial, observers should try to obtain copies at a later date;
- vi. a description of the observer's work: the methodology followed, the materials studied, people interviewed (as far as security allows) and a brief outline of the issues discussed and the information gathered;
- vii. sensitive material that may have been omitted from the published report (for example, the list of names and contact information which should be kept confidential);
- viii. copies of newspaper articles referring to the trial or the observer's presence, including the names of the newspapers and the dates of publication;
- ix. any additional information that is not strictly within the observer's mandate but which might be useful for the monitoring organisation (such as information about other prisoners, other forthcoming trials, recent changes in the law, the material conditions of the courts and the technical equipment used in them); and
- x. any practical observations that may help future observers.

iv. Fair Trial – General Standards

In this chapter we examine the international standards¹⁵ relating to the independence, impartiality and jurisdiction of tribunals and courts as well as the role of prosecutors in criminal proceedings and the independence and integrity of lawyers. Tables listing the main sources of law for each international standard are provided at the end of the chapter.

Due process of law or a fair trial are founded on two main principles: the right of all persons to equality before the law and the courts and the right of all persons to a public hearing with all due guarantees before a legally-constituted, competent, independent and impartial tribunal as well as the right to appeal. Even though most of the standards referred to in this chapter apply to the victims of gross human rights violations, as well as their relatives and other parties involved in such processes for reasons of methodology, this issue will be addressed in Chapter VII of this Guide.

1. Right to Equality Before the Law and Courts

The accused in criminal proceedings is entitled to both equality before the law and equal protection of the law, without discrimination.

All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. All persons are equal before the courts and tribunals.

National legislation should prohibit any type of discrimination and guarantee everyone equal and effective protection against discrimination on any ground such as race, colour, ethnic origin, language, sex, gender, sexual orientation, gender identity, political or other opinion, religion, creed, disability, national or social origin, birth, economic or other status.

In particular, national laws should prohibit any discrimination based on gender and must “establish legal protection of the rights of women on an equal basis with men and [...] ensure through competent national tribunals and other public institutions the effective protection of women against any act of discrimination”.¹⁶

This means that:

- i. When observing and enforcing the law as well as when dispensing justice, judges and officers of the court should not discriminate on any of the grounds set out above;

15. In some instances, the text of the relevant standards referred to is directly reproduced.

16. Article 2 (c), *Convention on the Elimination of All Forms of Discrimination against Women*.

- ii. Everyone is entitled to equal access to the courts without discrimination on any of the grounds set out above; and
- iii. Everyone is entitled to be treated equally by the courts without discrimination on any of the grounds set out above.

As a consequence of the principle of equality before the law and before the courts and tribunals, international human rights law in principle prohibits the establishment of *ad-hoc*, extraordinary or *ex post facto* courts or tribunals (see Chapter VII, “Special Cases”). However, although all persons are equal before the law and before courts and tribunals, differences in treatment are acceptable if founded on reasonable and objective criteria.¹⁷ As an exception and in specific and strictly-defined situations, international human rights law accepts the existence of special judicial procedures and specialised jurisdictions or tribunals in criminal matters, for certain people, such as indigenous peoples and juveniles, because of the specific nature of those seeking justice. This differential treatment is based on the existence of certain inequalities which, if not dealt with accordingly, may give rise to inequalities in legal treatment. For example, the existence of specialised jurisdictions for indigenous peoples and juveniles does not violate the principles of equality before the law and justice.¹⁸ Special judicial procedures in such cases are in fact instrumental in achieving justice and protecting those who find themselves in a weak legal position. Where trials do take place before specialised jurisdictions or tribunals, they must always be conducted in full conformity with the requirements of international standards on the right to a fair trial by an independent, impartial and competent tribunal established by law (see Chapter VII, “Special Cases”).

17. Human Rights Committee: *General Comment No. 32, Article 14: Right to equality before courts and tribunals and to a fair trial*, CCPR/C/GC/32, para. 14; Views of 19 April 1987, *Brooks v. The Netherlands*, Communication No. 172/1984, para. 13. See also, among others: Views of 9 April 1987, *Zwaan-de-Vries v. The Netherlands*, Communication No. 182/1984, Annex VIII.B; Views of 3 April 1989, *Ibrahima Gueye and others v. France*, Communication No. 196/1985; and Views of 19 July 1995, *Alina Simunek v. The Czech Republic*, Communication No. 516/1992, para.11.5. European Court of Human Rights, Decision dated 23 July 1968 on the merits of the case entitled *Certain aspects of the laws on the use of languages in education in Belgium*, p.34. Inter-American Court of Human Rights, Advisory Opinion OC-4/84, 19 January 1984, *Proposed Amendments to the Naturalization Provisions of the Constitution of Costa Rica*, Series A No. 4, paras. 56-57.

18. See *Convention No. 169 of the International Labour Organization concerning Indigenous and Tribal Peoples in Independent Countries*, Articles 9 and 10; World Conference on Human Rights, *Vienna Declaration and Programme of Action*, Part 1, para. 20; *Convention on the Rights of the Child*, Article 40 (3); *United Nations Standard Minimum Rules for the Administration of Juvenile Justice* (“Beijing Rules”); and the *United Nations Guidelines for the Prevention of Juvenile Delinquency* (Riyadh Guidelines).

2. Right to a Trial before an Independent, Impartial and Competent Tribunal Established by Law¹⁹

The accused is entitled to a trial before an independent, impartial and competent tribunal established by law.

The accused is entitled to a trial before an independent, impartial and competent tribunal established by law.

The right to be tried by an independent, impartial and competent tribunal is an absolute right that may suffer no exception.²⁰ Only a court of law may try and convict a person for a criminal offence²¹ and any criminal conviction by a body not constituting a tribunal is prohibited under international human rights law.²²

A situation where the functions and competences of the judiciary and the executive are not clearly distinguishable or where the latter is able to control or direct the former is incompatible with the principle of an independent and impartial tribunal.²³

The practice or system of “faceless” or “anonymous” judges or courts is inconsistent with basic judicial guarantees and the right to be tried by an independent and impar-

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19. See, at the universal level: the *Universal Declaration of Human Rights*, Article 10, the *International Covenant on Civil and Political Rights*, Article 14.1, the *International Convention on the Elimination of All Forms of Racial Discrimination*, Article 5(a), the *Convention on the Rights of the Child*, Articles 37(d) and 40.2, the UN Basic Principles on the Independence of the Judiciary, the UN Guidelines on the Role of Prosecutors and the *UN Basic Principles on the Role of Lawyers*. Among those to be found at regional level are the following: the *European Convention for the Protection of Human Rights and Fundamental Freedoms*, Article 6.1; *Recommendation No. R (94) 12 on the independence, efficiency and role of judges*, adopted on 13 October 1994 by the Committee of Ministers of the Council of Europe; the *Guidelines on Human Rights and the Fight against Terrorism* drawn up by the Committee of Ministers of the Council of Europe and adopted on 11 July 2002, Guideline IX; the *Charter of Fundamental Rights of the European Union*, Article 47; the *American Declaration of the Rights and Duties of Man*, Article XXVI; the *American Convention on Human Rights*, Article 8.1; the African Charter on Human and Peoples' Rights, Articles 7 and 26; the *African Charter on the Rights and Welfare of the Child*, Article 17 and the *Arab Charter on Human Rights*, Article 13.
20. Human Rights Committee, *General Comment No. 32*, paras. 18 and 19; Human Rights Committee, *General Comment No. 32*, paras. 18 and 19; Human Rights Committee, Views of 28 October 1992, *Miguel González del Río v. Peru*, Communication No. 263/1987, para. 5.2. See also the *Arab Charter on Human Rights*, Articles 4(c) and 13(1).
21. Human Rights Committee, *General Comment No. 29, States of Emergency: Article 4*, CCPR/C/21/Rev.1/Add.11, 31 August 2001, para. 16.
22. Human Rights Committee, *General Comment No. 32*, para. 18. See also: Inter-American Commission on Human Rights, Report No. 49/00 of 13 April 2000, Case No. 11.182, *Carlos Moleró Coca et al. (Peru)*, para. 86.
23. Human Rights Committee, Views of 20 October 1993, *Angel N. Oló Bahamonde v. Equatorial Guinea*, Communication No. 468/1991, para. 9.4; See also: Inter-American Commission on Human Rights, *Report on Terrorism and Human Rights*, OEA/Ser.L/V/11.116, Doc. 5 rev. 1 corr., 22 October 2002, para. 229.

tial tribunal.²⁴ Indeed, if the judge is anonymous, the accused is unable to assess his or her independence or impartiality in the case and is therefore denied the right to challenge their independence and impartiality in the courts.

3. An Independent Tribunal

The accused is entitled to a trial before an independent tribunal.

All tribunals, courts and judges must be independent from the executive and legislative branches of government²⁵ as well as from parties to the proceedings.²⁶ It means that neither the judiciary nor the judges of whom it is composed can be subordinate to any branches of the State or the parties to the proceedings.²⁷ Tribunals must also be truly and effectively independent as well as free from influences or pressure from the other branches of the State or from any other quarter.²⁸

The independence of the courts and judicial officers must be guaranteed by the constitution, laws and policies of the country and respected in practice by the government, its agencies and authorities, as well by the legislature.

The judiciary shall have jurisdiction over all issues of a judicial nature and shall have exclusive authority to decide whether an issue submitted for decision is within the competence of a court as defined by law.²⁹

There should not be any inappropriate or unwarranted interference with the judicial process. Decisions by courts should not be subject to revision (except through

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24. Human Rights Committee, Views of 6 November 1997, *Víctor Alfredo Polay Campos v. Peru*, Communication No. 577/1994; Views of July 2000, *María Sybila Arredondo v. Peru*, Communication No. 688/1996; Views of 21 October 2005, *Jorge Luis Quispe Roque v. Peru*, Communication No. 1125/2002; Views of 22 July 2003, *Teofila Gómez Casafra v. Peru* Communication No. 981/2001; *Concluding Observations of the Human Rights Committee on Peru*, CCPR/C/79/Add.67, 25 July 1996, paras. 12, and *Colombia*, CCPR/C/79/Add.76, 3 May 1997, para. 21. See also: *Concluding Observations of the Committee against Torture on Peru*, A/50/44, 26 July 1995, para. 68; Inter-American Court of Human Rights, Judgment of 30 May 1999, *Castillo Petrucci et al v. Peru*, Series C No. 52, para. 133, and Judgment of 25 November 2004, *Lori Berenson Mejía v. Peru*, Series C No. 119, para. 147; and Inter-American Commission on Human Rights, *Second Report on the Situation of Human Rights in Peru*, paras. 103, 104 and 113, and the *Third Report on the Situation on Human Rights in Colombia*, OEA/Ser.L/V/II.102, Doc. 9 rev. 1, 26 February 1999, paras. 121-124.
 25. European Court of Human Rights, Judgment of 9 December 1994, *Stran Greek Refineries and Stratis Andreadis v. Greece*, Application No. 13427/87, para. 49.
 26. European Court of Human Rights, Judgment of 16 July 1971, *Ringeisen v. Austria*, Application No. 2614/65 para. 95.
 27. European Court of Human Rights, Judgment of 16 July 1971, *Ringeisen v. Austria*, Application No. 2614/65 para. 95; and Inter-American Commission on Human Rights, *Report on Terrorism and Human Rights*, OAS Doc. OEA/Ser.L/V/II.116, Doc. 5 rev. 1 corr., 22 October 2002, para. 229.
 28. See the UN *Basic Principles on the Independence of the Judiciary*, Principles 1, 2, 3 and 4.
 29. Principle 3 of the UN *Basic Principles on the Independence of the Judiciary*.

judicial review), or mitigation or commutation of sentence – unless done so by competent authorities, in accordance with the law.³⁰

The judiciary must be independent in regards to internal matters of judicial administration, including the assignment of cases to judges within the court to which they belong.³¹

The independence of judges and tribunals has two dimensions: institutional independence and personal independence. Both require that neither the judiciary nor the judges who compose it be subordinate to any other public powers:

- i. institutional independence means that judges, courts and tribunals are independent from other branches of power, which means *inter alia* that judges are not subordinate or accountable to other branches of government, in particular the executive. It also means that all other State institutions have a duty to respect and abide by the judgments and decisions of the judiciary;
- ii. personal independence means that judges are independent from other members of the judiciary.

The process for the appointment of persons to judicial office should be transparent and subject to strict selection criteria. In general terms, it is preferable for judges to be elected by their peers or by a body independent from the executive and the legislature. Any method of judicial selection must safeguard the independence and impartiality of the judiciary. Appointments made by the executive branch or the election of judges by popular vote undermine the independence of the judiciary.³²

The criteria for appointment to judicial office should be the suitability of the candidate for such office based on their integrity, ability, legal skills and appropriate training or qualifications in law.³³ Any person who meets the criteria should be entitled to be considered for judicial office without discrimination on any ground such as race, colour, ethnic origin, language, sex, gender, sexual orientation, gender identity,

30. Principles 4 and 14 of the UN *Basic Principles on the Independence of the Judiciary*.

31. European Court of Human Rights, Judgment of 22 October 1997, *Papageorgiou v. Greece*, Application No. 24628/94.

32. Human Rights Committee: *Concluding Observations of the Human Rights Committee: Liechtenstein*, CCPR/CP/81/Lie, 12 August 2004, para. 12; *United States of America*, CCPR/C/79/Add.50 paras. 266-304, paras. 288 and 301; *Armenia*, CCPR/C/79/Add.100, 19 November 1998, para. 8; and European Court of Human Rights, Judgment of 2 September 1998, *Lauko v. Slovakia*, Application No. 26138/95, para. 64. For further information, see *International Principles on the Independence and Accountability of Judges, Lawyers and Prosecutors, Practitioners' Guide No. 1*, International Commission of Jurists, Geneva 2007, p. 47 *et seq.*

33. See *inter alia*: UN *Basic Principles on the Independence of the Judiciary*, Principle 10; Council of Europe, *Recommendation No. R (94) 12*, Principle 1.2; and *Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa*, Principle A, paras. 4 (i) and (k).

political or other opinion, religion, creed, disability, national or social origin, birth, economic or other status. However, it is not deemed discriminatory for States to:

- i. prescribe a minimum age or level of experience for candidates for judicial office;
- ii. prescribe a maximum or retirement age or duration of service for judicial officers;
- iii. prescribe that such maximum or retirement age or duration of service may vary depending on the level of a judge, magistrate or other officer in the judiciary;
- iv. require that only nationals of the State concerned are eligible for appointment to judicial office.

No person should be appointed to judicial office unless they have the appropriate legal training or qualifications in law that enables them to adequately fulfil their functions.

Judges shall have security of tenure until they reach a mandatory retirement age or their term of office expires.

The period of tenure, adequate remuneration, pension, conditions of physical and social security, age of retirement, disciplinary and recourse mechanisms and other conditions of service of judges shall be prescribed and guaranteed by law. Promotion of judges should be based on objective factors, in particular their professional ability, integrity and experience.

Judges can only be removed for serious misconduct incompatible with judicial office, for committing disciplinary or criminal offences or because of an incapacity that renders them unable to discharge their functions. Furthermore, judges enjoy personal immunity from civil suits for monetary damages arising from their rulings.³⁴ In all cases, disciplinary proceedings against judges must comply with the following standards:

- i. procedures for dealing with complaints against judges or for disciplining them in connection with their professional conduct should be prescribed by law. Any complaints or charges brought against judges should be processed promptly and fairly;
- ii. judges facing disciplinary, suspension or removal proceedings have the right to a fair hearing including the right to be represented by a legal representative of their choice and to have any decision taken during disciplinary,

34. See Principle 16 of the *UN Basic Principles on the Independence of the Judiciary*.

suspension or removal proceedings reviewed by an independent and impartial body;

- iii. judges cannot be removed or punished for *bona fide* errors,³⁵ for disagreeing with a particular interpretation of the law or solely because a decision of theirs has been overturned on appeal or referred for review by a higher judicial body.

4. An Impartial Tribunal

The accused is entitled to trial before an impartial tribunal.

Tribunals, courts and judges must be impartial. Impartiality means that tribunals, courts and judges should have no interest or stake in the specific case they are examining, should hold no preconceived views about the matter they are dealing with and should refrain from acting in ways that promote the interests of any of the parties. The impartiality of a tribunal, court or judge can be defined as the absence of bias, animosity or sympathy towards any of the parties.

Impartiality means that tribunals, courts and judges shall decide matters before them on the basis of the facts and in compliance with the law, with no restrictions of any kind and without improper influences, inducements, pressure, threats or interference, be they direct or indirect, from any quarter or for any reason.

The accused as well as all parties to criminal proceedings have the right to challenge the impartiality of tribunals, courts or judges on the basis of any evidence suggests they may have been compromised.

The duty of impartiality creates a correlative duty for judges to declare themselves unfit to try a case and to refrain from taking part in proceedings if they believe they will be unable to impart justice impartially or if their actual impartiality is likely to be compromised. In such cases, they should not wait for the parties to the proceedings to challenge their impartiality. Instead, they should declare themselves unfit and refrain from participating in the proceedings. Where the grounds for disqualifying or presenting a challenge to a judge are laid down by law, it is incumbent upon the court to consider such grounds *ex officio* and to replace any members of the court who may be affected by them.³⁶

35. Human Rights Committee, *Concluding Observations of the Human Rights Committee: Viet Nam*, CCPR/CO/75/VNM, 5 August 2002, para. 10.

36. Human Rights Committee, Views of 23 October 1992, Communication 387/1989, *Arvo O. Karttunen v. Finland*, para. 7.2; European Court of Human Rights, Judgment of 1 February 2005, *Indra v. Slovakia*, Application No. 46845/99, para. 49; *Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa*, Principle A, para. 5.

The impartiality of tribunals, courts and judges must be examined from a subjective as well as an objective perspective.³⁷ It is not sufficient for tribunals, courts and judges to actually be impartial, they must also be seen to be so. They can only be deemed impartial if they meet both the subjective and objective criteria of impartiality:

- i. the subjective impartiality of tribunals or judges refers to the personal views and convictions of judges in relation to a given case. Subjective evidence of this consists of seeking to determine the personal conviction of a specific judge in a given case and means that no judge in a court should harbour personal prejudice or partiality. Subjective impartiality is assumed in any given case unless there is evidence to the contrary;
- ii. the objective impartiality of tribunals or judges refers to there being sufficient guarantees of impartiality provided by members of the tribunal so that any doubts surrounding it are dispelled. Objective evidence of impartiality consists of determining whether a judge has provided sufficient guarantees to remove any legitimate doubt concerning his or her impartiality. Objective impartiality may be called into question if an objective evaluation (not related to a judge's personal conduct) finds evidence to suggest there is reason to doubt the impartiality of a tribunal or judge.

The impartiality of a tribunal, court or judge can be determined on the basis of three relevant elements:

- i. the role of the judge in other parts of the proceedings;
- ii. views expressed by the judge on matters relevant to the case at hand;
- iii. the judge has been involved in the matter under examination in a different capacity (e.g. as a defence lawyer, representative of the *parties civiles*³⁸, etc).

The impartiality of a tribunal, court or judge is undermined if:

- i. the same person has discharged the duties of examining magistrate and trial judge in the same case;³⁹

37. See, among others: Human Rights Committee, Views of 23 October 1992, *Arvo O. Karttunen v. Finland*, Communication 387/1989, para. 6.7; European Court of Human Rights, Judgment of 9 June 1998, *Incal v. Turkey*, Application No. 22678/93 para. 65 and Judgment of 20 May 1998, *Gautrin and others v. France*, Application Nos. 21257/93; 21258/93; 21259/93; 21260/93, para. 58; Inter-American Court of Human Rights, Judgment of 5 August 2008, *Apitz Barbera et al. ("Corte Primera de lo Contencioso Administrativo") v. Venezuela*, Series C No. 182, para.55 *et seq*; Inter-American Commission on Human Rights, Report No. 78/02 of 27 December 2002, Case No. 11.335, *Guy Malary (Haiti)*; and *Report on Terrorism and Human Rights*, *doc. cit.*, para. 229.

38. "*Parties civiles*" – victim or other party who has suffered damage as a result of the criminal offence which allows *locus standi* in the criminal proceedings.

39. European Court of Human Rights, Judgment of 26 October 1984, *De Cubber v. Belgium*, Application No. 9186/80.

- ii. a judge who has confirmed an indictment on the grounds that there is sufficient evidence against the accused goes on to sit on the tribunal that will be determining the merits of the case;⁴⁰
- iii. a person acts as judge in a case which he or she has presented to the court or in which he or she has been a complainant, as no one can be both judge and party;⁴¹
- iv. a former public prosecutor or legal representative sits as a judge in a case in which he or she prosecuted or represented one of the parties;
- v. a judge has secretly participated in the investigation of a case;
- vi. a judge has some connection or relationship with the case or one of the parties to the proceedings;
- vii. the same person has sat as both the trial judge and the appeal judge in the same case.

5. A Competent Tribunal Established by Law

The accused is entitled to trial before a competent tribunal established by law.

Tribunals, courts and judges, including examining magistrates, must be competent in accordance with the law. Everyone has the right to be tried by courts and judges established under ordinary jurisdiction in accordance with legally-established procedures. Tribunals that do not apply these duly established procedural norms shall not be created as a substitute for the jurisdiction that normally corresponds to the ordinary courts.⁴²

40. European Court of Human Rights, Judgment of 28 October 1998, *Castillo Algar v. Spain*, Application No. 28194/95, paras. 47 to 51 and Judgment of 26 October 1984, *De Cubber v. Belgium*, Application No. 9186/80, paras. 27 *et seq.*

41. European Court of Human Rights, Judgment of 9 November 2004, *Svetlana Naumenko v. Ukraine*, Application 41984/98, para. 97.

42. Principle 5 of the *Basic Principles on the Independence of the Judiciary*; Inter-American Court of Human Rights, *Castrillo Petruzzi et al. v. Peru*, *doc. cit.*, para. 129; Inter-American Commission on Human Rights, *Report on Terrorism and Human Rights*, *doc. cit.*, para. 230; African Commission on Human and Peoples' Rights, Judgment of 31 October 1998, Communications 137/94, 139/94, 154/96 and 161/97, *International Pen, Constitutional Rights Project, Interights and Civil Liberties Organisation v. Nigeria*, para. 86.

As a general principle, military tribunals, the jurisdiction of which shall be strictly limited to offences of a military nature committed by military personal, should not be competent:

- i. to try civilians;
- ii. to try military or police personnel for cases of human rights violations committed against civilians. (See Chapter VII “Special Cases”).

Tribunals and courts, as well as their sphere of jurisdiction, responsibilities and judicial functions, shall be previously established under national law.

6. The Role of Prosecutors⁴³

The accused is entitled to a trial in which the prosecutor is fair and impartial.

Prosecutors shall carry out their professional functions impartially and objectively and avoid discrimination on political, social, religious, racial, cultural, sexual orientation grounds or any other grounds.

The proper exercise of prosecutorial functions requires autonomy and independence from the other branches of the State.⁴⁴ Unlike in the case of judges, international law does not contain a provision that guarantees the institutional independence of prosecutors. This is due to the fact that in some systems prosecutors are appointed by the executive or are answerable to it to some degree, thus obliging them to comply with certain orders issued by the government. Whilst an independent prosecutorial authority is preferable to one that is answerable to the executive, in all cases States have a duty to provide safeguards so that prosecutors can conduct investigations impartially and objectively.

The office of prosecutor should be strictly separated from judicial functions.⁴⁵

Prosecutors should be able to perform their professional duties without intimidation, hindrance, harassment, improper interference or unjustified exposure to civil, penal or other liability.

43. See *inter alia*: the UN Guidelines on the Role of Prosecutors; Recommendation No. R (2000) 19 of the Committee of Ministers to Member States on *the role of public prosecution in the criminal justice system*; and *Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa*.

44. Inter-American Commission of Human Rights, *Report on the Situation of Human Rights in Mexico*, OEA/Ser.L/V/II.100, Doc. 7 rev. 1, paras. 372 and 381. European Court of Human Rights, Judgment of 10 July 2008, *Medvedev and others v. France*, Application No. 3394/03, para. 61.

45. Guideline 10 of the *Guidelines on the Role of Prosecutors*.

Prosecutors should have appropriate education and training and be made aware of the ideals and ethical duties of their office, of the constitutional and statutory protections available for the rights of suspects and victims, and of human rights and fundamental freedoms recognised by national and international law.⁴⁶

Prosecutors should play an active role in criminal proceedings, including the initiation of such proceedings and, where authorised by law or consistent with local practice, in the investigation of crime, supervision of the legality of such investigations, supervision of the execution of decisions taken by judicial bodies and the exercise of other functions as representatives of the public interest.⁴⁷

Prosecutors should, in accordance with the law, perform their duties fairly, consistently and expeditiously, and respect and protect dignity and uphold human rights, thus contributing to ensuring due process and the smooth functioning of the criminal justice system.⁴⁸

In the performance of their duties, prosecutors should:

- i. carry out their functions impartially and avoid all political, social, racial, ethnic, religious, cultural, sexual, gender or any other kind of discrimination;
- ii. protect the public interest, act with objectivity, take proper account of the position of the suspect and the victim, and pay attention to all relevant circumstances, irrespective of whether they are to the advantage or disadvantage of the suspect;
- iii. keep matters in their possession confidential, unless the performance of duty or needs of justice require otherwise;
- iv. consider the views and concerns of victims when their personal interests are affected and ensure that victims are informed of their rights.⁴⁹

Prosecutors should not initiate or continue prosecution, or should make every effort to stay proceedings, when an impartial investigation shows the charge to be unfounded.⁵⁰

Prosecutors should give due attention to the prosecution of crimes committed by public officials, particularly corruption, abuse of power, grave violations of human rights and other crimes recognised by international law.⁵¹

46. Guideline 2 of the *Guidelines on the Role of Prosecutors*.

47. Guideline 11 of the *Guidelines on the Role of Prosecutors*.

48. Guideline 12 of the *Guidelines on the Role of Prosecutors*.

49. Guideline 13 of the *Guidelines on the Role of Prosecutors*.

50. Guideline 14 of the *Guidelines on the Role of Prosecutors*.

51. Guideline 15 of the *Guidelines on the Role of Prosecutors*.

When prosecutors come into possession of evidence against a suspect that they know or believe on reasonable grounds was obtained through recourse to unlawful methods, which constitute a gross violation of the suspect's human rights, especially involving torture or cruel, inhuman or degrading treatment or punishment, or other violations of human rights, they should refuse to use such evidence against anyone other than those who used such methods, or inform the judicial body accordingly, and should take all necessary steps to ensure that those responsible for using such methods are brought to justice.⁵²

7. The Independence of the Legal Profession⁵³

Anyone accused of a criminal offence is entitled to be assisted and defended by a lawyer. The State must guarantee the independence of the legal profession and ensure that lawyers are able to carry out their professional duties.

Unless they wish to undertake their own defence, individuals who are charged with a crime must at all times be represented by a lawyer, who should ensure that their right to receive a fair trial by an independent and impartial tribunal is respected throughout the proceedings. Lawyers must be authorised to challenge the court's independence and impartiality and must seek to ensure that the defendant's rights and judicial guarantees are respected.⁵⁴ The right to be assisted by a lawyer, even if the individual cannot afford one, is an integral part of the right to a fair trial recognised under international law.

In addition, lawyers play a crucial role in protecting the right not to be arbitrarily detained by challenging arrests, for example, by presenting habeas corpus petitions.⁵⁵ They also advise and represent victims of human rights violations and their

52. Guideline 16 of the *Guidelines on the Role of Prosecutors*.

53. See: UN *Basic Principles on the Role of Lawyers*; *Recommendation 2000 (21) on the Freedom of exercise of the profession of lawyer* of the Committee of Ministers to Member States of the Council of Europe; and *Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa*.

54. See, for example, the UN *Basic Principles on the Role of Lawyers*, Principles 1 and 5; *International Covenant on Civil and Political Rights*, Article 14, para. 3 (d); *African Charter on Human and Peoples' Rights*, Article 7, para. 1 (c); *European Convention for the Protection of Human Rights and Fundamental Freedoms*, Article 6; *American Convention on Human Rights*, Article 8; and Principle 11 of the *Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment*.

55. Human Rights Committee, *General Comment No. 20, Article 7: Prohibition of torture, or other cruel, inhuman or degrading treatment or punishment*, para 11; *Concluding Observations of the Human Rights Committee on: Tajikistan*, CCPR/CO/84/TJK, 18 July 2005, para. 12, and *Thailand*, CCPR/CO/84/THA, 8 July 2005, para. 15. See *inter alia*: UN *Basic Principles on the Role of Lawyers*; *UN Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms*; *Recommendation 2000 (21) on the Freedom of exercise of the profession of lawyer* of the Committee of Ministers to Member States of the Council of Europe; and *Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa*.

relatives in criminal proceedings against the alleged perpetrators of such violations and in proceedings that seek to obtain reparation.

In order for legal assistance to be effective, it must be carried out independently. International law establishes certain guarantees that seek to ensure the independence of individual lawyers as well as of the legal profession as a whole.

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. States shall ensure that efficient procedures and responsive mechanisms for effective and equal access to lawyers are provided for all persons within their territory and subject to their jurisdiction or their effective control, without distinction of any kind, such as discrimination based on race, colour, ethnic origin, sex, sexual orientation, language, religion, political or other opinion, national or social origin, property, birth, economic or other status.

States shall ensure that:

- i. 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;
- ii. all persons arrested or detained, with or without criminal charge have prompt access to a lawyer, and in any case not later than forty-eight hours from the time of arrest or detention;
- iii. individuals who are charged with a crime are represented by a lawyer at all times and throughout every step of the judicial criminal proceeding;
- iv. persons who do not have a lawyer, 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.

States shall ensure that:

- i. lawyers are able to perform all of their professional functions without intimidation, hindrance, harassment or improper interference;
- ii. where the security of lawyers is threatened as a result of discharging their functions, they are adequately safeguarded ;
- iii. lawyers are able to travel and to consult with their clients freely both within their own country and abroad;

- iv. lawyers should not suffer, or be threatened with, prosecution or administrative, economic or other sanctions for any action taken in accordance with recognised professional duties, standards and ethics;
- v. all communications and consultations between lawyers and their clients within their professional relationship remain confidential; and
- vi. lawyers shall not be identified with their clients or their clients' causes as a result of discharging their functions.

It is the duty of the competent authorities to ensure lawyers have 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.

Lawyers should enjoy civil and penal immunity for relevant statements made in good faith in written or oral pleadings or in their professional appearances before a judicial body or other legal or administrative authority.

Lawyers should at all times maintain the honour and dignity of their profession as essential agents of the administration of justice and they should always fully respect the interests of their clients. Lawyers have basic professional duties, mostly related to their clients, which include:

- i. advising clients as to their legal rights and obligations, and as to the working of the legal system in so far as it is relevant to the legal rights and obligations of the clients;
- ii. assisting clients in every appropriate way, and taking legal action to protect their interests;
- iii. assisting clients before courts, tribunals or administrative authorities, where appropriate.

Lawyers, in protecting the rights of their clients and promoting the cause of justice, should seek to uphold human rights and fundamental freedoms recognised by national and international law and should at all times act freely and diligently in accordance with the law and recognised standards and ethics of the legal profession.

Charges or complaints made against lawyers in their professional capacity should be processed expeditiously and fairly under appropriate procedures. Lawyers should have the right to a fair hearing, including the right to be assisted by a lawyer of their choice.

General Standards on Fair Trial and Due Process of Law

Table No. 1: United Nations and Regional Treaty Standards

Acronyms used:

ICCPR: International Covenant on Civil and Political Rights
ECHR: European Convention for the Protection of Human Rights and Fundamental Freedoms and its Protocols 1, 4, 6, 7, 12 and 13
ACHR: American Convention on Human Rights
ACHPR: African Charter on Human and Peoples' Rights

ARCHR: Arab Charter on Human Rights
CAT: Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
ICERD: International Convention on the Elimination of All Forms of Racial Discrimination
CEDAW: Convention on the Elimination of All Forms of Discrimination against Women

ICRMW: International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families
ICED: International Convention for the Protection of All Persons from Enforced Disappearance
Art.: Article

	ICCPR	ECHR	ACHR	ACHPR	ARCHR	CAT	ICERD	CEDAW	ICRMW	ICED
<i>Right to equality before the law and courts and principle of non-discrimination</i>	Arts. 2(1), 3, 14(1), 26	Art. 14, Art. 1 of Protocol 12	Arts. 1, 24	Arts. 2, 3	Arts. 3, 11, 12	-	Arts. 2, 5, 7	Arts. 2, 15	Art. 18(1)	-
<i>Right to a fair trial</i>	Art. 14(1)	Art. 6(1)	Art. 8(1)	Art. 7	-	Art. 7(3)	-	-	Art. 18(1)	Art. 11(3)
<i>Right to a public hearing</i>	Art. 14(1)	Art. 6(1)	Art. 8(5)	-	Art. 13(2)	-	-	-	Art. 18(1)	-
<i>Right to a competent tribunal established by law</i>	Art. 14(1)	Art. 6(1)	Art. 8(1)	Art. 7(1)	Art. 13(1)	-	-	-	Art. 18(1)	Art. 11(3)
<i>Right to trial before an independent tribunal</i>	Art. 14(1)	Art. 6(1)	Art. 8(1)	Arts. 7(1), 26	Arts. 12, 13(1)	-	-	-	Art. 18(1)	Art. 11(3)
<i>Right to trial before an impartial tribunal</i>	Art. 14(1)	Art. 6(1)	Art. 8(1)	Art. 7(1)	Art. 13(1)	-	-	-	Art. 18(1)	Art. 11(3)

General Standards on Fair Trial and Due Process of Law

Table No. 2: United Nations Declaratory Instruments Standards

Acronyms used:

UDHR: Universal Declaration of Human Rights
BPIJ: UN Basic Principles on the Independence of the Judiciary
BPL: UN Basic Principles on the Role of Lawyers
GP: UN Guidelines on the Role of Prosecutors
SGDP: Safeguards guaranteeing protection of the rights of those facing the death penalty

DED: Declaration on the Protection of All Persons from Enforced Disappearance
DRA: Declaration on the Human Rights of Individuals Who are not Nationals of the Country in which They Live
Art.: Article
Guid.: Guideline

Prin.: Principle
R.: Rule
S.: Safeguard

	UDHR	BPIJ	BPL	GP	SGDP	DED	DRA
<i>Right to equality before the law and courts and principle of non-discrimination</i>	Arts. 1, 2, 7, 10	-	-	-	-	-	Art. 5(i)(c)
<i>Right to a fair trial</i>	Arts. 10, 11	Prin. 5, 6	Prin.1	-	S. 4	Art. 16(4)	
<i>Right to a public hearing</i>	Arts. 10, 11		-	-	-	-	-
<i>Right to a competent tribunal established by law</i>	-	Prin. 3, 5	-	-	S. 4	-	-
<i>Right to trial before an independent tribunal</i>	Art. 10	Prin. 1	-	-	-	Art. 16(2)	-
<i>Right to trial before an impartial tribunal</i>	Art. 10	Prin. 2	-	-	-	-	-
<i>The role of prosecutors</i>	-	-	-	Guid. 3(a), 7, 10(a), 17	-	-	-
<i>The independence of the legal profession</i>	-		Prin. 1, 12, 13, 14, 15	-	-	-	-

General Standards on Fair Trial and Due Process of Law

Table No. 3: Regional Declaratory Instruments Standards

Acronyms used:

APGFT:	Principles and Guidelines on the right to a fair trial and legal assistance in Africa, adopted by the African Union in 2003	EUCHR:	Charter of Fundamental Rights of the European Union	EGT:	Guidelines of the Committee of Ministers of the Council of Europe on Human rights and the fight against terrorism
ADHR:	American Declaration of the Rights and Duties of Man	Rec. R:	Recommendation No. R (2000) 19 of the Committee of Ministers to Member States of the Council of Europe on the role of public prosecution in the criminal justice system	Art.:	Article
OASPDLI:	Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas			Guid.:	Guideline
				Prin.:	Principle

	APGFT	ADHR	OASPDLI	EUCHR	Rec. R	EGT
<i>Right to equality before the law and courts and principle of non-discrimination</i>	-	Art. II	Prin. II	Art. 20, 21, 23	Prin. 26	-
<i>Right to a fair trial</i>	Prin. A(1), A(2)	Art. XXVI	-	-	-	Guid. IX
<i>Right to a public hearing</i>	Prin. A(1), A(3)	Art. XXVI	-	-	-	-
<i>Right to a competent tribunal established by law</i>	Prin. A(1), L	Art. XXVI	Prin. V	Art. 47	-	Guid. IX
<i>Right to trial before an independent tribunal</i>	Prin. A(1), A(4)	-	Prin. V	Art. 47	-	Guid. IX
<i>Right to trial before an impartial tribunal</i>	Prin. A(1), A(5)	-	Prin. V	Art. 47	-	Guid. IX
<i>The role of prosecutors</i>	Prin. F	-	-	-	-	-
<i>The independence of the legal profession</i>	Prin. I	-	-	-	-	-

v. Standards Applicable To Arrest And Pre-Trial Detention In Criminal Proceedings

In this chapter we examine the international standards⁵⁶ that apply to arrest and pre-trial detention as well as the investigation stage of criminal and pre-trial proceedings. A schedule listing the main sources of law for each international standard is provided at the end of the chapter.

1. Right to Personal Liberty and the Prohibition of Arbitrary Detention⁵⁷

Everyone has the right to personal liberty and to not be arbitrarily deprived of liberty (including arrest, pre-trial detention and detention). An arrest, pre-trial detention 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 authorised personnel. People charged with a criminal offence should not normally be held in detention pending trial.

States should guarantee the right to liberty and security of the person for everyone in its territory or under its jurisdiction or its effective control. States should ensure that no one is arbitrarily deprived of their liberty, as a result of either arbitrary arrest⁵⁸ or detention,⁵⁹ and that any deprivation of liberty is carried out only in strict compliance with the grounds and procedures established by law and by competent officials or persons authorised for that purpose.

No one shall be subjected to arbitrary arrest or detention. “Arbitrary” is not to be equated with “against the law”, but must be interpreted more broadly to include

56. In some instances, the text of the relevant standards referred to is directly reproduced.

57. The *Universal Declaration of Human Rights*, Articles 3 and 9, the *International Covenant on Civil and Political Rights*, Article 9, *International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families*, Article 16, *International Convention for the Protection of All Persons from Enforced Disappearance*, Article 17, *Declaration on the human rights of individuals who are not nationals of the country in which they live*, Article 5.1, *African Charter on Human and Peoples’ Rights*, Article 6, *Principles and guidelines on the right to a fair trial and legal assistance in Africa*, Principle M, *American Declaration of the Rights and Duties of Man*, Articles I and XXV, *American Convention on Human Rights*, Article 7, *Arab Charter on Human Rights*, Article 14 and *European Convention for the Protection of Human Rights and Fundamental Freedoms*, Article 5.

58. The UN *Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment* gives the following definition of ‘arrest’: “the act of apprehending a person for the alleged commission of an offence or by the action of an authority”.

59. According to the UN *Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment*, a ‘Detained Person’ means “any person deprived of personal liberty except as a result of conviction for an offence” (“Use of Terms”).

elements of inappropriateness, injustice and lack of predictability. This means that remanding a person in custody pursuant to lawful arrest or detention must not only be lawful but also reasonable in all the circumstances pertaining at the time. It must also be necessary in all circumstances, for example, to prevent flight, interference with evidence or repeat offending.⁶⁰

Deprivation of liberty merely for being unable to fulfil a contractual obligation is absolutely prohibited.⁶¹

Any deprivation of liberty must comply with the following general principles:

- i. legality (material and procedural grounds);
- ii. legitimacy (purpose of the detention);
- iii. necessity and reasonableness;
- iv. proportionality; and
- v. the protection of human rights, in particular, the right to the security of the person, the right not to be arbitrarily detained and the right to an effective remedy.⁶²

The proportionality, necessity and reasonableness of pre-trial detention should be assessed on a case-by-case basis. However, several factors need to be considered when examining the proportionality, necessity and reasonableness of pre-trial detention, including:

- i. the seriousness of the offence allegedly committed;
- ii. how complex the investigation is in terms of the nature of the offence and the number of alleged offenders;
- iii. the nature and severity of the possible penalties;

60. Human Rights Committee: Views of 23 July 1990, *Hugo van Alphen v. The Netherlands*, Communication No. 305/1988, para. 5.8. See also, Views of 5 November 1999, *Aage v. Norway*, Communication No. 631/1995, para. 6.3; Views of 21 July 1994, *Albert Womah Mukong v. Cameroon*, Communication No. 458/1991, para. 9.8; Views of 3 April 1997, *A[name deleted] v. Australia*, Communication No. 560/1993, para. 9.2.

61. Articles 4 and 11 of the *International Covenant on Civil and Political Rights*.

62. See *inter alia*, Inter-American Court of Human Rights: Judgment of 21 January 1994, *Gangaram- Panday v. Suriname*, Series C No. 16, paras. 46-47; Judgment of 8 July 2004, *Gómez Paquiyauri Brothers v. Peru*, Series C No. 110, para. 83; Judgment of 27 November 2003, *Maritza Urrutia v. Guatemala*, Series C No. 103, para. 65; Judgment of 18 September 2003, *Bulacio v. Argentina*, Series C No. 100, para. 125; and Judgment of 7 June 2003, *Juan Humberto Sánchez v. Honduras*, Series C No. 99, para. 78. See also: European Court of Human Rights: Judgment of 26 May 1993, *Brannigan and McBride v. United Kingdom*, Application Nos. 14553/89; 14554/89, para. 48; Judgment of 29 November 1988, *Brogan and others v. United Kingdom*, Application Nos. 11209/84; 11234/84; 11266/84; 11386/85, para. 32; Judgment of 27 September 2001, *Günay and others v. Turkey*, Application No. 31850/96, para. 22; Judgment of 26 November 1997, *Murat Sakik and others v. Turkey*, Application Nos. 23878/94; 23879/94; 23880/94; 23881/94; 23882/94; 23883/94, para. 44; Judgment of 15 November 1996, *Chahal v. United Kingdom*, Application No. 22414/93, para. 118

- iv. the risk that the accused will escape or abscond;
- v. the risk that the accused will destroy or tamper with the evidence; and
- vi. the possibility that the accused will re-offend.⁶³

Deprivation of liberty is arbitrary in the following cases:

- i. when it manifestly cannot be justified on any legal basis;
- ii. when it is the result of a judgment or sentence handed down for exercising the rights and freedoms enshrined in Articles 7, 13, 14, 18, 19, 20 and 21 of the *Universal Declaration of Human Rights* and also, as far as the relevant States Parties are concerned, Articles 12, 18, 19, 21, 22, 25, 26 and 27 of the *International Covenant on Civil and Political Rights*;
- iii. when the complete or partial non-observance of international standards relating to the right to a fair trial, as set forth in the *Universal Declaration of Human Rights* and relevant international instruments, is of such gravity that it renders the deprivation of liberty, of whatever kind, arbitrary; or
- iv. when the detention, including pre-trial detention, is based on criminal offences that are vaguely or ambiguously defined.⁶⁴

International human rights law prohibits at all times and in all circumstances unacknowledged arrests, secret detentions, detention in secret locations, hostage-taking, abductions and enforced disappearances,⁶⁵ all of which constitute gross human rights violations.

Pre-trial detention should not be the general rule: it should only be used in criminal proceedings as a last resort, and for the shortest possible time period, when required to meet the needs of justice or of the investigation of the alleged offence or

63. Human Rights Committee: Views of 23 July 1990, *Hugo van Alphen v. The Netherlands*, Communication No. 305/1988, para. 5.8; Views of 5 November 1999, *Aage Spakmo v. Norway*, Communication No. 631/1995, para. 6.3; Views of 21 July 1994, *Albert Womah Mukong v. Cameroon*, Communication No. 458/1991, para. 9.8; and Views of 3 April 1997, *A [name deleted] v. Australia*, Communication No. 560/1993, para. 9.2.

64. See: United Nations Working Group on Arbitrary Detention, *Fact Sheet No. 26: Working Group on Arbitrary Detention*; and United Nations Special Rapporteur on the Independence of Judges and Lawyers, E/CN.4/1998/39/Add.1, para. 129.

65. Human Rights Committee, *General Comment No. 29, States of Emergency (Article 4)*, paras. 11 and 13; *Concluding Observations of the Human Rights Committee; United States of America*, CCPR/C/USA/CO/3/Rev.1, 18 December 2006, para. 12; *International Convention on the Protection of All Persons from Enforced Disappearances*, Articles 1 and 17.1; *Declaration on the Protection of All Persons from Enforced Disappearances*, Article 2; and *Inter-American Convention on Forced Disappearance of Persons*, Article 1.

in order to protect society and the victim.⁶⁶ Pre-trial detention should be the exception and bail should be granted, except in situations where there is a likelihood that the accused would abscond, destroy evidence, influence witnesses or flee from the jurisdiction of the State.⁶⁷

States should establish in their national legislation the grounds, conditions and procedures under which orders to arrest and/or detain a person may be given, the grounds for which officials are authorised to issue such orders and which officials are authorised to execute them. Likewise national legislation should determine the penalties to be applied to any official who, without legal justification, refuses to provide information on a detention.

Each State should ensure strict control, including a clear chain of command, of all officials responsible for apprehension, arrest, detention, custody and imprisonment.

States should ensure, including by the enactment of legal provisions and adoption of procedures, that anyone who has been arbitrarily deprived of their liberty has the right to an effective remedy and to obtain reparation, including compensation.

2. Right to be Informed of the Reasons for the Arrest and of Any Charges Against Him/Her

Anyone who is arrested shall be informed, at the time of arrest, of the reasons for his or her arrest and notified without delay of any charges against him/her.

Anyone who is arrested should be informed, at the time of arrest, of the reason(s) for his or her arrest.

The reason(s) shall be provided at the time of arrest or detention and:

- i. should include a clear explanation of both the legal and factual basis for depriving the person of his/her liberty;
- ii. should be sufficiently detailed to allow the person deprived of liberty to challenge their arrest or detention before a court or judge so that the latter can decide promptly whether it is lawful and, if not, order their release; and

66. Article 9 (3) of the *International Covenant on Civil and Political Rights*; Principle 36 (2) of the *Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment*; and Rule 6 (1) of the *United Nations Standards Minimum Rules for Non-custodial Measures (The Tokyo Rules)*; Human Rights Committee, Views of 5 November 1999, *Aage v. Norway*, Communication No 631/1995, para. 6.3; and Human Rights Committee, *General Comment No. 8, Right to liberty and security of persons (Article 9)*, para 3.

67. Human Rights Committee, Views of 2 April 1997, *Michael and Brian Hill v. Spain*, Communication No. 526/1993, para. 12.3.

- iii. if the person does not understand or adequately speak the language used by the authorities responsible for the arrest or detention, he or she should have the right, without delay, to be given the above-mentioned information in a language that he or she understands.

Anyone arrested or detained on a criminal charge shall be informed promptly by the competent authority, in detail, and in a language that they understand, of the nature and grounds of the charge against them.

The accused should be informed of any charges against them in simple non-technical language that they can understand.

The information provided should include details of the offences or acts imputed to the person in question and their possible liabilities, the charges or criminal complaints that have been brought, as well as all applicable legislation. The accused should be informed in a manner that allows him or her to prepare a defence and to take immediate steps to secure his or her release. The accused has the right to state whether he or she admits or denies the alleged offence as well as to remain silent.

3. Right to be Informed of One's Rights

Anyone arrested or detained is entitled to be informed, in a language they understand, of their right to (a) legal representation; (b) examination and treatment by a doctor; (c) have a relative or friend notified of their arrest or detention; (d) communicate with or notify their consulate (in the case of foreign nationals) or a competent international organisation (in the case of refugees or persons who are stateless or under the protection of an inter-governmental organisation), and (e) be provided with information on how to avail themselves of such rights.

Anyone who is arrested or detained and who does not adequately understand or speak the language used by the authorities responsible for the arrest or detention should be informed of their rights and how to avail themselves of these rights in a language that they understand.

Anyone who is arrested or detained should be informed of their rights at the time of arrest, and in particular their right to:

- i. be assisted by a lawyer of their own choice, which means prompt and regular access to that person;
- ii. be given an appropriate medical examination and to receive medical treatment;

- iii. inform, or request the authorities to inform, their family or other appropriate persons designated by them of their arrest or detention and where they are being held;
- iv. communicate with their family and friends, which includes the right to be visited by and correspond with them;
- v. challenge the lawfulness of any deprivation of liberty, by means of *habeas corpus*, *amparo* or similar such judicial procedure, before a court or a judge.

If the arrested or detained person is a foreign national, he or she should be promptly informed of his/her right to communicate by appropriate means with a consular post or the diplomatic mission of the State of which he or she is a national. If he or she is a refugee or is otherwise under the protection of an inter-governmental organisation he/she is entitled to receive communications in accordance with international law with the representative of the competent international organisation.

4. Right to Legal Assistance Before Trial

All persons who are arrested or detained have the right to the immediate assistance of a lawyer during any pre-trial detention, interrogation and/or preliminary investigation. They have the right to a lawyer of their choice. If they are unable to afford a lawyer, then a defence counsel should be assigned to them free of charge.

Anyone who is arrested or detained has the right to be assisted by a lawyer without delay.⁶⁸ The right to be assisted by a lawyer includes the right to communicate and consult with him or her without interception or censorship and in full confidentiality.⁶⁹

- i. access to a lawyer may be delayed only in exceptional circumstances and must comply with strict criteria determined by law or legally-established regulations, if a judge or other authority deems it essential to maintain secu-

68. See, among others, Principles 17 and 18 of the *Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment* and Principle 7 of the *UN Basic Principles on the Role of Lawyers*. See also: Human Rights Committee: *Concluding Observations of the Human Rights Committee: Georgia*, CCPR/C/79/Add.75, 5 May 1997, para. 27; *Concluding Observations of the Human Rights Committee: Israel*, CCPR/CO/78/ISR, 23 August 2003, para. 13; and *Report of the Special Rapporteur on Torture, A/57/173*, 2 July 2002, para. 18 and E/CN.4/2004/56, 23 March 2004, para. 32.

69. *Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment*, Principle 18 (3) and the *UN Basic Principles on the Role of Lawyers*, Principle 8.

urity and order. In any event, the person deprived of liberty should have access to a lawyer within 48 hours of their arrest or detention;⁷⁰

- ii. any such restrictions should not amount to prolonged incommunicado detention or prolonged solitary confinement, both of which are forbidden under international law.

Anyone who is arrested or detained has the right to appoint a lawyer of their choice. In principle, a court may not assign a lawyer to the accused if he or she already has a lawyer of their choosing. However, although the right to defence entails the right not to be forced to accept court-appointed counsel,⁷¹ in cases involving the death penalty, it is axiomatic that the accused be effectively assisted by a lawyer at all stages of the proceedings.⁷² In such cases, even if the accused does not wish to appoint a lawyer of his or her choice or have a lawyer assigned to them, the court shall appoint one.⁷³

If a person who is arrested or detained does not have a lawyer of their own choice, they are entitled to have a lawyer assigned by a judicial or other authority in all cases where the interests of justice so require and without payment by them if they do not have sufficient means to pay.

When appointing defence counsel, the interests of justice should be determined by considering (i) the seriousness of the offence; and (ii) the severity of the sentence.⁷⁴

In the event that defence counsel is assigned by a court, the lawyer appointed should:

- i. be qualified to represent and defend the accused;
- ii. have the required training and experience that is consistent with the nature and severity of the case in question;

70. Principle 7 of the UN *Basic Principles on the Role of Lawyers*; Human Rights Committee, *Concluding Observations of the Human Rights Committee on Israel*, CCPR/CO/78/ISR, para. 13; and European Court of Human Rights: Judgment of 26 May 1993, *Brannigan and McBride v. United Kingdom*, Application Nos. 14553/89 and 14554/89, para 64.

71. Human Rights Committee: Views in: *inter alia*, *Sadías de Lopez v. Uruguay*, 29 July 1981, Communication No. 52/1979; and *Estrella v. Uruguay*, 29 March 1983, Communication No. 74/1980. See also Views of 20 July 1990, *Pinto v. Trinidad & Tobago*, Communication No. 232/1987, para. 12.5; Views of 6 April 1998, *Victor P. Domukovsky, Zaza Tsiklauri, Petre Gelbakhiani and Irakli Dokvadze v. Georgia*, Communications Nos. 623/1995; 624/1995; 626/1995 and 627/1995, para. 18.9.

72. Human Rights Committee, Views of 6 November 2003, *Kurbanova v. Tajikistan*, Communication No. 1096/2002, para. 6.5; Views of 7 August 2003, *Aliev v Ukraine*, Communication No. 781/1997; Views of 30 March 1989, *Robinson v. Jamaica*, Communication No. 223/1987, para. 10.4; Views of 23 March 1999, *Brown v. Jamaica*, Communication No. 775/1997.

73. European Court of Human Rights, Judgment of 25 September 1992, *Croissant v. Germany*, Application No. 13611/88, and Human Rights Committee, *General Comment No. 32, Article 14: Right of equality before courts and tribunals and to a fair trial*, paras. 37 and 38.

74. Human Rights Committee, *General Comment No. 32*, paras. 37 and 38.

- iii. be able to perform all of their professional functions without intimidation, hindrance, harassment or improper interference from the State authorities, including the judiciary;
- iv. assist the accused in every appropriate way and take legal action to protect their interests; and
- v. always fully respect the interests of their clients.

5. Right to Adequate Time and Facilities for the Preparation of a Defence

All persons charged with a criminal offence should be given adequate time and facilities for the preparation of their defence, including the opportunity to communicate in confidence with a lawyer of their own choosing.

Everyone who is arrested for a criminal offence and awaiting trial should be afforded adequate time and facilities for the preparation of their defence. The right to a defence applies at all stages of criminal proceedings, including the criminal investigation phase and the trial hearing.⁷⁵

What constitutes “adequate time” depends on the circumstances of each case, namely the type of proceedings, the nature and seriousness of the alleged offence and the factual circumstances of the case. Factors which may affect what constitutes “adequate time” include the complexity of the case, the accused’s access to evidence and to his or her lawyer, and time limits determined in national law for the proceedings in question.

The right of the accused to have adequate facilities to prepare their defence requires that they should have the ability to communicate, consult with and receive visits from their lawyer without interference or censorship and in full confidentiality.⁷⁶

- i. Interviews between detainees and their lawyers may be conducted within sight, but not within the hearing, of law enforcement officials;⁷⁷

75. Human Rights Committee, *General Comment No. 32*, para. 32.

76. *Ibid.*, para. 34.

77. Principle 18 (4) of the *Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment*.

- ii. Communications between detainees and their lawyers shall be inadmissible as evidence against the detained or imprisoned person unless connected to an ongoing or contemplated crime.⁷⁸

The right to adequate facilities to prepare a defence requires that the accused and his or her lawyer are guaranteed access to all appropriate information, documents and other evidence that the prosecution plans to offer in court against the accused or that are exculpatory.⁷⁹ However, this right may be subject to reasonable restrictions on grounds of security while the case is being investigated and prepared. Nevertheless, such restrictions may not be such that they result in “secret evidence” or “secret witnesses”.⁸⁰

The right to adequate facilities to prepare a defence requires that the accused should be able to obtain the opinion of independent experts when preparing their defence.

6. Right Not to be Held Incommunicado (Without Access to the Outside World)

Any person arrested or detained has the right to be provided with the facilities they require to communicate, as appropriate, with their lawyer, doctor, family and friends, and in the case of a foreign national, their embassy or consular post or an international organisation, subject to such restrictions and supervision only as are necessary to satisfy the interests of justice or the security of the institution in which they are being detained.

Secret detention, unacknowledged detention, prolonged incommunicado detention and prolonged solitary confinement are absolutely prohibited under international

78. Principle 18 (3 and 45) of the *Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment*.

79. Human Rights Committee, *General Comment No. 32*, para. 33.

80. Inter-American Commission on Human Rights, *Second report on the situation of human rights in Peru*, paras. 103, 104 and 110, and *Third report on the situation of human rights in Colombia*, paras. 121, 122, 123 and 124.

law.⁸¹ The prolonged solitary confinement or incommunicado detention of a detained person may amount to prohibited acts such as torture or ill-treatment.⁸²

Detained people should be allowed to communicate with the outside world, especially their family and counsel. This right may be limited solely for a matter of days and only in exceptional circumstances determined by law when it is considered indispensable by a judicial or other authority in order to maintain security and good order or where exceptional needs of the investigation so require.⁸³ In any event, detained people should have access to their lawyers not later than forty-eight hours from the time of arrest or detention.⁸⁴

Anyone who is arrested or detained has the right to notify, or have the authorities notify, their family or any other appropriate people designated by them, of their arrest or detention. Such information should include:

- i. the fact of the arrest, detention or transfer;
- ii. the place where the person is being detained or the place the person has been transferred to.

This should be done immediately, or at least without delay. In exceptional cases, such notification may be delayed where exceptional needs of the investigation so require. However, any such delay should not exceed a matter of days.

People held in pre-trial detention should be given all reasonable facilities to communicate with family and friends and to receive visits from them. These rights may be subject to restrictions determined by law only where necessary in the interests of the administration of justice or of the security and good order of the detaining institution.

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81. Human Rights Committee, *General Comment No. 29, States of Emergency (Article 4)*, 31 August 2001, paras. 11 and 13; *Concluding Observations of the Human Rights Committee: United States of America*, CCPR/C/USA/CO/3/Rev.1, 18 December 2006, para. 12; European Court of Human Rights, Judgment of 25 May 1998, *Kurt v. Turkey*, Application No. 24276/94, paras. 123 and 124; Inter-American Commission on Human Rights, *Report on Terrorism and Human Rights*, OEA/Ser.L/V/II.116, Doc. 5 rev. 1 corr., 22 October 2002, paras. 211 and 213; *International Convention on the Protection of All Persons from Enforced Disappearances*, Article 17.1; and *Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas*, Principle I.
 82. Human Rights Committee, *General Comment No. 20: Article 7 (Prohibition of torture, or other cruel, inhuman or degrading treatment or punishment)*, para. 6; Committee against Torture Reports A/54/44, paras. 121 and 146; A/53/44, para. 135; and A/55/44, para. 182; and Inter-American Court of Human Rights, Judgment 29 July 1988, *Velasquez Rodriguez v. Honduras*, Series C No. 4, para. 156 and Judgment of 12 November 1997, *Suárez Rosero v. Ecuador*, Series C No. 35, paras. 90-91.
 83. Principles 15, 16 and 18 of the *Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment*.
 84. Human Rights Committee, *Concluding Observations of the Human Rights Committee: Israel*, CCPR/CO/78/ISR, 23 August 2003, para. 13; European Court of Human Rights: Judgment of 26 May 1993, *Brannigan and McBride v. United Kingdom*, Application Nos. 14553/89; 14554/89, para 64; and Principle 7 of the *Basic Principles on the Role of Lawyers*.

Foreign nationals held in pre-trial detention have the right to communicate by appropriate means with a consular post or the diplomatic mission of the State of which they are nationals.⁸⁵ They should also 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 organisation, they have the right to communicate or receive visits from representatives of the competent international organisation.

Detainees have the right to be given a proper medical examination as promptly as possible after admission to the place of detention and thereafter medical care and treatment shall be provided whenever necessary. Such medical care and treatment shall be provided free of charge.⁸⁶

7. Right to be Brought Promptly Before a Judge

All those detained for committing a criminal offence have the right to be brought promptly before a judge or other official authorised by law to discharge judicial duties so that their rights can be protected.

Following their arrest or detention, any person detained for committing a criminal offence shall be brought without delay before a judge or other official authorised by law to discharge judicial duties. All arrests or detentions must be ordered by, or subject to the effective control of, a judge or other official authorised by law to discharge judicial duties.⁸⁷

In each case the judge or other official authorised by law to discharge judicial duties should:

- assess whether the arrest or detention is lawful;
- assess whether pre-trial detention is necessary;

85. Principle 16 (2) of the *Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment*; Article 36 of the *Vienna Convention on Consular Relations*; Article 38 (1) of the *Standard Minimum Rules on the Treatment of Prisoners*; Article 16 (7) of the *International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families*; Article 10 of the *Declaration on the human rights of individuals who are not nationals of the country in which they live*; Article 2 (Comment (a)) of the *Code of Conduct for Law Enforcement Officials*. See also, Inter-American Court of Human Rights, Advisory Opinion OC-16/99, *The Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law*, 1 October 1999, Series A, No. 16.

86. Principle 24 of the *Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment*; Article 6 of the *Code of Conduct for Law Enforcement Officials*; and Principle 5 (c) of the *Basic Principles on the Use of Force and Firearms by Law Enforcement Officials*.

87. *Declaration on the Protection of all Persons from Enforced Disappearance*, Article 10.1, *Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment*, Principles 4 and 11 and *Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas*.

- determine whether the detainee should be released pending trial and, if so, under what conditions;
- safeguard the well-being of the detainee;
- prevent any violations of the detainee’s fundamental rights;
- give the detainee the opportunity to challenge the lawfulness of their detention and order their release if the detention is unlawful or arbitrary.

If the detainee is brought before an official who is not a judge, that person must be authorised by law to exercise judicial power and must be independent and impartial.⁸⁸

8. Right to Challenge the Lawfulness of Detention

Anyone who is deprived of their liberty as a result of detention has the right, at any stage of criminal proceedings (including investigation and trial) to bring proceedings before a court in order that that court may decide without delay on the lawfulness of their detention and order their release if the detention is deemed unlawful.

The right to challenge the lawfulness of detention before a tribunal, court or judge is a non-derogable right.⁸⁹ It is crucial for protecting the right to liberty and preventing arbitrary detention. It is also crucial for preventing torture, ill-treatment, enforced

88. Inter-American Commission on Human Rights, *Report on the situation of human rights in Mexico*, OAS document OEA/Ser.L/V/11.100, Doc 7 rev. 1, paras. 372 and 381; and European Court of Human Rights, Judgment of 10 July 2008, *Medvedyev and others v. France*, Application No. 3394/03, para. 61

89. See, *inter alia*: Human Rights Committee, *General Comment No. 29*, paras. 14 and 16 and *Concluding Observations of the Human Rights Committee on Albania*, CCPR/CO/82/ALB, 2 December 2004, para. 9; Inter-American Court of Human Rights, *Advisory Opinion OC-8/87 of 30 January 1987, “Habeas corpus in emergency situations”*, Series A No. 8, and *Advisory Opinion OC-9/87 of 6 October 1987, “Judicial guarantees in states of emergency”*, Series A No. 9; Article 27 of the *American Convention on Human Rights*; Articles 4 and 14 of the *Arab Charter on Human Rights*; Article 17.2(f) of the *International Convention for the Protection of All Persons from Enforced Disappearance*; Principle 32 of *The Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment*; Principle M (5)(e) of the *Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa*; Article 9 of the *Declaration on the Protection of All Persons from Enforced Disappearances* and Resolution 1992/35 of the former UN Commission on Human Rights, entitled *habeas corpus*.

disappearance, incommunicado detention and other gross violations of human rights.⁹⁰

If such a proceeding is initiated, the detaining authorities must produce the detainee before the relevant court without undue delay. Courts or judges examining the lawfulness of detention must make a decision as quickly as possible or without delay and must order the release of the detainee if their detention is unlawful or arbitrary.

States must establish judicial appeals mechanisms and procedures in their legislation (such as *habeas corpus*, *amparo* or similar such procedures) through which the lawfulness of detentions can be challenged. Such procedures must be simple and quick, and free of charge if the detainee cannot afford to pay.

Courts must, at all times and in all circumstances, hear and act upon petitions for *habeas corpus*, *amparo* or similar such procedures. No circumstances whatsoever can be invoked as a justification for denying the right to *habeas corpus*, *amparo* or similar such procedures.

The authority reviewing the lawfulness of detention must be an independent and impartial court or judge established by law.⁹¹

To be effective as a remedy, the right to challenge the lawfulness of detention before a court cannot be subject to limitation or restriction. Limiting the grounds for obtaining a writ of *habeas corpus* to, for example, the absence of legal grounds for detaining somebody, a manifest breach of due process or requiring the exhaustion of all other remedies, impairs its effectiveness as a mechanism for challenging the lawfulness of detention.⁹²

Anyone who has been the victim of unlawful arrest or detention has the right to seek reparation, including compensation.

90. Special Rapporteur on torture, E/CN.4/2004/56, para. 39; E/CN.4/2003/68, para. 26 (i), and A/57/173, 2 July 2002, para. 16; Inter-American Court of Human Rights Advisory Opinion OC-9/87 of 6 October 1987, *Judicial Guarantees in States of Emergency, (Articles 27(2), 25 and (8) of the American Convention on Human Rights)*, Series A No. 9; para. 38; United Nations Working Group on Enforced and Involuntary Disappearances, E/CN.4/1983/14, para. 141; E/CN.4/1986/18/Add.1, paras. 55-58; E/CN.4/1989/18/Add.1, para. 136; E/CN.4/1990/13, para. 346; E/CN.4/1991/20/Add.1, para. 167; E/CN.4/1991/20, para. 409; E/CN.4/1992/18, paras. 368-370; and E/CN.4/1993/25, para. 514; European Court of Human Rights: Judgment of 26 May 1993, *Brannigan and McBride v. United Kingdom*, Application Nos. 14553/89; 14554/89, paras. 62-63; Judgment of 12 March 2003, *Öcalan v. Turkey*, Application No. 46221/99, para. 86.

91. Inter-American Court of Human Rights, Advisory Opinion No. OC-8/87 of 30 January 1987, *Habeas corpus in emergency situations*, Series A No. 8 (*Articles 27(2), 25(1) and 7(6) American Convention on Human Rights*), paras. 35 and 42; African Commission on Human and Peoples' Rights, Principle M (5(e)) of *Principles and Guidelines on the right to a fair trial and Legal Assistance in Africa*.

92. Human Rights Committee, *Concluding observations of the Human Rights Committee: Japan*, CCPR/C/79/Add.102, 19 November 1998, para. 24.

9. Right to Trial within a Reasonable Time

Anyone arrested or detained on a criminal charge has the right to be tried within a reasonable time or to be released pending trial.

Anyone arrested or detained on a criminal charge has the right to be tried within a reasonable time and without undue delay, or to be released pending trial.⁹³

Both prolonged detention without trial and prolonged detention while awaiting trial that have been unduly delayed are prohibited by international law and constitute arbitrary detention. In cases involving serious offences such as murder, and where the accused is denied bail by the court, the accused must be tried as quickly as possible.⁹⁴

The reasonableness of any time period should be assessed in line with the circumstances of each case.⁹⁵ Factors to be considered when examining the reasonableness of any time period include:

- i. the complexity of the alleged offence and the number of alleged perpetrators;
- ii. the complexity of the investigation and gathering of factual evidence;
- iii. the complexity of any legal issues raised by the case, as far as assessing the length of pre-trial detention is concerned;
- iv. the conduct of the accused; and
- v. the conduct of the authorities responsible for carrying out the investigation and bringing the charges as well as the conduct of the court or judge, and the way in which they have dealt with the case.

93. See, Article 38 of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment and Human Rights Committee, Views of 4 April 1995, *Leroy Shalto v. Trinidad and Tobago*, Communication No. 447/1991, para. 7.2.

94. See, *inter alia*, Human Rights Committee: *General Comment No. 32, Article 14: Right to equality before courts and tribunals and to a fair trial*, para. 35; Views of 19 July 1995, *Isidora Barroso on behalf of her nephew, Mario Abel del Cid Gomez, v. Panama*, Communication No. 473/1991, para 8.5; and Views of 16 July 2001, *Sandy Sextus v. Trinidad and Tobago*, Communication No. 818/1998, para. 7.2.

95. Human Rights Committee: *General Comment No. 32, Article 14: Right to equality before courts and tribunals and to a fair trial*, para. 35.

10. Rights During the Investigation

Even in the course of a criminal investigation, detainees shall continue to enjoy their fundamental rights and freedoms, albeit with certain limitations that are intrinsic to the deprivation of liberty. In addition to the right of access to counsel, safeguards for detainees during interrogation include the prohibition on compelling people to confess guilt or testify against themselves, the exclusion of evidence obtained as a result of torture or ill-treatment, the right to an interpreter and the right to have access to interrogation records.

Anyone suspected or accused of an offence shall be presumed innocent and be treated as such until proven guilty according to law in a trial at which they have had all the guarantees necessary for their defence. This means that:

- i. Presumption of innocence must be guaranteed during both the investigation phase and the trial;
- ii. Pre-trial detention, the refusal to grant bail and any findings of liability from civil proceedings have no adverse affect on the presumption of innocence; and that
- iii. The public authorities have a duty to refrain from prejudging the outcome of a trial, for example, by refraining from making public statements affirming the guilt of the accused.⁹⁶

No one who is charged with an offence or detained may be compelled to confess guilt, otherwise incriminate him or herself or testify against any other person. Everyone accused of an offence has the right to remain silent during interrogation.

No detained person during interrogation shall be subject to violence, threats or methods of interrogation which impair his or her decision-making capacity or judgment. Any method of interrogation that might constitute torture or other forms of cruel, inhuman or degrading treatment is strictly prohibited. For example, the following methods of interrogation are prohibited: prolonged stress positions and isolation, sensory deprivation, hooding, exposure to cold or heat, sleep and dietary adjustments, exploitation of detainees' individual phobias, severe beatings, suspending prisoners in humiliating and painful ways, electric shocks, exposure

96. Human Rights Committee: *General Comment No. 32, Article 14: Right to equality before courts and tribunals and to a fair trial*, para. 30.

to very loud music, sleep deprivation, threats, including death, the use of “water-boarding” or simulated execution and the use of “short shackling”.⁹⁷

Statements obtained as a result of torture, ill-treatment, death threats or other gross human rights violations cannot be put forward as evidence except at the trials of people accused of inflicting the said torture or other such gross human rights violations.

Anyone who does not adequately understand or speak the language used by the authorities is entitled to have the assistance of an interpreter, free of charge if necessary, during court and/or investigation proceedings following their arrest.

The duration of any interrogation of a detained or imprisoned person and of the intervals between interrogations as well as the identity of the officials who conducted the interrogations and other persons present shall be recorded in a register.⁹⁸ Such registers should be accessible to the detainee or their counsel. Female staff should be present during the interrogation of female detainees.

Anonymous witnesses may only be used in exceptional circumstances during the investigation stage of proceedings. In no case and under no circumstances should this type of testimony be used during the trial or court hearing. The court or judge, as well as the defence and the prosecution, should know the identity of witnesses in the trial.

Detainees have the right to be assisted by a lawyer during interrogation, including at the initial stages of police interrogation. While this right may be subject to legitimate restrictions in exceptional circumstances, in the light of the entirety of the proceedings any such restrictions must not deprive the accused of a fair hearing or constitute prolonged incommunicado detention or prolonged solitary confinement.⁹⁹

97. Human Rights Committee, *Concluding Observations of the Human Rights Committee: United States of America*, CCPR/C/USA/CO/3 of 15 September 2006, para. 13; Committee against Torture, *Conclusions and Recommendations of the Committee against Torture: United States of America*, CAT/C/USA/CO/2 of 25 July 2006, para. 24, and Inter-American Commission on Human Rights, *Report on Terrorism and Human Rights*, *doc. cit.*, paras. 211 and 213.

98. Human Rights Committee, *General Comment No. 20, Prohibition of torture and cruel treatment or punishment (Article 7)*, para. 11; Committee against Torture, *Conclusions and recommendations of the Committee against Torture: United States of America*, CAT/C/USA/CO/2, 25 July 2006, para. 16; and Principle 23 (1) of the *Body of Principles for the Protection of All Persons under any Form of Detention or Imprisonment*.

99. European Court of Human Rights, Judgment of 8 February 1996, *John Murray v. the United Kingdom*, Application No. 18731/91, paras. 63, 64 and 66.

11. Right to be Detained in an Official Place of Detention

All detainees have the right to be held only in officially recognised places of detention.

All persons deprived of their liberty should be held in officially recognised places of detention.¹⁰⁰

An up-to-date official register of everyone deprived of their liberty should be maintained in all places of detention. Such registers should contain specific information on all those deprived of their liberty, including:

- i. the identity of the person deprived of liberty;
- ii. the grounds and reasons for the deprivation of liberty;
- iii. the authority that ordered the deprivation of liberty;
- iv. the authority and the identity of the law enforcement officials who carried out the deprivation of liberty;
- v. the date, time and place where the person was deprived of liberty and admitted to the place of custody;
- vi. the place of detention, the date and time of admission to that place and the authority in charge of it;
- vii. the authority responsible for supervising the deprivation of liberty;
- viii. the date and time of the person's first appearance before a judicial or any other authority;
- ix. the date and time of every appearance before a judicial authority; and
- x. the date and time of transfer to any other place of detention, the destination and the authority responsible for the transfer.

The official up-to-date register of all persons deprived of their liberty should be available to any judicial or other competent national or international authority, as well as to the relatives of the detainee, the detainee's lawyer and anyone else who has a legitimate interest.

100. Human Rights Committee, *General Comment No. 20*, para. 11.

12. Right to Humane Treatment and Not to be Tortured While in Detention

All persons deprived of their liberty have the right to be treated with humanity, with respect for the inherent dignity of the human person and not to be subjected to torture or cruel, inhuman or degrading treatment or punishment.

States should ensure that all persons deprived of their liberty are treated with humanity, with respect for the inherent dignity of the human person and are not subjected to torture or cruel, inhuman or degrading treatment or punishment. No exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification for torture and/or ill-treatment or to deny detainees their right to be treated with humanity and respect for the inherent dignity of the human person.¹⁰¹

Prolonged incommunicado detention, prolonged solitary confinement and prolonged total isolation are absolutely prohibited under international law.

States should provide all detainees with essential services, such as 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.

All detainees, their legal representatives, relatives and others with a legitimate interest have the right to make a request or complaint regarding the detainee's treatment, in particular in the case of torture or other cruel, inhuman or degrading treatment, to the authorities responsible for the administration of the place of detention to higher authorities and, when necessary, to appropriate authorities vested with reviewing or remedial powers. This right entails:

- i. All detainees being informed of this right on entering the place of detention;
- ii. If requested by the complainant, the request or complaint shall remain confidential;
- iii. All requests and complaints being examined promptly and replied to without undue delay;
- iv. If the request or complaint is rejected or, in case of inordinate delay, the complainant is entitled to bring it before a judicial or other authority;

101. Human Rights Committee, *General Comment No. 29*, paras. 11 and 13.

- v. Detainees or persons with a legitimate interest shall not suffer prejudice for making a request or complaint.

Detainees should have access to the same level of health care afforded to those who are not in custody and should not suffer discrimination as a result of their legal situation.

- i. Detainees shall receive medical care and treatment whenever necessary. Such care and treatment shall be provided free of charge;
- ii. The fact that a detained or imprisoned person underwent a medical examination, the name of the physician and the results of any such examination shall be recorded and access to such records shall be ensured.

Persons in detention shall be subject to treatment appropriate to their status of non-convicted persons. Detainees in pre-trial detention should be kept separate from people who have been convicted and sentenced.

At all times, and unless it is deemed contrary to the overriding interest of the child, juvenile detainees should at all times be held separately from adult detainees or prisoners as well as from convicted juveniles.

States shall take special measures to protect pregnant women and nursing mothers, children and juveniles, the elderly, sick and handicapped persons while they are deprived of liberty. The need for, and the application of, such measures shall always be subject to review by a judicial or other authority.

Women should at all times be detained separately from men, supervised by female members of staff and, while in custody, receive care, protection and any necessary individual assistance – be it psychological, medical or physical – they may require in view of their gender:

- i. In mixed institutions, the women's section shall be under the authority of a responsible woman officer who shall have the custody of the keys of that part of the institution.
- ii. No male officials shall enter the women's section without being accompanied by a female member of staff.
- iii. Women prisoners shall be supervised only by women officers. This does not, however, preclude male members of the staff, particularly doctors and teachers, from carrying out their professional duties in institutions or parts of institutions set aside for women.
- iv. Female staff shall be solely responsible for conducting body searches of female detainees.

Instruments of restraint, such as handcuffs, chains, and strait-jackets, shall never be applied as a punishment. Furthermore, chains and irons shall not be used as restraints. Other instruments of restraint may only be used in the following circumstances:

- i. As a precaution against escape during transfer, provided that they are removed when the prisoner appears before a judicial or administrative authority;
- ii. On medical grounds by direction of the medical officer;
- iii. 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.

In any event, such instruments must not be applied for any longer time than is strictly necessary.

Body searches of persons detained must be conducted by persons of the same gender and in such a way as to respect the dignity of the persons being searched.

General Standards on Arrest, Pre-trial Detention and Criminal Investigations

Table No. 1: United Nations and Regional Treaty Standards

Acronyms used:

ICCPR:	International Covenant on Civil and Political Rights	CAT:	Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment	ICED:	International Convention for the Protection of All Persons from Enforced Disappearance
ECHR:	European Convention for the Protection of Human Rights and Fundamental Freedoms and its Protocols 1,4,6,7, 12 and 13	ICERD:	International Convention on the Elimination of All Forms of Racial Discrimination	IACED:	Inter-American Convention on Forced Disappearance of Persons
ACHR:	American Convention on Human Rights	IACAT:	Inter-American Convention to Prevent and Punish Torture	VieCon:	Vienna Convention on Consular Relations
ACHPR:	African Charter on Human and Peoples' Rights	ICRMW:	International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families	Art.:	Article

	ICCPR	ECHR	ACHR	ACHPR	ARCHR	CAT	ICERD	IACAT	ICRMW	IACED	VieCon
<i>Right to liberty: Prohibition on arbitrary arrest and detention</i>	Arts. 9(1), 11	Art. 5	Art. 7	Art. 6	Art. 14	-	Art. 5(b) (implicitly)	-	Art. 16(4)	Art. 17(f)	-
<i>Right to be informed of the reasons for arrest and any charges against him/her</i>	Art. 9(2)	Art. 5 (2)	Art. 7(4)	-	Art. 14(3)	-	-	-	Art. 16(5)	-	-
<i>Right to be informed of rights</i>	-	-	-	-	-	-	-	-	Art. 16(7)	-	Art. 36
<i>Right to legal assistance before trial</i>	Art. 14(3) (d)	Art. 6(3)(c)	Art. 8(2)(a)	Art. 7(1)(c)	Art. 13(1)	-	-	-	Arts. 16(7) (c), (8)	-	-
<i>Right to adequate time and facilities for the preparation of a defence</i>	Art. 14(3) (b)	Art. 6(3)(b)	Art. 8(2)(c)	Art. 7(1)(c)	Art. 16(2)	-	-	-	-	-	-
<i>Right not to be held incommunicado (without access to the outside world)</i>	-	-	-	-	Art. 14(3)	Art. 6(3)	-	-	Arts. 16, 17(5)	Art. 17(1) & (2)(d)	Art. 36

	ICCP	ECHR	ACHR	ACHPR	ARCHR	CAT	ICERD	IACAT	ICRMW	ICED	IACED	VieCon
<i>Right to be brought promptly before a judicial officer</i>	Art. 9(3)	Art. 5(3)	Art. 7(5)	-	Art. 14(5)	-	-	-	Art. 16(6)	-	-	-
<i>Right to challenge the lawfulness of detention</i>	Arts. 2(3), 9(4)	Arts. 5(4), 13	Arts. 7(6), 25	-	Art. 14(6)	-	-	-	Art. 16(8)	Arts. 17(2) (f) & 22	Art. X	-
<i>Right to trial within a reasonable time or to be released</i>	Art. 9(3)	Art. 5(3)	Art. 7(5)	-	Art. 14(5)	-	-	-	Art. 16(6)	-	-	-
<i>Rights during the investigation, including interrogation</i>	-	-	-	-	Arts. 14(4), 16	Arts. 10, 11, 15	Art. 5(b) (implicitly)	Arts. 7, 10	-	Art. 11(3)	-	-
<i>Right to be detained in an officially recognized and supervised place of deprivation of liberty</i>	-	-	-	-	-	-	-	-	-	Art. 17(2) (c)	Art. XI	-
<i>Right to humane treatment during detention and freedom from torture</i>	Arts. 7, 10(1)	Art. 3	Art. 5	Arts. 4, 5	Arts. 8, 20	Arts. 2, 11, 15, 16	Art. 5(b)	Arts. 1, 5	Art. 10, 16(2), 17	Arts. 1, 17(1)	Art. I	-

General Standards on Arrest, Pre-trial Detention and Criminal Investigations

Table No. 2: United Nations Declaratory Instruments Standards

Acronyms used:

UDHR: Universal Declaration of Human Rights
BPL: UN Basic Principles on the Role of Lawyers
GP: UN Guidelines on the Role of Prosecutors
SMR: Standard Minimum Rules for the Treatment of Prisoners
BPTP: Basic Principles for the Treatment of Prisoners
BPD: Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment

SGDP: Safeguards guaranteeing protection of the rights of those facing the death penalty
CC: Code of Conduct for Law Enforcement Officials
PEJ: Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions
DED: Declaration on the Protection of All Persons from Enforced Disappearance

DRA: Declaration on the Human Rights of Individuals Who are not Nationals of the Country in which They Live
Art.: Article
Guid.: Guideline
Prin.: Principle
R.: Rule
S.: Safeguard

	UDHR	BPIJ	BPL	GP	SMR	BPTP	BPD	SGDP	CC	PEJ	DED	DRA
<i>Right to liberty: Prohibition on arbitrary arrest and detention</i>	Arts. 3, 9	-	-	-	-	-	Prin. 2, 4, 6, 36(2)	-	-	-	-	Art. 5(t)(a)
<i>Right to be informed of the reasons for arrest and any charges against him/her</i>	-	-	-	-	-	-	Prin. 10	-	-	-	-	-
<i>Right to be informed of rights</i>	-	-	-	-	-	-	Prin. 13, 14	-	-	-	-	-
<i>Right to legal assistance before trial</i>	-	-	Prin. 1, 5-8 & 13-15	-	R. 93	-	Prin. 11, 17, 18	S. 4	-	-	-	-
<i>Right to adequate time and facilities for the preparation of a defence</i>	-	-	Prin. 8	-	R. 93	-	Prin. 11, 18	-	-	-	-	-

	UDHR	BPIJ	BPL	GP	SMR	BPTP	BPD	SGDP	CC	PEJ	DED	DRA
<i>Right not to be held incommunicado (without access to the outside world)</i>	-	-	Prin. 7	-	R. 92, 93	Prin. 7	Prin. 15, 16(4), 18(3), 19, 20, 29(2)	-	-	-	-	Art. 10
<i>Right to be brought promptly before a judicial officer</i>	-	-	-	-	-	-	Prin. 37, 38	-	-	-	-	-
<i>Right to challenge lawfulness of detention</i>	Art. 8	-	-	-	-	-	Prin. 9, 32	-	-	-	Art. 9	-
<i>Right to trial within a reasonable time or to be released</i>	-	-	-	-	-	-	Prin. 11, 32, 38, 39	-	-	-	-	-
<i>Rights during the investigation, including interrogation</i>	-	-	-	Guid. 15, 16	R. 87 – 91	-	Prin. 3, 23, 24	-	-	-	Art. 16(4)	-
<i>Right to be detained in an officially recognized and supervised place of deprivation of liberty</i>	-	-	-	-	R. 7	-	-	-	-	Prin. 6	Art. 10	-
<i>Right to humane treatment during detention and freedom from torture</i>	Arts. 3, 5	-	-	-	R. 33, 34	-	Prin. 1, 6	-	Arts. 5, 6, 8	Prin. 4	Arts. 2, 6, 7	Arts. 5(1)(a), 6

General Standards on Arrest, Pre-trial Detention and Criminal Investigations

Table No. 3: Regional Declaratory Instruments Standards

Acronyms used:

APGFT:	Principles and Guidelines on the right to a fair trial and legal assistance in Africa, adopted by the African Union in 2003	EUCHR:	Charter of Fundamental Rights of the European Union	EGT:	Guidelines of the Committee of Ministers of the Council of Europe on Human rights and the fight against terrorism
ADHR:	American Declaration of the Rights and Duties of Man	Rec. 2000:	Recommendation 2000 (21) on the Freedom of exercise of the profession of lawyer of the Committee of Ministers to Member States of the Council of Europe	Art.:	Article
OASPDIL:	Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas	EPR:	European Prison Rules	Guid.:	Guideline
				Prin.:	Principle
				R.:	Rule

	APGFT	ADHR	OASPDIL	EUCHR	Rec. 2000	EPR	EGT
<i>Right to liberty: Prohibition on arbitrary arrest and detention</i>	Prin. M(1)(a)(b)	Art. XXV	Prin. III	Art. 6	-	R. 14	-
<i>Right to be informed of the reasons for arrest and any charges against him/her</i>	Prin. M(2)	-	Prin. V	-	-	-	Guid. VII(1)
<i>Right to be informed of rights</i>	Prin. M(2)	-	Prin. V	-	-	R. 15.2, R. 30	-
<i>Right to legal assistance before trial</i>	Prin. M(2)	-	Prin. V	-	Prin. I(5), IV	R. 23, R. 37.1, R. 37.4, R. 98.1	-
<i>Right to adequate time and facilities for the preparation of a defence</i>	Prin. M(2)	-	-	-	-	R. 23, R. 37.2, R. 98.2	-
<i>Right not to be held incommunicado (without access to the outside world)</i>	Prin. M(2)(7)	-	Prin. V	-	Prin. I (6)	R. 24, R. 99	-
<i>Right to be brought promptly before a judicial officer</i>	Prin. M(3)	-	Prin. V	-	-	-	-

	APGFT	ADHR	OASPDIL	EUCHR	Rec. 2000	EPR	EGT
<i>Right to challenge lawfulness of detention</i>	Prin. M(4)(5)	Art. XXV	Prin. V	Art. 47	-	-	Guid. VII(3)
<i>Right to trial within a reasonable time or to be released</i>	Prin. M(3)	Art. XXV	Prin. V	-	-	-	-
<i>Rights during the investigation, including interrogation</i>	Prin. M	-	-	R. 87 – 91	-	-	Guid. IV
<i>Right to be detained in an officially recognized and supervised place of deprivation of liberty</i>	Prin. M(6)	-	Prin. IX	R. 7	-	R. 9	-
<i>Right to humane treatment during detention and freedom from torture</i>	Prin. M(7)	Art. V	Prin. I	Art. 4	-	R. 1, R. 3, R. 4, R. 16, R. 42.1 & 42.3	Guid. IV, XI

VI. Standards Applicable to Trial Proceedings

In this chapter we examine the international standards¹⁰² specifically applicable to criminal proceedings, and in particular trials and court hearings. A table listing the main sources of law for each international standard is provided at the end of the chapter.

All criminal proceedings should take place before an independent and impartial tribunal, court or judge established by law (see Chapter IV of this Guide). As international jurisprudence on human rights has repeatedly affirmed, only a court of law may try and convict a person for a criminal offence¹⁰³ and international human rights law prohibits any criminal conviction by a body not constituting a tribunal or court.¹⁰⁴ The right to be tried by an independent, impartial and competent court or tribunal is an absolute right that is not subject to any exception.¹⁰⁵

For criminal proceedings or trials to be deemed compliant with international law, it is not sufficient for them to be conducted before an independent and impartial court, tribunal or judge. They must all be carried out with due respect for judicial guarantees as established in the international standards relating to due process.¹⁰⁶

1. Right to a Fair Trial

The accused is entitled to a fair trial. The right to a fair trial encompasses all the procedural and other guarantees concerning due process laid down in international standards. However, it is broader in scope than the sum of the individual guarantees and depends upon the conduct of the trial as a whole.

The notion of a trial that is endowed with all due guarantees includes the guarantee of a fair hearing. The fairness of the hearing entails the absence of any direct or

102. In some instances, the text of the relevant standards referred to is directly reproduced.

103. Human Rights Committee, *General Comment No. 29, States of Emergency (Article 4)*, 31 August 2001, para. 16.

104. Human Rights Committee, *General Comment No. 32, Article 14: Right to equality before courts and tribunals and to a fair trial*, para. 18. See also Inter-American Commission on Human Rights, Report No. 49/00 of 13 April 2000, Case No. 11.182, *Rodolfo Gerbert Ascencio Lindo et al. (Peru)*, para. 86.

105. Human Rights Committee, *General Comment No. 32*, paras. 18 and 19; Views of 28 October 1992, *Miguel González del Río v. Peru*, Communication No. 263/1987, para. 5.2. See also the *Arab Charter on Human Rights*, Articles 4 and 13.

106. *Universal Declaration of Human Rights*, Article 10, the *International Covenant on Civil and Political Rights*, Article 14, *European Convention for the Protection of Human Rights and Fundamental Freedoms*, Article 6; the *Charter of Fundamental Rights of the European Union*, Article 47; the *American Declaration of the Rights and Duties of Man*, Article XXVI; the *American Convention on Human Rights*, Article 8; the *African Charter on Human and Peoples' Rights*, Articles 7; the *Arab Charter on Human Rights*, Article 13; and *Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa*.

indirect influence, pressure or intimidation or intrusion from whatever side and for whatever motive.¹⁰⁷

A hearing is not fair if, for instance, the defendant in criminal proceedings is faced with the expression of a hostile attitude from the public or support for one party in the courtroom that is tolerated by the court, thereby impinging on the right to defence, or is exposed to other manifestations of hostility with similar effects. Expressions of racist attitudes by a jury that are tolerated by the tribunal, or a racially biased jury selection are other instances which adversely affect the fairness of the procedure.¹⁰⁸

The right to a fair trial can be breached in many ways. As a general principle, defendants must at all times be given a genuine possibility of answering charges, examining, questioning and challenging evidence, examining and cross-examining witnesses, and doing so in a dignified atmosphere (for example, they must genuinely and effectively be able to take part in the proceedings and exercise their right to a fair trial).

The right to a fair trial entails observance of, and compliance with, various procedural requirements and guarantees that are inherent in due process of law, including:

- i. the requirement that the proceedings be conducted expeditiously by the tribunal or court, without undue delay;¹⁰⁹
- ii. the right of the defendant to be present at the trial and to be heard in person;¹¹⁰
- iii. the right to defence, including adequate opportunity for the accused to respond to the charges against him/her;¹¹¹
- iv. the principle of equal procedural rights or “equality of arms” between the parties to the proceedings;¹¹²

107. Human Rights Committee, *General Comment No. 32, Article 14: Right to equality before courts and tribunals and to a fair trial*, para. 25.

108. See, *inter alia*: Human Rights Committee, *General Comment No. 32, Article 14: Right to equality before courts and tribunals and to a fair trial*, para. 25. See also; Views of 20 July 2000, *Gridin v. Russian Federation*, Communication No. 770/1997, para. 8.2. See also: Committee on the Elimination of Racial Discrimination, *Narrainen v. Norway*, Communication No. 3/1991, para. 9.3.

109. Human Rights Committee, *General Comment No. 32, Article 14: Right to equality before courts and tribunals and to a fair trial*, para. 27.

110. European Court of Human Rights, Judgment of 19 February 1996, *Botten v. Norway*, Application No. 16206/90, para. 53

111. Inter-American Commission on Human Rights, *Report on Terrorism and Human Rights*, OAS Doc. OEA/Ser.L/V/II.116, Doc. 5 rev. 1 corr., of 22 October 2002, paras. 260 and Recommendation 10.

112. Human Rights Committee, *General Comment No. 32, Article 14: Right to equality before courts and tribunals and to a fair trial*, para. 13.

- v. the principle of adversarial proceedings;¹¹³ and
- vi. the right to legal assistance.¹¹⁴

The notion of a fair trial with the due guarantees is directly related to the principal of equality before courts and tribunals. It entails that both the accused and any other party to the proceedings should have equality of arms and that all parties to the proceedings in question are treated without any discrimination.¹¹⁵ All parties to a trial have the same procedural rights except when otherwise specified in law. In the case of the latter, any procedural inequality needs to be justified on reasonable and objective grounds, not entailing actual disadvantage or unfairness to the accused.¹¹⁶ There is no equality of arms if, for example, the prosecution can appeal a specific decision but the accused cannot.¹¹⁷

Each party must be treated in a manner that ensures that they have a procedurally equal position during the course of the trial and are in an equal position to make their case under conditions that do not place them at a substantial disadvantage vis-à-vis their opposing party. This principle of equality of arms means that:

- i. Both parties should have an adequate time and facilities to prepare the case and genuine opportunity to present arguments and evidence and challenge or respond to opposing arguments or evidence;
- ii. Both parties should be entitled to consult and be represented by a legal representative or other qualified persons chosen by them at all stages of the proceedings;
- iii. If either of the parties cannot understand or speak the language used by the judicial body, then they should be assisted by an interpreter;
- iv. Both parties are entitled to have their rights and obligations affected only by decisions based solely on evidence presented to the court; and
- v. Both parties should have the right to appeal decisions taken by the trial court before a higher judicial body.

113. Human Rights Committee, Views adopted on 26 March 1992, *D. Wolf v. Panama*, Communication No. 289/1988, para. 6.6.

114. Inter-American Commission on Human Rights: Report No. 58/02 of 21 October 2002, Case No. 12.275, *Denton Aitken (Jamaica)*, para. 148; Report No. 56/02 of 21 October 2002, Case No. 12.158, *Benedict Jacob (Grenada)*, para. 102; and Human Rights Committee, *General Comment No. 32, Article 14: Right to equality before courts and tribunals and to a fair trial*, paras. 37 and 38.

115. Human Rights Committee, *General Comment No. 32, Article 14: Right to equality before courts and tribunals and to a fair trial*, para. 8.

116. Human Rights Committee, Views of 23 July 2007, *Dudko v. Australia*, Communication No. 1347/2005, para. 7-4.

117. Human Rights Committee, Views of 3 April 2003, *Weiss v. Austria*, Communication No. 1086/2002, para. 9.6, and Views adopted on 30 March 1989, *Robinson v. Jamaica*, Communication No. 223/1987, para. 10.4.

Equality and fairness in judicial proceedings cannot be interpreted as guaranteeing absence of error on the part of the competent tribunal.¹¹⁸ However, if it is shown that the evaluation of evidence or application of legislation was clearly arbitrary or amounted to a manifest error or denial of justice or that the court otherwise violated its obligation to be independent and impartial, then the right to a fair trial and due process of law has been breached.¹¹⁹

2. Right to a Public Hearing

Except in narrowly defined circumstances, court hearings in criminal proceedings should be open to the public and court judgments should be published.

All trials in criminal matters must in principle be conducted orally and publicly. Having a public hearing ensures transparency of proceedings and thus provides an important safeguard for the interest of the individual and society at large.¹²⁰

Every person facing prosecution for a criminal offence has the right to a public hearing in proceedings before a court or judge of first instance. However, the right to a public hearing does not necessarily apply to all appellate proceedings, which can take place on the basis of written representations, or to pre-trial decisions taken by prosecutors and other public authorities.¹²¹

In order to ensure that hearings and trials are public:

- i. all necessary information concerning the dates and specific locations of hearings and trials, as well as details of the court that will be responsible for hearing the case, must be made available to the public by the tribunal or court concerned;
- ii. the authorities should establish a permanent system for publicising information about hearings;

118. Human Rights Committee, Decision on admissibility of 30 March 1989, *B. d. B. v. The Netherlands*, Communication No. 273/1988, para. 6.3, and Decision on admissibility of 21 July 2005, *Martínez Mercader and others v. Spain*, Communication No. 1097/2002, para. 6.3.

119. Human Rights Committee, *General Comment No. 32, Article 14: Right to equality before courts and tribunals and to a fair trial*, para. 26.

120. Human Rights Committee, *General Comment No. 32, Article 14: Right to equality before courts and tribunals and to a fair trial*, para. 28. See also: European Court of Human Rights, Judgment of 8 December 1983, *Axen v. Germany*, Application No. 8273/78, para. 25; Inter-American Court of Human Rights, Judgment of 30 May 1999, *Castillo Petruzzi et al. v. Peru*, Series C No. 52, para. 172.

121. Human Rights Committee, *General Comment No. 32, Article 14: Right to equality before courts and tribunals and to a fair trial*, para. 28.

- iii. adequate facilities should be provided to enable interested members of the public to attend hearings and trials;
- iv. all hearings should be open to the general public and not, for instance, be limited to a particular category of people;¹²²
- v. representatives of the media should be entitled to attend and report on judicial proceedings, though a tribunal or court can impose restrictions on the use of cameras or audio visual recording equipment.

In exceptional circumstances, courts and judges have the power to exclude the public, including the media, from all or part of a trial. These exceptional circumstances are restricted to:

- i. when it is strictly necessary to protect the interests of justice (for example when it is necessary to protect witnesses);
- ii. when the interests of the private lives of the parties so require (for example, in cases involving the trial of juveniles, cases in which juveniles or children are victims or those in which the identity of victims of sexual violence needs to be protected); or
- iii. when it is strictly necessary for reasons of public order, morals or national security in an open and democratic society that respects human rights and the rule of law.

Any such restriction must, however, be strictly justified and assessed on a case-by-case basis and be subject to on-going judicial supervision. Laws establishing criminal proceedings *in camera* in a mandatory and general way, without taking into account the particularity of each case, are in breach of international human rights standards. Even when it is possible to restrict the right to a public hearing, defendants have the right to be present at the hearing before the tribunal or court that is judging them.¹²³ All criminal trials, except in cases tried *in absentia*, have to provide the defendant with the right to an oral hearing. Legislation that provides for criminal proceedings solely in writing and which precludes any form of hearing during the trial is incompatible with the principle of a fair trial.

Courts must take steps to protect defendants, victims, witnesses and complainants who may be at risk or in danger as a result of participating in judicial proceedings or, in the case of the trials of juveniles or minors, due to the interests of the child

122. Human Rights Committee, *General Comment No. 32, Article 14: Right to equality before courts and tribunals and to a fair trial*, para. 29.

123. Human Rights Committee, Views adopted on 23 July 2002, *Miguel Angel Rodríguez Orejuela v. Colombia*, Communication No 848/1999, para. 7-3.

taking precedence. However, these measures do not justify the use of anonymous witnesses nor do they make secret evidence admissible.¹²⁴

States should ensure that proper systems exist for recording all proceedings before courts and that such information is documented and made available to the public.

All judgments in criminal proceedings should be published and made available to everyone throughout the country. Even in cases in which the public is excluded from the trial, the judgment, including the essential findings, key evidence and legal reasoning must be made public, except where the interests of juvenile persons otherwise requires.¹²⁵ Publication of the judgment is essential, not only for the convicted or acquitted individual but also for the victims to the extent that it constitutes a form of reparation.

3. Presumption of Innocence

Everyone charged with a criminal offence has the right to be presumed innocent until proven guilty according to law.

The right to be presumed innocent until proven guilty according to law is an absolute right, which can never be derogated from, restricted or limited;¹²⁶

The presumption of innocence:

- i. places the burden of proof on the prosecution;
- ii. guarantees that guilt cannot be presumed unless the charge has been proven beyond reasonable doubt;¹²⁷
- iii. ensures that the accused has the benefit of doubt; and

124. Human Rights Committee, *Concluding Observations of the Human Rights Committee: Canada*, CCPR/C/CAN/CO/5, 20 April 2006, para. 13, and *United States of America*, CCPR/C/USA/CO/3/Rev.1, 18 December 2006, para. 18; Inter-American Commission on Human Rights, *Second Report on the Situation of Human Rights in Peru*, OEA/Ser.L/V/II.106, Doc. 59 rev., 2 June 2000, paras. 103, 104 and 110, and *Third Report on the Situation of Human Rights in Colombia*, OEA/Ser.L/V/II.102, Doc. 9 rev. 1, 26 February 1999, paras. 121-124.

125. Human Rights Committee, *General Comment No. 13, Equality before the courts and the right to a fair and public hearing by an independent court established by law (Article 14)*, para. 6, and *General Comment No. 32*, para. 29.

126. Human Rights Committee, *General Comment No. 29*, para. 11, and *General Comment No. 32*, para. 6; Inter-American Commission on Human Rights, *Report on Terrorism and Human Rights*, OEA/Ser.L/V/II.116, Doc. 5 rev. 1 corr., 22 October 2002, paras. 247, 253 and 261; and Inter-American Commission on Human Rights, Report No. 49/00 of 13 April 2000, Case No. 11.182, *Rodolfo Gerbert Asensios Lindo et al. (Peru)*, para. 86.

127. Human Rights Committee, Views of 24 July 2006, *Francisco Juan Larrañaga v. The Philippines*, Communication No. 1421/2005, para. 7-4.

- iv. requires persons accused of an offence to be treated in accordance with this principle.

The denial of bail¹²⁸ or findings of liability in civil proceedings¹²⁹ do not affect the presumption of innocence. The length of pre-trial detention should never be taken as an indication of guilt or of its degree.¹³⁰

Public authorities and officials must respect the presumption of innocence. All public authorities have a duty to refrain from prejudging the outcome of a trial, for example, by refraining from making public statements affirming the guilt of the accused.¹³¹ Public authorities and officials, including prosecutors, may inform the public about criminal investigations or charges but should not express a view as to the guilt of any defendant.

The rules of evidence and conduct of the trial should ensure that the burden of proof rests with the prosecution throughout the trial.

Legal presumptions of fact or law are permissible in a criminal case only if they are rebuttable, allowing a defendant to prove his or her innocence.

Persons undergoing trial, whether or not in detention, should be treated as innocent as long as their guilt has not been established by a court in accordance with the law. Normally defendants should not be shackled or caged during trial or presented to the court in any other way that gives the impression they may be dangerous criminals. They should also not appear in the courtroom in prison uniform but have the right to wear civilian clothes.

If a person is acquitted of a criminal offence by a court or tribunal, the public authorities, particularly prosecutors and the police, should refrain from implying that they may have been guilty. Furthermore, the media should also avoid news coverage that undermines the presumption of innocence.

128. Human Rights Committee, Views of 23 October 2001, *Cagas, Butin and Astillero v. Philippines*, Communication No. 788/1997, para. 7.3.

129. Human Rights Committee: Decision on admissibility of 28 July 1989, *Moraël v. France*, Communication No. 207/1986, para. 9.5; Decision on admissibility of 22 July 1992, *W.J.H. v. The Netherlands*, Communication No. 408/1990, para. 6.2; and Decision on admissibility of 23 October 1992, *W.B.E. v. The Netherlands*, Communication No. 432/1990, para. 6.6.

130. Human Rights Committee, *General Comment No. 32*, para. 30.

131. Human Rights Committee, *General Comment No. 32*, para. 30; and Views of 20 July 2000, *Gridin v. The Russian Federation*, Communication No 770/1997, paras. 3.5 and 8.3.

4. Right to be Informed Promptly of the Charge

All persons charged with a criminal offence are entitled to be informed promptly and in detail, in a language that they understand, of the nature and cause of the charge against them.

The first minimum guarantee in criminal proceedings is the right for all persons charged with a criminal offence to be informed promptly and in detail, in a language that they understand, of the nature and cause of the charge(s) against them. This guarantee applies to all charges of a criminal nature, including those brought against people who are not in detention, but not to criminal investigations that precede the laying of charges. However, this right arises if, in the course of an investigation, the court or an authority of the prosecution decides to take procedural steps against a person suspected of a crime or publicly names him or her as such.¹³²

The right to be informed of the charge “promptly” requires that:

- i. information be given as soon as a competent authority lays charges against a person in line with national law, or publicly names him or her as a suspect;¹³³
- ii. the information provided must give details of both the law and the alleged facts on which the charge is based;
- iii. the information must be provided in writing;
- iv. when, in special circumstance, the charge is delivered orally, it must be later confirmed in writing;¹³⁴ and
- v. notification of the charge must precede the trial.

In the case of trials *in absentia*, it is required that, notwithstanding the absence of the accused, all due steps have been taken to inform accused persons of the charges and to notify them of the criminal proceedings.¹³⁵ This means that all necessary steps must be taken to summon the accused sufficiently in advance of the trial, informing them of the date and place of trial beforehand and requesting them to attend.

132. Human Rights Committee, *General Comment No. 13, Equality before the courts and the right to a fair and public hearing by an independent court established by law (Article 14)* para. 8.

133. Human Rights Committee, Views of 29 March 2005, *Márques de Morais v. Angola*, Communication No. 1128/2002, para. 5.4 and Views of 8 April 1991, Communication No. 253/1987, *Kelly v. Jamaica*, para. 5.8.

134. Human Rights Committee, *General Comment No. 32*, para. 31.

135. Human Rights Committee, *General Comment No. 32*, paras. 31 and 36; Views of 25 March 1983, Case of *Mbenge v. Zaire*, Communication No. 016/1977, para. 14.1; Views of 15 July 1999, *Maleki v. Italy*, Communication No. 699/1996, para. 9.3.

5. Right to Defence

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 own choice. If they do not have one and where required in the interest of justice, they have the right to have a lawyer assigned to them free of charge if they cannot afford to pay. Accused persons must have adequate time and facilities for the preparation of their defence. They have the right to communicate with their lawyer in confidence.

The right to defence implies that all persons charged with a criminal offence have the right to defend themselves against the charge and to have adequate time and facilities for the preparation of their defence.¹³⁶

Persons charged with a criminal offence may defend themselves in person or through legal counsel of their own choosing:

- i. the accused shall be informed of this right;
- ii. these two types of defence (in person and through legal counsel) are not mutually exclusive. Accused persons assisted by a lawyer have the right to both instruct a lawyer on the conduct of their case, within the limits of professional responsibility, and testify on their own behalf.¹³⁷

Although the right to defence entails the right not to be forced to accept an assigned lawyer¹³⁸ and to refuse to have assistance from any legal counsel, the right to defend oneself without a lawyer is not absolute.¹³⁹ Any restriction of the right of an accused person to defend themselves must have an objective and sufficiently serious purpose and not go beyond what is necessary to uphold the interests of justice. However, the interests of justice may, in specific cases, require the assignment of a lawyer against the wishes of the accused. Examples of this include:

- i. where the accused has substantially and persistently obstructed the proper conduct of the trial;

136. Human Rights Committee, *General Comment No. 32*, paras. 32 et seq.; Inter-American Commission on Human Rights, *Report on Terrorism and Human Rights*, OEA/Ser.LV/II.116, Doc. 5 rev. 1 corr., 22 October 2002, paras. 235, 236 and 237.

137. Human Rights Committee, *General Comment No. 32*, para. 37.

138. Human Rights Committee: *inter alia*, Views of 29 July 1981, *Sadías de Lopez v. Uruguay*, Communication No. 52/1979; Views of 29 March 1983, *Estrella v. Uruguay*, Communication No. 74/1980. See also Views of 20 July 1990, *Pinto v. Trinidad & Tobago* Communication No. 232/1987; Views of 6 April 1998, *Victor P. Domukovsky, Zaza Tsiklauri, Petre Gelbakhiani and Irakli Dokvadze v. Georgia*, Communications No. 623/1995; 624/1995; 626/1995; 627/1995, para. 18. 9.

139. Human Rights Committee, *General Comment No. 32*, para. 37.

- ii. where the accused faces serious charges and is unable to act in his/her own interests;
- iii. where the accused faces the possibility of the death penalty if convicted, in which case it is axiomatic that the accused be effectively assisted by a lawyer at all stages of the proceedings;¹⁴⁰ and
- iv. where necessary, to protect vulnerable witnesses from further distress or intimidation if they were to be questioned by the accused.

In these cases, even if the accused is opposed to being represented by a lawyer of his or her own choosing or an assigned lawyer, the tribunal must appoint a lawyer.¹⁴¹

When an accused is facing a criminal trial without legal representation, the tribunal or court should notify the accused of his/her right to be assisted by a lawyer. In order for this notice to be effective, it must be given sufficiently in advance of the trial to allow the accused adequate time and facilities to prepare a defence.

The accused usually has the right to be assisted by a lawyer of his/her choosing. However, the right to be represented by a lawyer of one's choice may be restricted if the lawyer in question is not acting within the bounds of professional ethics, is the subject of criminal proceedings or refuses to follow court procedures.

If an accused person does not have a lawyer of their choice to represent them, they may have counsel assigned to them if the interests of justice so require. Determination of whether the interests of justice require appointment of a lawyer is based primarily on the seriousness of the offence, the legal issues at stake, the potential sentence and the complexity of the case. In cases where the death penalty may be imposed, it is axiomatic that the accused should be effectively assisted by a lawyer at all stages of the proceedings.

If the accused does not have sufficient funds to pay for a lawyer in a case in which the interests of justice require a lawyer to be appointed, the State should provide one free of charge.

Court-appointed lawyers should perform their duties freely and diligently in accordance with the law and recognised standards and ethics of the legal profession and should effectively represent the accused. They should also be able to advise and represent persons charged with a criminal offence in accordance with generally recognised professional ethics without restrictions, influence, pressure or undue

140. Human Rights Committee, Views of 6 November 2003, *Kurbanova v. Tajikistan*, Communication No. 1096/2002, para. 6.5; Views of 7 August 2003, *Aliiev v Ukraine* Communication No. 781/1997, para. 7.2; Views of 30 March 1989, *Robinson v. Jamaica*, Communication No. 223/1987, para.10.2; and Views of 23 March 1999, *Brown v. Jamaica*, Communication No. 775/1997.

141. European Court of Human Rights, Judgment of 25 September 1992, *Croissant v. Germany*, Application No. 13611/88.

interference from any quarter.¹⁴² When a defendant is represented by assigned counsel:

- i. the court or competent authority should ensure that the lawyer assigned has the experience, competence and knowledge commensurate with the nature of the offence of which the defendant is accused; and
- ii. the court or other competent authority should not prevent lawyers appointed in this way from carrying out their duties properly, for instance, by preventing the accused from talking to them.¹⁴³

Accused persons must have adequate time and facilities for the preparation their defence:¹⁴⁴

- i. what will qualify as “adequate time” depends on the circumstances of each case. If counsel reasonably feels that the time for the preparation of the defence is insufficient, it is incumbent on them to request that the trial be adjourned;
- ii. the tribunal or court has an obligation to grant reasonable requests for adjournment, in particular, when the accused is charged with a serious criminal offence and additional time for preparation of the defence is needed;
- iii. “adequate facilities” must include access to documents and other evidence and all materials the accused requires to prepare his or her case;
- iv. “adequate facilities” must include access to documents and other evidence, including all materials that the prosecution plans to offer in court either against the accused or that are exculpatory. Exculpatory material should be understood as including not only material establishing innocence but also any other evidence that could assist the defence case (for instance, indications that a confession was not voluntary);
- v. “adequate facilities” includes the opportunity to engage and communicate with counsel.

142. Human Rights Committee, *General Comment No. 32*, para. 34.

143. Human Rights Committee, Views of 27 March 2004, *Arutyunyan v. Uzbekistan*, Communication No. 917/2000, para. 6.3.

144. Human Rights Committee: *General Comment No. 32*, paras. 32 *et seq.*; Views of 29 March 2005, *Morais v. Angola*, Communication No. 1128/2002, paras. 5.4 and 5.6; Views of 27 July 1992, *Wright v. Jamaica*, Communication No. 349/1989, para. 8.4; Views of 31 March 1992, *Thomas v. Jamaica*, Communication No. 272/1988, para. 11.4; Views of 1 November 1991, *Henry v. Jamaica*, Communication No. 230/87, para. 8.2; Views of 11 April 1991, *Michael Sawyers and Michael Desmond Mclean v. Jamaica*, Communication Nos. 226/1987 and 256/1987, para. 13.6; Views of 31 October 2005, *Chan v. Guyana*, Communication No. 913/2000, para. 6.3; Views of 20 October 1998, *Phillip v. Trinidad and Tobago*, Communication No. 594/1992, para. 7.2; and Views of 21 October 2005, *Quispe Roque v. Peru*, Communication No. 1125/2002, para. 7.3.

The right to communicate with counsel requires that the accused is granted prompt access to their lawyer. Lawyers should be able to meet their clients in private and to communicate with them in conditions that fully respect the confidentiality of their communications (whether written or on the telephone).¹⁴⁵ Such interviews or telephone calls may be conducted in sight, but not within the hearing of, law enforcement officials.¹⁴⁶

Lawyers should be able to advise and represent persons charged with a criminal offence in accordance with generally recognised standards of professional ethics without restrictions, influence, pressure or undue interference from any quarter.¹⁴⁷ This also means that they should not be identified with their clients or their clients' causes as a result of carrying out their duties. Identifying lawyers with the causes of their clients, unless there is sufficient evidence to justify it, may constitute a form of intimidation and harassment of the lawyers involved.¹⁴⁸

6. The Right to Be Assisted by an Interpreter

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 any documents used during the proceedings translated.

The right to an interpreter is integral to the observation and application of the right to defence and the principle of equality of arms in criminal proceedings. It is one of the fundamental requirements of their implementation that people charged with criminal offences understand everything that happens during the proceedings as well as any documents that are used in the course of them. 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.¹⁴⁹

The accused must be provided with the assistance of an interpreter, free of charge, if he or she cannot understand or speak the language used by the tribunal or court or has difficulties in understanding or expressing himself or herself in the language used at trial.¹⁵⁰

145. Human Rights Committee, *General Comment No. 32*, para. 34.

146. *Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment*, Principle 18 (4).

147. Human Rights Committee, *General Comment No. 32*, para. 34.

148. *Report of the Special Rapporteur on the Independence of Judges and Lawyers*, E/CN.4/1998/39, para. 179.

149. Human Rights Committee, *General Comment No. 13*, para. 13.

150. Human Rights Committee, Views of 11 April 1991, *Yves Cadoret and Herve Le Bihan v. France*, Communication No. 323/1988, para. 5-6; Views of 11 April 1991, *Hervé Barzhig v. France*, Communication No. 327/1988, para. 5-5; Views of 25 July 1990, *Dominique Guesdon v. France*, Communication No. 219/1986, para. 10.2.

The right to an interpreter applies both to aliens and nationals. However, accused persons whose mother tongue differs from the official court language are, in principle, not entitled to the free assistance of an interpreter if they know the official language sufficiently well to defend themselves effectively.¹⁵¹ The right to an interpreter applies at all stages of the oral proceedings, including the preliminary inquiries and pre-trial investigations and proceedings.

The right to have all necessary documents translated so that the defendant can understand the proceedings and prepare his or her defence is also essential.¹⁵² However, depending on the circumstances of the case and the relevance of the particular document to the exercise of the right of defence, such translation may be oral and does not always need to be provided in writing, as long as the document in question is available to the defence lawyer and he or she is able to determine their contents.¹⁵³

The interpretation or translation provided should be of a standard which enables the accused to understand the proceedings, exercise their right of defence and for the tribunal or court and other parties to the proceedings to understand the testimony of the accused.

It should not be a condition of the right to interpretation and/or translation that the accused pay the costs of using an interpreter or translator. Even if the accused is convicted, he or she should not be required to pay the interpretation or translation costs.¹⁵⁴

7. 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 rebut the prosecution case and present a defence.

The accused has the right to appear in person before the tribunal or court and be present throughout the whole trial. This right requires the authorities to take all necessary steps to notify the accused (and his or her defence counsel) in sufficient

151. Human Rights Committee, *General Comment No. 32*, para. 40.

152. Inter-American Commission on Human Rights, *Report on the Situation of Human Rights of a Segment of the Nicaraguan Population of Miskito Origin*, OEA/Ser.L/V/II.62, Doc. 10, rev. 3, 1983.

153. Human Rights Committee, Views of 15 July 1994, *Barry Stephen Harward v. Norway*, Communication No. 451/1991, para. 9-5.

154. European Court of Human Rights, Judgment of 28 November 1978, *Luedicke, Belkacem and Koc v. Germany*, Application Nos. 6210/73; 6877/75; 7132/75, paras. 48-50.

time of the date and location of the trial, request his/her presence and not wrongfully exclude him/her from attending.¹⁵⁵

The right of the accused to be present at trial may be temporarily restricted on an exceptional basis if they seriously disrupt the court proceedings to such an extent that the court deems it impractical for the trial to continue in their presence. However, in such cases, the lawyers representing the accused must continue to attend the trial in order to ensure the defence of their clients.

The accused may voluntarily waive the right to be present at trial but any such waiver should be established in an unambiguous manner, preferably in writing.¹⁵⁶

In principle, the accused should not be tried *in absentia*. However, defendants may be tried *in absentia* in certain exceptional circumstances in the interests of the proper administration of justice (for example, when defendants who have been given sufficient advance notice of their trial waive their right to attend or refuse to do so). In order to comply with international human rights standards on fair trial, trial *in absentia* requires that:¹⁵⁷

- i. all necessary steps have been taken to inform the accused of the charges against them and notify them of the criminal proceedings;
- ii. all necessary steps have been taken to inform the accused sufficiently in advance of the date and place of their trial and to request their attendance;
- iii. the tribunal or court has taken all necessary steps to ensure the strict observance of defence rights, in particular by assigning legal counsel, and upholds the basic requirements of a fair trial.¹⁵⁸

If a defendant is convicted *in absentia*, he or she has the right to request a new trial if it can be shown that the competent authorities failed to take the necessary steps to inform him/her of the trial, if he/she were not properly notified or if his/her failure to appear was for reasons beyond his/her control or against his/her will.

155. Human Rights Committee, *General Comment No. 32*, para. 36.

156. Human Rights Committee, *General Comment No. 32*, para. 36, and European Court of Human Rights, Judgment of 23 November 1993, *Poitrinol v. France*, Application No. 14032/88.

157. Human Rights Committee: *General Comment No. 32*, paras. 31 and 36; Views of 25 March 1983, Case of *Mbenge v. Zaire*, Communication No. 016/1977, para. 14.1.

158. European Court of Human Rights, Judgment of 23 November 1993, *Poitrinol v. France*, Application No. 14032/88; Judgment of 22 September 1994, *Pelladoah v. The Netherlands*, Application No. 16737/90 and Judgment of 22 September 1994, *Lala v. The Netherlands*, Application No. 14861/89.

8. Right to Equality of Arms (Principle of Equality of Arms)

Each party must have the same procedural means and opportunities available to them during the course of the trial and be in an equal position to make their case under conditions that do not place them at a substantial disadvantage vis-à-vis the opposing party.

In criminal proceedings, the principle of equality of arms requires procedural equality between the accused, the prosecution and all other parties to the proceedings (for instance, victims joining the proceedings as civil parties). It implies that the parties to the proceedings should not be discriminated against in any way. This means that the same procedural rights are to be provided to all the parties unless distinctions are based on law and can be justified on objective and reasonable grounds, not entailing actual disadvantage or other unfairness to the defendant.¹⁵⁹

The principle of equality of arms, as protector of procedural rights, means that the procedural conditions at trial and sentencing must be the same for all parties.¹⁶⁰ The principle of equality of arms does not mean substantive equality.

The principle of equality of arms requires that trials comply with the principle of adversarial proceedings. This means that all parties should have the procedural opportunity to know the arguments and evidence being put forward by the opposing party, be able to refute and contest them and present their own arguments and evidence.

The principle of equality of arms means, for example, that:

- i. at no stage of the proceedings must any party be placed at a substantial disadvantage vis-à-vis the opposing party;
- ii. the accused has the right to examine, or have examined, any witnesses against them and have witnesses appear and testify on their behalf under the same conditions as the witnesses who are testifying against them;
- iii. the accused has the same legal powers as the prosecution to compel witnesses to appear and to examine and cross-examine them;

159. Human Rights Committee: *General Comment No. 32*, para. 13.

160. International Criminal Tribunal for the Former Yugoslavia (Appeals Chamber), Judgment of 15 July 1999, *The Prosecutor v. Tadic*, No.IT-94-1-T; Human Rights Committee, Decision on admissibility of 30 March 1989 *B.d.B. et al. v. The Netherlands*, Communication No. 273/1988; European Court of Human Rights, Judgment of 27 October 1993, *Dombo Beheer B.V. v. Netherlands*, Application No. 14448/88; and Inter-American Commission on Human Rights, Report No. 52/01 of 4 April 2001, Case No. 12.243, *Juan Raul Garza (United States of America)*.

- iv. the accused, the prosecution and all other parties to the proceedings have the same rights to secure the appearance as witnesses of experts and others who may be able to shed light on the case, as well as to examine them;
- v. witnesses for both the prosecution and defence should be treated equally as far as procedural matters are concerned;
- vi. both the prosecution and the accused have the same right to challenge court decisions. There is no equality of arms if, for instance, only the prosecutor, and not the defendant, is allowed to appeal a certain decision;¹⁶¹
- vii. each party to the proceedings shall have the procedural opportunity to refute and contest all the arguments and evidence adduced by the opposing party;¹⁶²
- viii. the accused has the right to obtain exculpatory evidence under the same conditions as the prosecution was able to obtain incriminating evidence against him or her;
- ix. all experts called by the defence should be afforded the same facilities as those called by the prosecution;
- x. all parties shall have equal access to the records, documents and evidence that form part of the case dossier;
- xi. the prosecution and defence should be allowed equal time to present their evidence and arguments;
- xii. the accused and all other parties have the right to be provided with interpreters for any witnesses called on their behalf who do not understand or speak the language used by the court. In such cases, provision of the services of an interpreter is obligatory.¹⁶³

The tribunal or court has a duty to intervene to correct any errors or shortcomings that may undermine the principle of equality of arms between the prosecution and the defence.

161. Human Rights Committee: *General Comment No. 32*, para. 13.

162. Human Rights Committee, Views of 3 April 2001, *Jansen-Gielen v. The Netherlands*, Communication No. 846/1999, para. 8.2, and Views of 24 October 2001, *Äärelä and Näkkäläjärvi v. Finland*, Communication No. 779/1997, para. 7.4.

163. Human Rights Committee: *General Comment No. 32*, para. 13; Views of 11 April 1991, *Yves Cadoret and Hervé Le Bihan v. France*, Communication No. 323/1988, para. 5.6; Views of 11 April 1991, *Herve Barzhig v. France*, Communication No. 327/1988, para. 5.5; Views of 25 July 1990, *Dominique Guesdon v. France*, Communication No. 219/1986, para. 10.2.

9. Right to Call and Examine Witnesses

The accused has the right to examine, or have examined, witnesses against him or her and to secure the attendance and examination of witnesses on his or her behalf under the same conditions as witnesses appearing against him or her.

The prosecution should, within a reasonable time prior to trial, provide the defence with the names of the witnesses that it intends to call at trial so as to allow the defence lawyer sufficient time to prepare his or her case.

The accused has the right to examine, or have examined, the witnesses appearing against him or her and to secure the appearance of witnesses on his or her own behalf and for the latter to be examined in the same conditions as the witnesses against him or her. Defendants thus have the same legal powers as the prosecution to compel witnesses to appear and to examine and cross-examine them. This guarantee does not, however, provide an unlimited right to obtain the attendance of any witness requested by the accused or their counsel, but only a right to have witnesses admitted that are relevant for the defence, and to be given a proper opportunity to question and challenge witnesses against them at some stage of the proceedings.¹⁶⁴

The right to compel the attendance of witnesses may mean that they are detained to ensure their presence at trial and to testify (witness *subpoena*).¹⁶⁵ This is an exceptional measure, which should be implemented as a result of a court decision (witness order) only when there are special circumstances and it is strictly regulated by law. It cannot be used against those who, for professional reasons, have the right to keep their sources of information confidential, such as journalists.

The accused has the right to be present when witnesses are testifying. This right may be limited only in exceptional circumstances, such as when a witness reasonably fears reprisal by the defendant, when the accused engages in a course of conduct seriously disruptive to the proceedings, or when the accused repeatedly fails to appear for trivial reasons and after having been duly notified.

164. Human Rights Committee: *General Comment No. 32*, para. 39; Inter-American Commission on Human Rights, *Report on Terrorism and Human Rights*, *doc. cit.*, para. 238; Inter-American Court of Human Rights, Judgment of 30 May 1999, *Castillo Petruzzi et al. v. Peru*, Series C No. 52, paras. 153 and 154; and European Court of Human Rights, Judgment of 6 December 1988, *Barberà, Messegué and Jabardo v. Spain*, Application No. 10590/83.

165. International Criminal Tribunal for the Former Yugoslavia (Appeals Chamber), Judgment of 29 October 1997, *The Prosecutor v. Blaskić*, No. IT-95-14.

The accused has the right to personally examine and cross-examine the witnesses appearing against him or her. However, while bearing in mind the defendant's right to a fair trial, this right may be restricted if the witness is a victim of sexual violence or a minor. Nevertheless, this type of limitation shall not be interpreted as authorising the use of secret or anonymous witnesses and, in all cases, the defence lawyer shall have the right to examine and cross-examine the witnesses appearing for the prosecution.

If the defendant is excluded or if the presence of the defendant cannot be ensured, the lawyer acting on their behalf shall always have the right to be present in order to preserve the defendant's right to examine the witness.

If national law does not permit the accused to examine witnesses during pre-trial investigations, the defendant must have the opportunity, personally or through defence counsel, to examine the witnesses at trial. However, this type of limitation shall not be interpreted as authorising the use of secret or anonymous witness.

Testimony of anonymous victims and witnesses during trial is a breach of the due process of law.¹⁶⁶ It is admissible only in exceptional cases, for example if it is deemed essential for the protection of the witnesses life and physical safety, and only during the investigation phase of proceedings and under strict judicial supervision. In all cases, the identity of anonymous victims and witnesses must be disclosed to the defendant sufficiently in advance of the trial commencing so that a fair trial and the effectiveness of the right of defence can be ensured and the accused can challenge the veracity of the testimonies.¹⁶⁷

10. Right not to be Compelled to Confess Guilt or to Testify against Oneself

No one who is charged with a criminal offence may be compelled to confess guilt or testify against him/herself.

166. Inter-American Court of Human Rights, Judgment of 25 November 2005, *García Asto and Ramírez Rojas v. Peru*, Series C No. 137, paras. 152-154; Judgment of 25 November 2004, *Lori Berenson Mejía v. Peru*, Series C No. 119, paras. 183, 184 and 192; and Judgment of 30 May 1999, *Castillo Petruzzi et al. v. Peru*, Series C No. 52, paras. 153, 154 and 172.

167. Human Rights Committee, *Concluding Observations of the Human Rights Committee: Canada*, CCPR/C/CAN/CO/5, 20 April 2006, para. 13; *Concluding Observations of the Human Rights Committee: United States of America*, CCPR/C/USA/CO/3/Rev.1, 18 December 2006, para. 18; Inter-American Commission on Human Rights, *Report on Terrorism and Human Rights*, doc. cit., para. 262, *Second Report on the Situation of Human Rights in Peru*, doc. cit., paras. 103, 104 and 110, and *Third Report on the Situation of Human Rights in Colombia*, doc. cit., paras. 121, 122, 123 and 124; and European Court of Human Rights, Judgment of 20 November 1989, *Kostovski v. The Netherlands*, Application No. 11454/85, paras. 43-45.

This right is intimately linked to the principle of innocence and the absolute prohibition of torture and cruel, inhuman or degrading treatment.¹⁶⁸ It is a non-derogable right.¹⁶⁹ It implies that no direct or indirect physical or psychological pressure should be inflicted on the accused by the investigating or judicial authorities in order to secure a confession of guilt.¹⁷⁰ It also means that judicial sanctions cannot be used to force the accused to testify against himself/herself.

The investigating and judicial authorities should not resort to any form of coercion or pressure, whether direct or indirect, physical or psychological, in order to compel the accused to testify.

The right for the accused to remain silent at trial is implicit in the right not to be compelled to testify against oneself or confess guilt.¹⁷¹ The silence of the accused person shall not be interpreted or considered as denoting acceptance of the charges nor responsibility or recognition of guilt.

If an accused alleges during the course of proceedings that he or she has been compelled to testify against him/herself or to confess guilt, the judge should have the authority to consider any such complaint at any stage of the proceedings.¹⁷²

All allegations that statements have been extracted as a result of torture or cruel, inhuman or degrading treatment or other abuses of human rights should be promptly and impartially examined by the competent authorities, including prosecutors and judges.

11. Exclusion of Evidence Elicited by Illegal Means, Including Torture or Ill-Treatment

Evidence obtained by illegal means, for example, as a result of torture or other prohibited treatment, cannot be used against the accused or against any other person in any proceedings, except those brought against the perpetrators of such violations.

168. Human Rights Committee: *General Comment No. 32*, para. 41, and Inter-American Commission on Human Rights, *Report on Terrorism and Human Rights*, *doc. cit.*, paras. 237 and 247.

169. Human Rights Committee: *General Comment No. 32*, para. 6, and *General Comment No. 29, States of Emergency (Article 4)*, paras. 7 and 15; and Inter-American Commission on Human Rights, *Report on Terrorism and Human Rights*, *doc. cit.*, para. 247.

170. Human Rights Committee, Views of 7 April 1994, *A. Berry v. Jamaica*, Communication No. 330/1988, para. 11.7.

171. European Court of Human Rights, Judgment of 8 February 1996, *John Murray v. the United Kingdom*, Application No. 18731/91, para. 45.

172. Human Rights Committee: *General Comment No. 13*, para. 15.

Evidence, including confessions by the accused, elicited as a result of torture or cruel, inhuman or degrading treatment or other abuses of human rights cannot be used in any proceedings except those brought against the alleged perpetrators.

This prohibition also applies to evidence obtained through unlawful means. Evidence may be unlawful if obtained by authorities who are not permitted under national legislation to undertake criminal investigations, if gathered by non-competent investigating authorities, or if obtained using procedures that do not satisfy the conditions established in national law for securing evidence by legal means (principle of legality of the evidence).

Any statement obtained under torture or as a result of cruel, inhuman or degrading treatment or other abuses of human rights is inadmissible as evidence in criminal proceedings, except in proceedings against the alleged perpetrators of such human rights violations.

These standards do not only apply to statements made by the accused but also to the testimonies of any of the witnesses.

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.¹⁷³

Judges must be attentive to any sign of:

- i. unlawful compulsion used to elicit confessions or statements, neither of which may be used or invoked as evidence either for or against the accused;
- ii. evidence obtained or produced unlawfully.

12. Right to be Tried Without Undue Delay

Everyone charged with a criminal offence has the right to be tried without undue delay.

The right to be tried without undue delay is not only designed to avoid keeping people in a state of uncertainty about their fate for too long and, if in detention

173. Guideline 16 of the *Guidelines on the Role of Prosecutors*.

during trial, to ensure that such deprivation of liberty does not last longer than necessary, but also to serve the interests of justice.¹⁷⁴ The right of the accused to be tried without undue delay means that he or she must be tried within a reasonable time.

The right to be tried without undue delay encompasses the entire criminal proceedings, including sentencing and the appeals process. The authorities must ensure that the entire criminal proceedings, from the pre-trial investigation stages until the final appeal, are completed within a reasonable time;

The time period considered in determining whether this right has been respected begins from the time of the very first step in the proceedings (for example, and depending on the circumstances, when the suspect is arrested, when he or she is informed that charges have been brought against them or when they are notified that they are going to be tried) and ends when all possible review and appeal mechanisms have been exhausted and final judgment is pronounced.¹⁷⁵

Determining whether there has been undue delay in the proceedings should be assessed in the light of the specific circumstances of each, in particular:

- i. the complexity of the case, including, among other things, the nature of the offence and the number of charges, defendants and/or witnesses;
- ii. the conduct of the accused and the parties; and
- iii. the manner in which the administrative and judicial authorities have dealt with the matter.¹⁷⁶

In cases in which the court has refused to grant the defendants bail, the latter must be tried as quickly as possible.¹⁷⁷

The accused cannot be held responsible for delays caused by him or her making use of the right to silence or not actively cooperating with the judicial authority.¹⁷⁸

174. Human Rights Committee: *General Comment No. 32*, para. 35.

175. Human Rights Committee: *General Comment No. 13*, para. 10; Inter-American Court of Human Rights, Judgment of 12 November 1997, *Suárez Rosero v. Ecuador*, Series C No. 35 paras. 70-72.

176. Human Rights Committee: *General Comment No. 32*, para. 35; Views of 15 March 2006, *Abdelhamid Taright, Ahmed Touadi, Mohamed Remli and Amar Yousfi v. Algeria*, Communication No. 1085/2002, para. 8.5; European Court of Human Rights; Judgment of 25 March 1996, *Mitap and Müftüoğlu v. Turkey*, Application Nos. 15530/89 and 15531/89 and Judgment of 23 June 1993, *Ruiz-Mateos v. Spain*, Application No. 12952/87, paras. 38-53; Inter-American Court of Human Rights: *Suárez Rosero v. Ecuador*, *doc. cit.*, para. 73, and Judgment of 29 January 1997, *Genie Lacayo v. Nicaragua*, Series C No. 30, para. 77; and Inter-American Commission on Human Rights, *Report on Terrorism and Human Rights*, *doc. cit.*, para. 234.

177. Human Rights Committee: *General Comment No. 32*, para. 35.

178. European Court of Human Rights: Judgment of 8 June 1995, *Yagci and Sargin v. Turkey*, Application Nos. 16419/90; 16426/90, para. 66; Judgment of 25 February 1993, *Dobbertin v. France*, Application No. 13089/87, para. 43.

Judicial delays can only be attributed to the accused in cases of deliberate obstructive behaviour.

13. Principle of Legality of Criminal Offences (*Nullum Crimen Sine Lege*)

People may only be charged, prosecuted, tried and punished for crimes that are clearly defined in law.

The legal definition of criminal offences must comply with the principle of legality of criminal offences (*nullum crimen sine lege*), which is absolute and non-derogable.¹⁷⁹ The principle of *nullum crimen sine lege* is closely linked to the right to “security of person”¹⁸⁰ since it seeks to safeguard people’s right to know for which acts they may be punished and which not.¹⁸¹ Indeed, “[c]riminal law provides a standard of conduct which the individual must respect”.¹⁸² The principle of legality of offences is a fundamental element of the right to a fair trial as far as criminal matters are concerned.

The principle of legality of criminal offences means that, in order to be termed a criminal offence, the specific type of behaviour to be punished needs to be strictly

179. The *International Covenant on Civil and Political Rights*, Article 15, the *European Convention for the Protection of Human Rights and Fundamental Freedoms*, Article 7, the *African Charter on Human and Peoples’ Rights*, Article 7.2, the *Arab Charter on Human Rights*, Article 15; the *American Convention on Human Rights*, Article 9; the *Rome Statute of the International Criminal Court*, Article 22; and the reports of the International Law Commission to the UN General Assembly, 1993 (Supplement No. 10 (A/48/10), p.81) and 1994 (Supplement No. 10 (A/49/10), p. 321). See also: Human Rights Committee, *General Comment No. 29, States of emergency (Article 4)*, para. 7; *Concluding Observations of the Human Rights Committee on Estonia*, CCPR/CO/77/EST, 15 April 2003, para. 8; European Court of Human Rights, Judgment of 22 June 2000, *Cöeme and others v. Belgium*, Application Nos. 32492/96; 32547/96; 32548/96; 33209/96; 33210/96; Inter-American Court of Human Rights, Judgment of 30 May 1999, Case of *Castillo Petruzzi et al. v. Peru*, Series C No. 52, para. 119 *et seq.*; and Inter-American Commission on Human Rights, *Report on Terrorism and Human Rights*, OAS document OEA/Ser.L/V/II.116, Doc. 5 rev. 1 corr., 22 October 2002, para. 218.

180. Article 3 of the *Universal Declaration of Human Rights*.

181. Inter-American Commission on Human Rights, *Second report on the situation of human rights in Peru*, OEA/Ser.L/V/II.116, Doc. 59 rev., 2 June 2000, para. 80.

182. International Law Commission, *Draft Code of Crimes against the Peace and Security of Mankind with commentaries – 1996*, UN document A/51/10 (Supplement No. 10), p. 36.

classified in law as an offence and the definition of all criminal offences must be precise and free of ambiguity.¹⁸³

The principle of legality of offences means that, in order to be held criminally responsible for a crime, the alleged offender must have fully committed the criminal behaviour in question (be it an act or omission) as described precisely and unambiguously in criminal legislation, without prejudice to the rules of criminal liability concerning the attempted commission of such an offence or the issue of complicity.¹⁸⁴

Definitions of criminal offences that are vague, ambiguous and imprecise contravene international human rights law and the “general conditions prescribed by international law”.¹⁸⁵

The principle of legality of criminal offences implies a restrictive interpretation of criminal law and the prohibition of analogy.¹⁸⁶ The bringing of charges or proceedings or the imposition of criminal penalties based on analogy for types of behaviour that are not established in criminal law as offences are incompatible with the principle of legality.¹⁸⁷

183. See, among others, the Human Rights Committee: *General Comment No. 29, States of emergency (Article 4)*, para. 7; Views of 19 March 2004, *David Michael Nicholas v. Australia*, Communication No. 1080/2002, paras. 7.2 *et seq.*; *Concluding Observations of the Human Rights Committee: Democratic People's Republic of Korea*, CCPR/CO/72/PRK, 27 August 2001, para. 14; *Concluding Observations of the Human Rights Committee: Belgium*, CCPR/CO/81/BEL, 12 August 2004, para. 24; *Concluding Observations of the Human Rights Committee: Iceland*, CCPR/CO/83/ISL, 25 April 2005, para. 10; *Concluding Observations of the Human Rights Committee: Estonia*, CCPR/CO/77/EST, 15 April 2003, para. 8; *Concluding Observations of the Human Rights Committee: Canada*, CCPR/C/CAN/CO/5, 20 April 2006, para. 12; and *Concluding Observations of the Human Rights Committee: Morocco*, CCPR/CO/82/MAR, 1 December 2004, para. 20; European Court of Human Rights: Judgment of 25 May 1993, *Kokkinakis v. Greece*, Application No. 14307/88, para. 52 and Judgment of 22 June 2000, *Côme and others v. Belgium*, Application Nos. 32492/96; 32547/96; 32548/96; 33209/96; 33210/96; Inter-American Court of Human Rights: Judgment of 30 May 1999, Case of *Castillo Petrucci et al v. Peru*, Series C, No 52, paras. 119, 120 and 121; and Inter-American Commission on Human Rights: *Second report on the situation of human rights in Peru*, *op. cit.* 76, para. 80, and *Report on Terrorism and Human Rights*, *op. cit.* 32, “Recommendations”, No. 10 (a).

184. Human Rights Committee: Views of 19 March 2004, *David Michael Nicholas v. Australia*, Communication No. 1080/2002, para. 7.3.

185. UN Special Rapporteur on the Independence of Judges and Lawyers, UN Document E/CN.4/1998/39/Add.1, para. 129. See also, Human Rights Committee: *Concluding Observations of the Human Rights Committee: Portugal (Macau)*, CCPR/C/79/Add.115, 4 November 1999, para. 12; *Algeria*, CCPR/C/79/Add.95, 18 August 1998, para. 11; *Egypt*, CCPR/C/79/Add.23, 9 August 1993, para. 8; *Peru*, CCPR/C/79/Add.67, 25 July 1996, para. 12; *Democratic People's Republic of Korea*, CCPR/CO/72/PRK, 27 August 2001, para. 14; *Belgium*, CCPR/CO/81/BEL, 12 August 2004, para. 24; *Iceland*, CCPR/CO/83/ISL, 25 April 2005, para. 10; *Estonia*, CCPR/CO/77/EST, 15 April 2003, para. 8; and *Canada*, CCPR/C/CAN/CO/5, 20 April 2006, para. 12. See also: the Inter-American Court of Human Rights, Judgment of 30 May 1999, *Castillo Petrucci et al v. Peru*, Series C, No. 52, para. 121; and the Inter-American Commission on Human Rights, *Annual Report of the Inter-American Commission on Human Rights, 1983-1984*, p.85, para. 7, and the *Second report on the situation of human rights in Peru*, *doc. cit.* 76, para. 80.

186. See, among others, Article 22(2) of the Rome Statute which stipulates that “[t]he definition of a crime shall be strictly construed and shall not be extended by analogy”.

187. Human Rights Committee, *Concluding Observations of the Human Rights Committee: Democratic People's Republic of Korea*, CCPR/CO/72/PRK, 27 August 2001, para. 14.

Legitimately exercising one's fundamental freedoms cannot be legally termed or classified as a criminal offence because criminal law can only prohibit forms of behaviour that harm society.¹⁸⁸

The principle of legality of offences also means that no one can be convicted for an offence except on the basis of individual criminal responsibility (principle of individual penal responsibility). This principle prohibits collective criminal responsibility.¹⁸⁹ It does not, however, preclude prosecution of persons on such established grounds of individual criminal responsibility as complicity or incitement, nor does it prevent individual accountability on the basis of the well-established superior responsibility doctrine.¹⁹⁰

14. Prohibition on the Retroactive Application of Criminal Law (Principle of Non-Retroactivity of Criminal Law)

No one may be prosecuted and convicted for an act or omission which was not a criminal offence at the time it was committed.

The principle of non-retroactivity of criminal law is a key safeguard of international law and a consequence of the principle of legality of criminal offences (*nullum crimen sine lege*). The principle of prohibiting the retroactive application of criminal law is absolute and applies in all circumstances and at all times, including during states of emergency and in time of war. The right not to be convicted for acts or omissions which were not crimes at the time they were committed is a non-derogable right.¹⁹¹

No one can be deemed guilty of any criminal offence for an act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed.¹⁹² However, nothing in this principle shall prejudice the trial and punishment of any person for any act or omission which, at the time when it

188. See, for example, Human Rights Committee: *Concluding Observations of the Human Rights Committee: Syrian Arab Republic*, CCPR/CO/71/SYR, 24 April 2001, para. 24, and *Concluding Observations of the Human Rights Committee: Iceland*, CCPR/CP/83/ISL, 25 April 2005, para. 10.

189. Inter-American Commission on Human Rights, *Report on Terrorism and Human Rights*, doc. cit., paras. 222 and 227; and European Court of Human Rights, Judgment of 6 November 1980, *Guzzardi v. Italy*, Application No. 7367/76.

190. Inter-American Commission on Human Rights, *Report on Terrorism and Human Rights*, doc. cit., paras. 222 and 227.

191. *International Covenant on Civil and Political Rights* (Article 4), *European Convention on Human Rights* (Article 15) and *American Convention on Human Rights* (Article 27).

192. Human Rights Committee, Views of 19 March 2004, *David Michael Nicholas v. Australia*, Communication No. 1080/2002, paras. 7.2 et seq.; Inter-American Court of Human Rights: Judgment of 18 November 2004, *De la Cruz Flores v. Peru*, Series C No. 115, para. 104 et seq; Judgment of 31 August 2004, *Ricardo Canese v. Paraguay*, Series C No. 111, para. 175; Judgment of 25 November 2005, *García Asto and Ramírez Rojas v. Peru*, Series C No. 137, para. 206; and Judgment of 20 June 2005, *Fernín Ramírez v. Guatemala*, Series C No. 126, para. 90.

was committed, was criminal according to the general principles of law recognised by the community of nations (international customary law).¹⁹³

15. Prohibition of Double Jeopardy (*Ne Bis In Idem*)

No one may be tried or convicted again for a criminal offence for which a final judgment of conviction, dismissal or acquittal in respect of that person has already been rendered by a court in the same country.

This prohibition (or *ne bis in idem* principle) embodies the principle of *res judicata*. This provision prohibits bringing a person, once convicted or acquitted of a certain offence, either before the same court again or before another tribunal for the same offence.¹⁹⁴ It applies to all criminal offences, however serious.

The prohibition of submitting someone to a new trial for the same offence takes effect once a final judgment of conviction, dismissal or acquittal has been rendered. This means that, for this prohibition to apply, all relevant judicial reviews and/or appeals must have been exhausted or, failing that, the legally-established time limits for invoking such reviews and/or appeals must have passed. Thus, the following are not prohibited:

- i. a higher court has quashed a conviction and ordered a re-trial;¹⁹⁵
- ii. there are exceptional circumstances for resuming a criminal trial, such as the discovery of evidence which was not available or known at the time of the acquittal;¹⁹⁶ and
- iii. in the case of a trial of someone found guilty *in absentia*, the person concerned asks for a re-trial. In such situations, the prohibition does, however, apply to the second conviction.¹⁹⁷

193. Article 15 (2) of the *International Covenant on Civil and Political Rights*; Article 7 (2) of the *European Convention on Human Rights*, Article 9 of the *American Convention on Human Rights*, Principle I of the *Principles of international law recognized by the charter of the Nuremberg Tribunal and the judgment of the Tribunal* (adopted by the International Law Commission of the United Nations in 1950). See also, Inter-American Court of Human Rights, Judgment of 26 September 2006, *Almonacid Arellano et al. v. Chile*, Series C No. 154, para. 151, and International Commission of Jurists, *Impunidad y graves violaciones de derechos humanos – Practitioners’ Guide No. 3*, Geneva, 2008, pp. 129-133.

194. Human Rights Committee: *General Comment No. 32*, para. 54.

195. Human Rights Committee, Views of 26 March 1992, *Terán Jijón v. Ecuador*, Communication No. 277/1988, para. 5.4.

196. Human Rights Committee: *General Comment No. 32*, para. 56.

197. Human Rights Committee: *General Comment No. 32*, para. 54.

The prohibition prevents new trials or convictions for the same offences or acts by courts in the same country. However, the *ne bis in idem* principle does not apply to trials and judicial decisions by courts in other countries.¹⁹⁸

In order for a judgment to have the authority of *res judicata* and for the *ne bis in idem* principle to apply, it is essential for any such judicial decision to result from the actions of a competent, independent and impartial tribunal or court and for the trial to have been conducted with full observance of the judicial guarantees of due process.¹⁹⁹ In the case of judgments or judicial decisions that are the result of proceedings which failed to comply with international standards concerning fair trial or due process or which have been rendered by judicial bodies that do not satisfy the requirements of independence, impartiality and/or competence, the *ne bis in idem* principle cannot be invoked. In such cases, resumption of the proceedings in question or a new trial may be ordered.²⁰⁰

In proceedings against the alleged perpetrators of serious human rights violations, a judgment may not be deemed *res judicata* and the *ne bis in idem* principle cannot be invoked if there was no genuine intention to bring those responsible to justice or the proceedings sought to exonerate the accused from any responsibility for serious human rights violations (“fraudulent *res judicata*”).²⁰¹

198. Human Rights Committee: *General Comment No. 32*, para. 57; Decision on Admissibility, 2 November 1987, *A.P. v. Italy*, Communication No. 204/1986, para. 7 (3); and Views of 28 July 1997, *A.R.J. v. Australia*, Communication No. 692/1996, para. 6 (4). See also: International Law Commission, *Report of the International Law Commission on the work of its forty-eighth session, 6 May – 26 July 1996*, United Nations document A/51/10 (Supplement No. 10), p. 72.

199. Human Rights Committee: Views of 6 November 1997, *Polay Campos v. Peru*, Communication No. 577/1994; Inter-American Court of Human Rights, Judgment of 30 May 1999, *Castillo Petruzzi et al. v. Peru*, Series C No. 52, paras. 218 and 219; Inter-American Commission on Human Rights, Report No. 15/87 of 30 June 1987, Case 9635 (Argentina); and African Commission on Human and Peoples’ Rights, decisions in the cases of *Media Rights Agenda v. Nigeria*, Communication No. 224/98 and *Avocats sans Frontières (Gaëtan Bwampamye)*, Communication No. 231/99.

200. See, *inter alia*: Human Rights Committee: Views of 6 November 1997, *Polay Campos v. Peru*; Communication No. 577/1994; Views of 28 October 1981, *Raúl Sendic Antonaccio v. Uruguay*, *op. cit.*; Inter-American Court of Human Rights: Judgment of 22 November 2004, *Carpio Nicolle et al. v. Guatemala*, Series C No. 117; Judgment of 29 November 2006, *La Cantuta v. Peru*, Series C No. 162; Judgment of 26 September 2006 *Almonacid Arellano et al. v. Chile*, Series C No. 154; and Judgment of 12 September 2005, *Gutiérrez Soler v. Colombia*, Series C No. 132; Inter-American Commission on Human Rights, Informe No. 15/87 of 30 June 1987, Case 9635 (Argentina); African Commission on Human and Peoples’ Rights: decisions on cases: *Media Rights Agenda v. Nigeria*, Communication No. 224/98 and *Avocats sans Frontières (Gaëtan Bwampamye)*, Communication No. 231/99.

201. See, *inter alia*: Inter-American Court of Human Rights, Judgment of 22 November 2004, *Carpio Nicolle et al. v. Guatemala* Series C No. 117; Judgment of 29 November 2006, *La Cantuta v. Peru*, Series C No. 162; Judgment of 26 September 2006, *Almonacid Arellano et al. v. Chile*, Series C No. 154; and Judgment of 12 September 2005, *Gutiérrez Soler v. Colombia*, Series C No. 132; Inter-American Commission on Human Rights, Report No. 36/96 of 15 October 1996, Case 10.843, *Héctor Marcial Garay Hermosilla y otros* (Chile), paras. 106 et seq. See also: International Law Commission, *Report of the International Law Commission on the work of its forty-eighth session, 6 May – 26 July 1996*, United Nations document A/51/10 (Supplement No. 10), p. 72; the *Rome Statute of the International Criminal Court* (Article 20.3); the *Statute of the International Criminal Tribunal for the Former Yugoslavia* (Article 10) and the *Statute of the International Criminal Tribunal for Rwanda* (Article 9).

16. Right to a Public and Reasoned Judgment

Judgments must be made public, except where the interest of juveniles otherwise requires. Everyone tried by a court of law, whether convicted or acquitted, has the right to know the reasoning on which the judgment against them is based.

Judgments in both trials and appeals must be made public except where the interest of juveniles otherwise requires. However, even when the latter applies, the parties to the proceedings should be made aware of the judgment in its entirety and be provided with a copy of it.

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 and made available to anyone who can establish an interest.²⁰²

Even in cases where the public has been excluded from the trial, the judgment, including the essential findings, evidence and legal reasoning, must be made public.²⁰³

The principle that court judgments be made public requires that, in all circumstances, the accused and other parties to the proceedings should have access to a copy of the judgment.²⁰⁴ It is not sufficient for it to be read out in the courtroom. The failure to make available the text of the judgment to those concerned may result in a breach of the right of defence and, in particular, the right to challenge that decision before a higher court.²⁰⁵

The right to have a duly reasoned judgment is inherent to the right to a fair trial.²⁰⁶ It applies at all stages of criminal proceedings, including the appeal stage. The right to have a reasoned judgment means that the court ruling must include the essential findings, evidence and legal reasoning on which the tribunal or court based its judgment. However, the concept of a duly reasoned judgment cannot be understood as requiring a detailed answer to every point of fact or law raised by the accused or other parties.

202. European Court of Human Rights, Judgment of 22 February 1984, *Sutter v. Switzerland*, Application No. 8209/78, para.34.

203. Human Rights Committee: *General Comment No. 32*, para. 29.

204. Human Rights Committee, Views of 31 March 1981, *Tourón v. Uruguay*, Communication No. 32/1978.

205. Inter-American Court of Human Rights, Judgment of 25 November 2005, *García Asto and Ramírez-Rojas v. Peru*, Series C No. 137, para. 155.

206. Human Rights Committee, Views of 24 March 1993, *V. Francis v. Jamaica*, Communication No. 320/1988, para. 12.2; European Court of Human Rights, Judgment of 21 January 1999, *García Ruiz v. Spain*, Application No. 30544/96, para. 26.

The right to a public judgment means that the accused and other parties to the proceedings have a right to know the judgment rendered by the tribunal or court. This right is essential to the defendant's right of defence in subsequent stages of the proceedings, such as the appeal stage.

The right to trial within a reasonable time includes the right to receive a reasoned judgment (at trial and appeal) within a reasonable time.²⁰⁷

17. Right not to Suffer a Heavier Penalty than the one Applicable at the Time the Criminal Offence was Committed and Right to Benefit from a Lighter Sentence Subsequently Introduced by Law

Courts may not impose a heavier penalty than the one established in law at the time the crime was committed. However, if, as a result of legal reform, the penalty for that offence is later reduced, States are obliged to retroactively apply the lighter penalty.

This right is intimately linked to the prohibition on imposing punishment retroactively or one that is unlawful (principle of legality of penalties).²⁰⁸

Anyone who is tried for a criminal offence has the right to benefit from the retroactive application of the law most favourable to them. This right means that:

- i. no-one convicted of a criminal offence should suffer a heavier penalty than the one that was applicable at the time when the criminal offence was committed;²⁰⁹ and
- ii. if, subsequent to the commission of the offence, provision is made by law for the imposition of a lighter penalty, the defendant shall benefit from it.

This right is non-derogable.

207. Human Rights Committee, Views of 29 March 1994, *Currie v. Jamaica*, Communication No. 377/1989, para.13.5; Views of 15 March 2006, *Abdelhamid Taright, Ahmed Touadi, Mohamed Remli and Amar Yousfi v. Algeria*, Communication No. 1085/2002, paras. 8.4 and 8.5.

208. Human Rights Committee, Views of 31 July 2003, *Klaus Dieter Baumgarten v. Germany*, Communication No. 960/2000, para. 9.3; and Inter-American Court of Human Rights, Judgment of 25 November 2005, *García-Asto and Ramírez-Rojas v. Peru*, Series C No. 137, para. 191.

209. Human Rights Committee, Views of 22 July 2003, *Casafranca v. Peru*, Communication No. 981/2001, para. 7.4.

18. Right not to be Punished Other than in Accordance with International Standards

Neither the punishment itself nor the way that it is applied or carried out may violate international standards, including the prohibition of torture and other cruel, inhuman or degrading treatment or punishment. Any punishment imposed as the result of a court judgment must comply with the right of the convicted individual to be treated with due respect for the inherent dignity of the human person.

Torture and other cruel, inhuman or degrading treatment or punishment are absolutely prohibited. No judicial authority may impose punishment of that nature, however serious the offence of which a person has been convicted.²¹⁰

Corporal punishment (such as physical punishment involving blows to the body, including flogging, caning, whipping and beatings, mutilation, amputation and branding) imposed by judicial order is prohibited under international law as it violates the absolute prohibition on inflicting torture and cruel, inhuman and degrading treatment or punishment.²¹¹

Capital punishment can only be imposed for the most serious crimes and only in countries which have not abolished the death penalty. The notion of the “most serious crime” must be interpreted restrictively. Regardless of the nature of the criminal offence, people under 18 years of age at the time an offence is committed shall not be sentenced to death, nor shall the death sentence be carried out on pregnant women, or on new mothers, or on persons who have become insane (see Chapter VII, “Special Cases”).

Punishment imposed by a tribunal or court as a result of a fair trial must comply with the principle of the proportionality of penalties. In the case of gross human rights violations, such as torture, extrajudicial execution or enforced disappearance, the

210. Human Rights Committee, *General Comment No. 20, Prohibition of torture and other cruel, inhuman or degrading treatment or punishment*, paras. 2 and 3.

211. Human Rights Committee, *General Comment No. 20, Prohibition of torture and other cruel, inhuman or degrading treatment or punishment*, para. 5; *Concluding Observations of the Human Rights Committee: Iraq*, CCPR/C/79/Add.84, 19 November 1997 para. 12; *Libya*, CCPR/C/LBY/CO/4, 15 November 2007, para. 16; *Trinidad and Tobago*, CCPR/CO/70/TTO, 3 November 2000, para. 13; *Yemen*, CCPR/CO/84/YEM, 9 August 2005, para. 16; *Conclusions and recommendations of the Committee against Torture: Saudi Arabia*, CAT/C/CR/28/5, 12 June 2002, paras. 4(b) and 8(b); European Court of Human Rights, Judgment of 25 April 1978, *Tyrer v. United Kingdom*, Application No. 5856/72, para. 33; and Inter-American Court of Human Rights, Judgment of 11 March 2005, *Caesar v. Trinidad and Tobago*, Series C No. 123, para. 59 *et seq.*

proportionality of the penalties should take the extreme gravity of such violations into account.²¹²

Penalties which punish more than the individual convicted and penalties which amount to collective punishment are absolutely prohibited under international law.²¹³ The prohibition of both these forms of punishment are intimately linked to the principle of the legality of offences and the principle of individual criminal responsibility.

Prison conditions for people sentenced to imprisonment should not be in breach of international standards. For example, the following are incompatible with such standards:

- i. imprisonment in prolonged isolation or solitary confinement without communication with the outside world, including a prohibition on the delivery and exchange of correspondence;
- ii. imprisonment in a place that is totally inhospitable on account of the climatic and atmospheric conditions;
- iii. imprisonment in a place that is geographically isolated, making it very difficult, in practice, for relatives to visit the prisoner.²¹⁴

19. Right to Appeal

Everyone convicted in a criminal proceeding has the right to challenge his or her conviction and sentence and have it reviewed before a higher tribunal.

Any review of a conviction or sentence must take place before a *higher tribunal according to law*. The right to challenge one's conviction or sentence and have it reviewed ensures that there will be at least two levels of judicial scrutiny of a case.

212. Committee against Torture, Views of 17 May 2005, *Kepa Urra Guridi v. Spain* Communication No. 212/2002, para. 6(7); Inter-American Commission on Human Rights: Report No. 136/99 of 22 December 1999, Case No. 10.488, *Ignacio Ellacuría, S.J. et al. (El Salvador)*, para 238.

213. Human Rights Committee, *General Comment No. 29*, para. 11; Human Rights Committee, Views of 26 March 1986, *Ngalula Mpandanjila and others v. Zaire*, Communication No. 138/1983, para. 8.2; *Concluding Observations of the Human Rights Committee: Libya*, CCPR/C/LBY/CO/4, para. 20; and Inter-American Commission on Human Rights, *Report on Terrorism and Human Rights*, doc. cit., para. 227.

214. Human Rights Committee, Views of 6 November 1997, *Polay Campos v. Peru*, Communication No. 577/1994, para. 8.4 *et seq.*, and Views of 28 October 2005, *Marlem Carranza Alegre v. Peru*, Communication No. 1126/2002, para. 7.4; Committee against Torture, *Summary account of the results of the proceedings concerning the inquiry on Peru (Article 20 of the Convention)*, A/56/44, paras. 183 and 184; and Inter-American Court of Human Rights, Judgment of 25 November 2005, *García-Asto and Ramírez-Rojas v. Peru*, Series C No. 137, para. 221 *et seq.*

The second level of jurisdiction must lie with a tribunal or court that is higher in the court hierarchy than the one that rendered the first judgment.

The principle of double judicial scrutiny in respect of convictions and the imposition of penalties means that there must always be the possibility of appeal to another court. Furthermore, the right to appeal the conviction and/or sentence implies:

- i. The procedure challenging or seeking review of a conviction or sentence must take place before a higher tribunal or court distinct from the one that reached the initial verdict. If procedural law only provides for conviction to be challenged or reviewed before the tribunal or court that initially took the decision (for instance, by means of an appeal for reversal), the right to an appeal before a higher tribunal has been violated.²¹⁵
- ii. It only applies to proceedings of a criminal nature. Thus the existence of a judicial remedy of a different kind (such as an action for protection of a right guaranteed by the Constitution) cannot in itself be deemed to comply with this principle. Regardless of the existence of a judicial remedy of a different kind, two tiers of criminal jurisdiction are required for this right to be effective.²¹⁶
- iii. If a person has been acquitted by a court at the first level of jurisdiction but is convicted on appeal to a court at the second level, it should be possible to challenge or seek a review of the conviction and/or sentence before a still higher tribunal or court. If that is not the case, then the right to challenge conviction before a higher court has been violated.²¹⁷
- iv. If, as a result of the establishment of “special jurisdictions” for certain categories of people on account of their position (such as Heads of State or Government, ministers, members of Parliament, senior officers of the armed forces), responsibility for trial, conviction and sentencing lies with the highest

215. Human Rights Committee, Views of 24 March 1982, *Consuelo Salgar de Montejo v. Colombia*, Communication No. 64/1979, paras. 9.1, 10.4 and 11; and African Commission on Human and Peoples' Rights, Communication 60/91, *Constitutional Rights Project v. Nigeria*, para. 13.

216. Human Rights Committee, Views of 19 October 1993, *Dennis Douglas, Errol Gentles and Lorenzo Kerr v. Jamaica*, Communication No. 352/1989, para. 11.2; Views of 25 March 2008, *Luis Hens Serena and Juan Ramón Corujo Rodríguez v. Spain*, Communication Nos. 1351/2005 and 1352/2005, para. 9.3; and Inter-American Commission on Human Rights, Report No. 55/97 of 18 November 1997, Case No. 11.137, *Juan Carlos Abella (Argentina)*, para. 269.

217. Human Rights Committee, Views of 31 October 2006, *Juan García Sánchez and Bienvenida González Clares v. Spain*, Communication No. 1332/2004, para. 7.2; Views of 22 July 2005, *Gomariz v. Spain*, Communication No. 1095/2002, para. 7.1; Views of 7 July 2006, *Larrañaga v. Philippines*, Communication No. 1421/2005, para. 7.8; and Views of 31 October 2006, *Mario Conde Conde v. Spain*, Communication No. 1325/2004, para. 7.2.

court in the country, the right to challenge conviction before a higher court cannot be disregarded.²¹⁸

If the national legal system provides for further appeal mechanisms through which convictions and/or sentences can be challenged, such as appeal to the Supreme Court or other extraordinary appeals, then the convicted person should have effective access to each one of them.²¹⁹

The right to challenge convictions and/or sentences must be guaranteed for all kinds of criminal offences; it cannot be confined to the most serious ones.²²⁰

In principle, the right to challenge a conviction or sentence is not violated if the higher court, upon reviewing the case, convicts the defendant of a more serious offence (for example, by deeming him or her guilty as the principal offender rather than as an accessory, or by finding circumstances that aggravate criminal liability) and/or imposes a heavier sentence.²²¹ However, the new verdict cannot be based on new charges or alleged acts that differ from those which were the subject of the initial verdict.²²² Similarly, if, under national legislation, the court at the second level of jurisdiction is prohibited from increasing the sentence (*non reformatio in peius principle*), then any higher court reviewing the conviction in question is also prohibited from doing so.

Regardless of the name given to any judicial remedy (appeal, review, etc.), the higher court must legally have the opportunity of fully reviewing the verdict reached and the sentence imposed.²²³ This means that the higher court must be legally empowered to substantially review the conviction and the sentence with regard to the sufficiency both of the evidence and the legislation in such a way that the proceedings allows the nature of the case to be properly taken into consideration. As a consequence, if the remedy is confined to reviewing the formal, procedural or legal aspects of the conviction or is limited to just some of the grounds (factual or legal),

218. Human Rights Committee, Views of 11 July 2006, *Luis Oliveró Capellades v. Spain*, Communication No. 1211/2003, para. 7, and Views of 5 November 2004, *Terrón v. Spain*, Communication No. 1073/2002, para. 7.4.

219. Human Rights Committee, Views of 1 November 1991, *Raphael Henry v. Jamaica*, Communication No. 230/1987, para. 8.4.

220. Human Rights Committee, *General Comment No. 32*, para. 45.

221. Human Rights Committee, Views of 28 March 2006, *Rafael Pérez Escobar v. Spain*, Communication No. 1153/2003, para. 9.2; and European Court of Human Rights, Judgment of 24 October 1996, *Salvador Torres v. Spain*, Application No. 21525/93, para. 30 *et seq.*

222. Human Rights Committee, Views of 24 July 2006, *Francisco Juan Larrañaga v. Philippines*, Communication No. 1421/2005, para. 7.8, and European Court of Human Rights, Judgment of 11 December 2007, *Drassich v. Italy*, Application No. 25575/04, paras. 36 to 43.

223. Human Rights Committee, Views of 20 July 2000, *Cesáreo Gómez Vázquez v. Spain*, Communication No. 701/1996, para. 11.1.

thereby preventing a full genuine review of the conviction or sentence, the right to challenge the conviction and sentence has been violated.²²⁴

The right to challenge conviction and/or sentence is not satisfied simply with the existence of a higher tribunal or court. The higher court must have the jurisdictional authority to take up the particular case in question. In other words, as well as being independent and impartial, it must be competent²²⁵ (principle of the natural judge – see Chapter IV (5) of this Guide).

To be effective, the right to challenge conviction and/or sentence necessarily implies that the convicted person has access, within a reasonable time, to the duly reasoned written judgments at all stages of the review or appeal.²²⁶ He or she must also have access to any other documents, such as trial transcripts, that are necessary to enable them to effectively exercise that right.²²⁷ The absence of a written judgment, unjustified delays in providing it and the absence of the reasoning (both factual and legal) all constitute violations of the right to challenge conviction and/or the sentence imposed.

The elements and rights inherent in the right to a fair trial must be observed by the higher tribunal when considering a challenge or review of a conviction.²²⁸ They include:

- i. the presumption of innocence;²²⁹
- ii. the right to adequate time and facilities to prepare the appeal;

224. Human Rights Committee, Views of 28 March 2006, *Bandajevsky v. Belarus*, Communication No. 1100/2002, para. 10.13; Views of 18 October 2005, *Aliboeva v. Tajikistan*, Communication No. 985/2001, para. 6.5; Views of 30 March 2005, *Khalilova v. Tajikistan*, Communication No. 973/2001, para. 7.5; Views of 6 April 1998, *Domukovsky and others v. Georgia*, Communications Nos. 623 to 627/1995, para. 18.11; Views of 8 July 2004, *Saidova v. Tajikistan*, Communication No. 964/2001, para. 6.5; and Views of 17 March 2003, *Gelazauskas v. Lithuania*, Communication No. 836/1998, para. 7.2.

225. Inter-American Court of Human Rights, Judgment of 30 May 1999, *Castillo Petruzzi et al. v. Peru*, Series C No. 52, para. 161, and Judgment of 25 November 2004, *Lori Berenson Mejía v. Peru*, Series C No. 119, paras. 192 and 193.

226. Human Rights Committee, Views of 1 November 1991, *Raphael Henry v. Jamaica*, Communication No. 230/87, para. 8.4, Views of 23 March 1993, *Víctor Francis v. Jamaica*, Communication No. 320/1988, para. 12.2; and European Court of Human Rights, Judgment of 16 December 1992, *Hadjianastassiou v. Greece*, Application No. 12945/87, paras. 31 – 37

227. Human Rights Committee, *General Comment No. 32*, para. 49.

228. Human Rights Committee, *General Comment No. 32*, paras. 48 *et seq.*, and Views of 24 July 2006, *Francisco Juan Larrañaga v. Philippines*, Communication No. 1421/2005, para. 7.4 *et seq.*; and Inter-American Court of Human Rights, Judgment of 30 May 1999, *Castillo Petruzzi et al. v. Peru*, Series C No. 52, para. 161, and Judgment of 25 November 2004, *Lori Berenson Mejía v. Peru*, Series C No. 119, paras. 192 and 193.

229. Human Rights Committee, Views of 24 July 2006, *Francisco Juan Larrañaga v. Philippines*, Communication No. 1421/2005, para. 7.4, and Views of 30 March 2005, *Arutyuniantz v. Uzbekistan*, Communication No. 971/2001, para. 6.4.

- iii. the right to a lawyer of one's choosing;²³⁰
- iv. the right to equality of arms (including the right to be notified of the opposing party's submissions);
- v. the right to be tried within a reasonable time;²³¹ and
- vi. the right to a public and reasoned judgment within a reasonable time.²³²

The right to have counsel appointed to represent the appellant 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. If the lawyer who defended the accused in the first trial does not intend to appeal the conviction or sentence or submit arguments to a higher tribunal or court (because, for example, he or she does not think there are grounds to challenge the court's verdict), the defendant has the right to be so informed as well as to appoint another lawyer so that his or her concerns can be examined on appeal. The higher tribunal must take steps to ensure that this right is made effective.²³³

The right to a public hearing does not necessarily apply to all procedures for challenging conviction or sentence.²³⁴ However, when national legislation provides for the participation of the guilty party in person at the appeal proceedings and/or public hearing related to it, the relevant international standards relating to the latter two rights must be applied (see points 2 and 7 of this chapter). If the review procedure is carried out only in writing, the higher court is, nevertheless, required to examine in detail the facts of the case, the allegations against the person found guilty and the items of evidence presented at trial and on appeal.²³⁵

230. Human Rights Committee, Views of 29 March 1984, *Antonio Viana Acosta v. Uruguay*, Communication No. 110/1981, paras. 13.2 and 15.

231. Human Rights Committee, Views of 29 March 1984, *Antonio Viana Acosta v. Uruguay*, Communication No. 110/1981, paras. 13.2 and 15, Views of 29 October 1981, *Larry James Pinkney v. Canada*, Communication No. 27/1978, para. 35; and Views of 25 October 2001, *Boodlal Sooklal v. Trinidad and Tobago*, Communication No. 928/2000, para. 4.8 *et seq.*

232. Human Rights Committee, Views of 23 March 1994, *Lenford Hamilton v. Jamaica*, Communication No. 333/1988, para. 9.1.

233. Human Rights Committee, Views of 25 October 2001, *Boodlal Sooklal v. Trinidad and Tobago*, Communication No. 928/2000, para. 4.10, and Views of 31 March 1998, *Anthony McLeod v. Jamaica*, Communication No. 734/1997, para. 6.3.

234. Human Rights Committee, *General Comment No. 32*, paras. 28 and 48 and European Court of Human Rights, Judgment of 18 October 2006, *Hermi v. Italy*, Application No. 18114/02, para. 62.

235. Human Rights Committee, Views of 28 March 2006, *Rafael Pérez Escobar v. Spain*, Communication No. 1156/2003, para. 9.3.

Standards on Judicial Proceedings

Table No. 1: United Nations and Regional Treaty Standards

Acronyms used:

ICCPR: International Covenant on Civil and Political Rights
ECHR: European Convention for the Protection of Human Rights and Fundamental Freedoms and its Protocols 1,4,6,7, 12 and 13
ACHR: American Convention on Human Rights
ACHR: African Charter on Human and Peoples' Rights
ARCHR: Arab Charter on Human Rights

CAT: Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
ICERD: International Convention on the Elimination of All Forms of Racial Discrimination
IACAT: Inter-American Convention to Prevent and Punish Torture
CEWAW: Convention on the Elimination of All Forms of Discrimination against Women

ICRMW: International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families
ICED: International Convention for the Protection of All Persons from Enforced Disappearance
IACED: Inter-American Convention on Forced Disappearance of Persons

	ICCPR	ECHR	ACHR	ACHPR	ARCHR	CAT	ICERD	IACAT	CEWAW	ICRMW	ICED	IACED
<i>Right to a fair hearing</i>	Art. 14(1)	Art. 6(1)	Art. 8(1)	Art. 7(1)	Art. 13(1)	-	-	-	-	Art. 18(1)	-	-
<i>Right to a public hearing</i>	Art. 14(1)	Art. 6(1)	Art. 8(5)	-	Art. 13(2)	-	-	-	-	Art. 18(1)	-	-
<i>Presumption of innocence</i>	Art. 14(2)	Art. 6(2)	Art. 8(2)	Art. 7(1)(b)	Art. 16	-	-	-	-	Art. 18(2)	-	-
<i>Right to be informed promptly of the charge</i>	Art. 14(3)(a)	Art. 6(3)(a)	Art. 8(2)(b)	-	Art. 16(1)	-	-	-	-	Art. 18(3)(a)	-	-
<i>Right to defence</i>	Art. 14(3)(b), 14(3)(d)	Art. 6(3)(b), 6(3)(c)	Art. 8(2)(c), (d), (e)	Art. 7(1)(c)	Art. 16(2), (3), (4)	-	-	-	-	Art. 18(3)(b)	-	-
<i>Right to an interpreter</i>	Art. 14(3)(f)	Art. 6(3)(e)	Art. 8(2)(a)	-	Art. 16(4)	-	-	-	-	Art. 18(3)(f)	-	-
<i>Right to be present at trial</i>	Art. 14(3)(d)	Art. 6(3)(c)	Art. 8(2)(d)	-	Art. 16(3)	-	-	-	-	Art. 18(3)(d)	-	-
<i>Right to equality of arms</i>	Art. 14(3), 14(3)(e)	Art. 6(3)(d)	Art. 8(2)	-	Art. 16(5)	-	-	-	-	Art. 18(3)(e)	-	-
<i>Right to call and examine witnesses</i>	Art. 14(3)(e)	Art. 6(3)(d)	Art. 8(2)(f)	-	Art. 16(5)	-	-	-	-	Art. 18(3)(e)	-	-
<i>Right not to be compelled to confess guilt or to testify</i>	Art. 14(3)(g)	-	Art. 8(2)(g), 8(3)	-	Art. 16(6)	Arts. 13, 16	-	Art. 10	-	Art. 18(3)(g)	-	-

	ICPCR	ECHR	ACHR	ACHPR	ARCHR	CAT	ICERD	IACAT	CEDAW	ICRMW	ICED	IACED
<i>Exclusion of evidence elicited by illegal means, including torture or ill-treatment</i>	-	-	Art. 8(3)	-	-	Arts. 15, 16	-	Art. 10	-	-	-	-
<i>Right to be tried without undue delay</i>	Art. 14(3)(c)	Art. 6(1)	Art. 8(1)	Art. 7(1)(d)	-	-	-	-	-	Art. 18(3)(c)	-	-
<i>Principle of legality of criminal offences</i>	Art. 15	Art. 7(1)	Art. 9	Art. 7(2)	Art. 15	-	-	-	-	Art. 19	-	-
<i>Prohibition of the retro-activity of criminal law</i>	Art. 15(1)	Art. 7(1)	Art. 9	Art. 7(2)	Arts. 6, 15	-	-	-	-	Art. 19	-	-
<i>Prohibition on double jeopardy (ne bis in idem)</i>	Art. 14(7)	Art. 4, Protocol 7	Art. 8(4)	-	Art. 19(1)	-	-	-	-	Art. 18(7)	-	-
<i>Right to a public and reasoned judgment</i>	Art. 14(1)	Art. 6(1)	Art. 8(5)	-	Art. 13(2)	-	-	-	-	Art. 18(1)	-	-
<i>Right not to suffer a heavier penalty than the one applicable at the time the criminal offence was committed and right to benefit from a lighter sentence subsequently introduced by law</i>	Art. 15(1)	Art. 7(1)	Art. 9	Art. 7(2)	Art. 15	-	-	-	-	Art. 19	-	-
<i>Right not to be punished otherwise than in accordance with international standards</i>	Arts. 6, 7, 10, 11	Art. 3; Art. 1, Protocol 1; Arts. 1, 2 & 3, Protocol 6; Art. 1, Protocol 13	Arts. 4, 5(2), 5(3), 5(6), 7(7)	Art. 5, 7(2)	Arts. 6, 7, 8, 18, 20	Arts. 1, 2, 16	Arts. 3, 5(a) & 5(b)	Arts. 1, 5	Art. 2(g)	Arts. 10, 20(t)	Art. 1	Art. 1
<i>Right to appeal</i>	Art. 14(5)	Art. 2, Protocol 7	Art. 8(2)(h)	Art. 7(1)(a)	Arts. 16(7), 19	-	-	-	-	Art. 18(5)	-	-

Standards on Judicial Proceedings

Table No. 2: United Nations Declaratory Instruments Standards

Acronyms used:

UDHR: Universal Declaration of Human Rights
BPL: UN Basic Principles on the Role of Lawyers
GP: UN Guidelines on the Role of Prosecutors
SMR: Standard Minimum Rules for the Treatment of Prisoners
BPTP: Basic Principles for the Treatment of Prisoners
BPD: Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment

SGDP: Safeguards guaranteeing protection of the rights of those facing the death penalty
CC: Code of Conduct for Law Enforcement Officials
PEJ: Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions
DED: Declaration on the Protection of All Persons from Enforced Disappearance

DRA: Declaration on the Human Rights of Individuals Who are not Nationals of the Country in which They Live
Art.: Article
Guid.: Guideline
Prin.: Principle
R.: Rule
S.: Safeguard

	UDHR	BPIJ	BPL	GP	SMR	BPTP	BPD	SGDP	CC	PEJ	DED	DRA
<i>Right to a fair hearing</i>	Arts. 10, 11	Prin. 5, 6	-	-	-	-	-	-	-	-	-	-
<i>Right to a public hearing</i>	Arts. 10, 11	-	-	-	-	-	-	-	-	-	-	-
<i>Presumption of innocence</i>	Art. 11(t)	-	-	Guid. 13(b), 14	R. 84(2)	-	Prin. 36	S. 4	-	-	-	-
<i>Right to be informed promptly of the charge</i>	-	-	-	-	-	-	Prin. 10	-	-	-	-	-
<i>Right to defence</i>	Art. 11(t)	-	Prin. 1, 5-8 & 13-15	-	R. 93	-	Prin. 18	S. 4	-	-	-	-
<i>Right to an interpreter</i>	-	-	-	-	-	-	Prin. 14	-	-	-	-	Art. 5(t)(c)
<i>Right to be present at trial</i>	-	-	-	-	-	-	-	-	-	-	-	-
<i>Right to equality of arms</i>	Art. 10	Prin. 6	-	-	-	-	-	-	-	-	-	-
<i>Right to call and examine witnesses</i>	-	-	-	-	-	-	-	-	-	-	-	-
<i>Right not to be compelled to confess guilt or to testify</i>	-	-	-	-	-	-	Prin. 21	-	-	-	-	-

	UDHR	BPIJ	BPL	GP	SMR	BPTP	BPD	SGDP	CC	PEJ	DED	DRA
<i>Exclusion of evidence elicited by illegal means, including torture or ill-treatment</i>	-	-	-	Guid. 15, 16	-	-	Prin. 27	-	-	-	Arts. 6, 7	-
<i>Right to be tried without undue delay</i>	-	-	-	-	-	-	Prin. 38	-	-	-	-	-
<i>Principle of legality of criminal offences</i>	Art. 11(2)	-	-	-	-	-	-	-	-	-	-	-
<i>Prohibition of the retro-activity of criminal law</i>	Art. 11(2)	-	-	-	-	-	-	-	-	-	-	-
<i>Prohibition on double jeopardy (non bis in idem)</i>	-	-	-	-	-	-	-	-	-	-	-	-
<i>Right to public and reasoned judgment</i>	Art. 10	-	-	-	-	-	-	-	-	-	-	-
<i>Right not to suffer a heavier penalty than the one applicable at the time the criminal offence was committed and right to benefit from a lighter sentence subsequently introduced by law</i>	Art. 11(2)	-	-	-	-	-	-	S. 2	-	-	-	-
<i>Right not to be punished otherwise than in accordance with international standards</i>	Arts. 3, 5, 9	-	-	-	R. 8, 33, 56-83	Prin. 7	Prin. 1, 3, 6	S. 1-9	Arts. 5, 6, 8	Prin. 1	Arts. 2, 6, 7	Arts. 5(i)(a), 6
<i>Right to appeal</i>	Art. 8	-	-	-	-	-	-	S. 6	-	-	-	-

Standards on Judicial Proceedings

Table No. 3: Regional Declaratory Instruments Standards

Acronyms used:

APGFT:	Principles and Guidelines on the right to a fair trial and legal assistance in Africa, adopted by the African Union in 2003	Rec. 2000:	Recommendation 2000 (21) on the Freedom of exercise of the profession of lawyer of the Committee of Ministers to Member States of the Council of Europe	EGT:	Guidelines of the Committee of Ministers of the Council of Europe on Human rights and the fight against terrorism
ADHR:	American Declaration of the Rights and Duties of Man	Rec. R:	Recommendation No. R (2000) 19 of the Committee of Ministers to Member States of the Council of Europe on the role of public prosecution in the criminal justice system	Art.:	Article
OASPDIL:	Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas			Guid.:	Guideline
EUCHR:	Charter of Fundamental Rights of the European Union			Prin.:	Principle

	APGFT	ADHR	OASPDIL	EUCHR	Rec. 2000	Rec. R	EGT
<i>Right to a fair hearing</i>	Prin. A(4)(2)	Art. XXVII	-	-	-	-	Guid. IX
<i>Right to a public hearing</i>	Prin. A(4)(3)	Art. XXVI	-	-	-	-	-
<i>Presumption of innocence</i>	Prin. N(6)(e)	Art. XXVI	Prin. III(2)	Art. 48	-	Prin. 26, 27, 30	Guid. IX
<i>Right to be informed promptly of the charge</i>	Prin. N(1)	-	-	-	-	-	-
<i>Right to defence</i>	Prin. N(2)	-	Prin. V	Art. 48	Prin. I(5)(7)	-	Guid. IX
<i>Right to an interpreter</i>	Prin. A(2)(g), N(4)	-	Prin. V	-	-	-	-
<i>Right to be present at trial</i>	Prin. N	-	-	-	-	-	-
<i>Right to equality of arms</i>	Prin. N(6)	-	-	-	-	Prin. 29	-
<i>Right to call and examine witnesses</i>	Prin. N(6)	-	-	-	-	-	-
<i>Right not to be compelled to confess guilt or to testify</i>	Prin. N(6)	-	Prin. V	-	-	-	-

	APGFT	ADHR	OASPDIL	EUCHR	Rec. 2000	Rec. R	EGT
Exclusion of evidence elicited by illegal means, including torture or ill-treatment	Prin. F(0), N(6)	-	Prin. V	-	-	Prin. 28	-
Right to be tried without undue delay	Prin. N(5)	-	Prin. V	-	-	Prin. 24(C)	-
Principle of legality of criminal offences	Prin. N(8)	-	Prin. IV	Art. 49	-	-	Guid. X
Prohibition of the retroactivity of criminal law	Prin. N(7)	-	Prin. IV	Art. 49	-	-	Guid. X
Prohibition on double jeopardy (ne bis in idem)	Prin. N(8)	-	Prin. V	Art. 50	-	-	-
Right to public and reasoned judgment	Prin. A(3)(i), D	-	-	-	-	-	-
Right not to suffer a heavier penalty than the one applicable at the time the criminal offence was committed and right to benefit from a lighter sentence subsequently introduced by law	Prin. N(7)	-	Prin. V	Art. 49	-	-	-
Right not to be punished otherwise than in accordance with international standards	Prin. N(9)	Arts. XXV, XXVI	Prin. V	Arts. 2, 4, 49	-	-	Guid. IV, X
Right to appeal	Prin. N(10)	Art. XVIII	Prin. V	Art. 47	-	-	-

VII. Special Cases

In this section we examine the additional fair trial guarantees that are applicable in trials involving either children (Item A) or the death penalty (Item B). We also provide guidance as to the issues that trial observers should focus on when assessing the fairness of proceedings before special courts (Item C), military courts (Item D) and courts operating during a state of emergency (Item E).

A. Juvenile Offenders and the Criminal Justice System

Children who are accused of having committed a criminal offence are entitled to all the fair trial guarantees applicable to adults²³⁶ and to some additional special protection on account of their age aimed at affording them special protection. Under international human rights law, a “juvenile” is any person under the age of 18.²³⁷

In the cases of children alleged or accused to have committed criminal offences, also referred to as “children in conflict with the law”, international law requests that States establish a juvenile justice system, with specialised jurisdiction or proceedings different than those applied to adults.²³⁸ The juvenile justice system must be based on the best interests of the child.²³⁹ As pointed out by the Committee on the Rights of the Child:

“Children differ from adults in their physical and psychological development, and their emotional and educational needs. Such differences constitute the basis for the lesser culpability of children in conflict with the law. These and other differences are the reasons for a separate juvenile justice system and require a different treatment for children. The protection of the best interests of the child means, for instance, that the traditional objectives of criminal justice, such as repression/retribution, must give way to rehabilitation and

236. Human Rights Committee, *General Comment No. 13, Article 14: Administration of Justice*, para. 16.

237. Article 1, *Convention on the Rights of the Child*; Committee on the Rights of the Child, *General Comment No. 10: Children’s rights in juvenile justice*, CRC/C/GC/10, 25 April 2007, para. 36; Article 2, *African Charter on the Rights and Welfare of the Child*.

238. See, *inter alia*: Article 40(3) of the *Convention on the Rights of the Child*; Rule 2.3 of the *UN Standard Minimum Rules for the Administration of Juvenile Justice* (“The Beijing Rules”); *UN Guidelines for Action on Children in the Criminal Justice System*; Guidelines 52-59 of the *United Nations Guidelines for the Prevention of Juvenile Delinquency* (“The Riyadh Guidelines”); Article 5(5) of the *American Convention on Human Rights*; Article 17 of the *Arab Charter on Human Rights*; and Principle O of the *Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa*.

239. Article 3, *Convention on the Rights of the Child*.

restorative justice objectives in dealing with child offenders. This can be done in concert with attention to effective public safety.”²⁴⁰

In this sense, all juvenile justice systems must be based on the principles of rehabilitation and social reintegration.

1. Sources of Children’s Additional Fair Trial Rights

Several human rights standards include provisions relating to the treatment of children accused of, or convicted of, breaches of the law. The most important sources of additional fair trial rights for persons under the age of 18 are the *International Convention on Civil and Political Rights*, Articles 6(5), 10(2)(d) and 10(3) and 14(1), the *Convention on the Rights of the Child*, particularly Articles 1, 2, 3, 6, 12, 37 and 40, the *Declaration on the Rights of the Child*, the *UN Rules for the Protection of Juveniles Deprived of their Liberty* (the “Havana Rules”), the *UN Guidelines for the Prevention of Juvenile Delinquency* (“The Riyadh Guidelines”), the *UN Standard Minimum Rules for the Administration of Juvenile Justice* (“The Beijing Rules”) and the *Guidelines for Action on Children in the Criminal Justice System*. Articles 10(2)(b), 10(3), 14(4) and 24 of the ICCPR are also of relevance.

At the regional level, there are also other relevant instruments: *African Charter on the Rights and Welfare of the Child*, particularly Article 17 and the *Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa*, particularly Principle O; *Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas*, Principles II, III, X, XII-XIV, XIX and XXII; the *Arab Charter on Human Rights*, Articles 17 and 33; and the Council of Europe’s *Recommendation No. R (87) 20 concerning Social reactions to Juvenile Delinquency* and *Recommendation Rec (2003)20 on New Ways of Dealing with Juvenile Delinquency and the Role of Juvenile Justice*.

2. General Principles for the Treatment of Children

Every child has the right to protection by their family, the state and society as required by their status as a minor.²⁴¹

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

240. Committee on the Rights of the Child, *General Comment No. 10, Children’s rights in juvenile justice*, para. 10, CRC/C/GC/10, 25 April 2007. In the same line, see also: Human Rights Committee, *General Comment No. 32, Article 14: Right to equality before courts and tribunals and to a fair trial*, paras. 42 *et seq.*, and Inter-American Court of Human Rights, *Advisory Opinion OC-18, Juridical Condition and Rights of the Undocumented Migrants*, of 17 September 2003, Series A No. 18, paras. 104 *et seq.*

241. Article 24(1) of the *International Covenant on Civil and Political Rights*, Article 19 of the *American Convention on Human Rights*, Principle 2 of the *Declaration of the Rights of the Child*, Article 3(2) of the *Convention on the Rights of the Child*; Article 33 of the *Arab Charter on Human Rights*.

legislative bodies.²⁴² The Committee on the Rights of the Child has pointed out that “The protection of the best interests of the child means, for instance, that the traditional objectives of criminal justice, such as repression/retribution, must give way to rehabilitation and restorative justice objectives in dealing with child offenders”.²⁴³

Every child has the right to protection from discrimination of any kind, irrespective of the child’s or his or her parent’s or legal guardian’s race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status.²⁴⁴ States have to take all necessary measures to ensure that all children in conflict with the law are treated equally.²⁴⁵ This principle implies that the State must pay particular attention to *de facto* discrimination and disparities, which may be the result of a lack of a consistent policy and involve vulnerable groups of children, such as street children, children belonging to racial, ethnic, religious or linguistic minorities, indigenous children, girl children, children with disabilities and children who are repeatedly in conflict with the law (recidivists).²⁴⁶ This principle requires the State to abolish the provisions on status offences²⁴⁷ in order to establish equal treatment under the law for children and adults and to enact legislation in order to ensure that any conduct not considered an offence or not penalised if committed by an adult is not considered an offence and not penalised if committed by a young person (Guideline 56 of the Riyadh Guidelines.) The UN Committee on the Rights of the Child has pointed out that States should “abolish the provisions on status offences in order to establish an equal treatment under the law for children and adults”.²⁴⁸

The use of juvenile criminal justice must be an exceptional response to “children in conflict with the law” and States have the obligation to promote measures for dealing with children in conflict with the law without resorting to judicial proceedings.²⁴⁹ States shall give preference, where appropriate, to alternatives to criminal prosecution, with proper safeguards for the protection of the well-being of the child.²⁵⁰

242. Article 3(1) of the *Convention on the Rights of the Child*; Principle 2 of the *Declaration of the Rights of the Child*; Article 4 (1) of the *African Charter on the Rights and Welfare of the Child*; Principle O of the *Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa*; Article 33 of the *Arab Charter on Human Rights*.

243. Committee on the Rights of the Child, *General Comment No. 10, Children’s rights in juvenile justice*, para. 10.

244. Article 2 of the *Convention on the Rights of the Child*.

245. Committee on the Rights of the Child, *General Comment No. 10*.

246. *Ibid.*

247. This refers to children’s behaviour- such as vagrancy, truancy or running away from their homes- often as a consequence of psychological or socio-economic problems, which are criminalised by national legislation.

248. Committee on the Rights of the Child, *General Comment No. 10, Children’s rights in juvenile justice*, para. 8.

249. Committee on the Rights of the Child, *General Comment No. 10, Children’s rights in juvenile justice*, paras. 24 et seq.

250. Article 40 (3)(b) of the *Convention on the Rights of the Child* and Principle O of the *Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa*.

The juvenile justice system must emphasise 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.²⁵¹

States should recognise 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.²⁵²

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.²⁵³

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".²⁵⁴

Children must 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.²⁵⁵ The UN Human Rights Committee has pointed out that any juvenile person shall "be tried as soon as possible in a fair hearing in the presence of legal counsel, other appropriate assistance and their parents or legal guardians, unless it is considered not to be in the best interest of the child".²⁵⁶

3. General Guarantees for the Treatment of Children

Age of criminal responsibility: States must establish laws and procedures that set a minimum age below which children will be presumed not to have the capacity to infringe the criminal law.²⁵⁷ There is no clear international standard regarding the age at which criminal responsibility can be reasonably imputed to a juvenile. However,

251. Rules 5 and 17(1) of *The Beijing Rules* and Principle O (o) (1) of the *Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa*.

252. Article 40(1) of the *Convention on the Rights of the Child*; Article 17 of the *African Charter on the Rights and Welfare of the Child*; Principle O of the *Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa*.

253. Article 14(4) of the ICCPR, Rule 1 of the *UN Rules for the Protection of Juveniles Deprived of their Liberty*; Article 17 of the *Arab Charter on Human Rights*; and Principle O of the *Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa*.

254. Article 5(e) of *The Riyadh Guidelines*.

255. Article 12 of the *Convention on the Rights of the Child*; Principle O of the *Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa*.

256. Human Rights Committee, *General Comment No. 32: Article 14: Right to equality before courts and tribunals and to a fair trial*, para. 42.

257. Article 40(3)(a) of the *Convention on the Rights of the Child*; see also Rule 4 of *The Beijing Rules*, Article 17(4) of the *African Charter on the Rights and Welfare of the Child*.

Article 40(3) of the Convention on the Rights of the Child provides that States “shall seek to promote [...] the establishment of a minimum age below which children shall be presumed not to have the capacity to infringe the penal law”. The Beijing Rules add to this the principle that “the beginning of that age shall not be fixed at too low an age level, bearing in mind the facts of emotional, mental and intellectual maturity” (Rule 4.1). The UN Committee on the Rights of the Child has suggested that it considers the age of 15 to be appropriate, and that behaviour by younger children that is punishable by law should instead be dealt with by child welfare or child protection authorities and procedures. In this context it is relevant that the Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa states that “[t]he age of criminal responsibility should not be fixed below 15 years of age. No child below the age of 15 shall be arrested or detained on allegations of having committed a crime.”²⁵⁸ The Statute of the Special Court of Sierra Leone²⁵⁹ limits the age for juvenile offenders to 15 -18 years of age²⁶⁰ and the Rome Statute of the International Criminal Court excludes from the jurisdiction of the Court persons who were under the age of 18 at the time of the alleged commission of a crime.²⁶¹ As pointed out by the Inter-American Court of Human Rights: “From a criminal perspective – associated with conduct that is defined and punishable as a crime, and with the consequent sanctions – chargeability refers to a person’s capacity for culpability. If the person does not have this capacity, it is not possible to file charges in a lawsuit as in the case of a person who is chargeable. Chargeability is not an option when the person is unable to understand the nature of his or her action or omission and/or to behave in accordance with that understanding. It is generally accepted that children under a certain age lack that capacity. This is a generic legal assessment, one that does not examine the specific conditions of the minors on a case by case basis, but rather excludes them completely from the sphere of criminal justice”.²⁶²

Separate systems for juvenile justice: States should establish separate or specialised procedures and institutions for handling cases in which children are accused of or found responsible for having committed criminal offences.²⁶³

Procedures short of trial: States should give consideration, wherever appropriate, to dealing with a juvenile offender without resorting to a formal trial, provided that

258. (Principle O (d)) of the *Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa*.

259. Established by an Agreement between the United Nations and the Government of Sierra Leone pursuant to Security Council resolution 1315 (2000) of 14 August 2000.

260. Article 7 of the *Statute of the Special Court of Sierra Leone*.

261. Article 26 of the *Rome Statute of the International Criminal Court*.

262. Inter-American Court of Human Rights, *Advisory Opinion OC-17/02, Juridical Condition and Human Rights of the Child*, of 28 August 2002, Series A No. 17, para. 105.

263. Article 40(3) of the *Convention on the Rights of the Child*; Rule 2.3 of *The Beijing Rules, UN Guidelines for Action on Children in the Criminal Justice System*; Article 5(5) of the *American Convention on Human Rights*; Article 17 of the *Arab Charter on Human Rights*; and Principle O of the *Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa*.

human rights and legal safeguards are fully respected. Alternative methods include referral to community or other services.²⁶⁴

Expediency in judicial proceedings: All cases relating to children accused of infringing the law, whether or not they are held in detention, must be dealt with speedily.²⁶⁵

Privacy: In order to protect the child from stigmatisation, the privacy of every child accused of or found to have infringed the penal law must be protected²⁶⁶. Records of child offenders must be kept strictly confidential and must not be accessible to other than duly authorised authorities (Rule 21 of The Beijing Rules). Such records may not be used in subsequent proceedings against the offenders when they are adults.²⁶⁷

4. Children's Rights During Arrest and Pre-Trial Detention

Right to remain with parents: In most cases, the best interests of a child are protected by not separating them from their parents.²⁶⁸

Deprivation of liberty as a measure of last resort: Arrest, detention or imprisonment of a child should only be used as a measure of last resort, must comply with the law, and be employed for the minimum period of time necessary.²⁶⁹

Segregation from adults: Children detained pending trial must be segregated from adults, except where this would not be in the best interests of the child.²⁷⁰

264. Article 40(3)(b) of the *Convention on the Rights of the Child*; Rule 11 of *The Beijing Rules*; Article 17 (2) of the *African Charter on the Rights and Welfare of the Child*; and Principle O of the *Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa*.

265. Article 10(2)(b) of the *International Covenant on Civil and Political Rights*; 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 on Human Rights*; Article 17 (2)(c)(iv) of the *African Charter on the Rights and Welfare of the Child*; and Principle O of the *Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa*.

266. Article 40(2)(b)(vii) of the *Convention on the Rights of the Child*; Rules 8 and 21 of *The Beijing Rules*; and Principle O of the *Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa*.

267. Rule 21.2 of *The Beijing Rules*; see also, Rule 19 of the *UN Rules for the Protection of Juveniles Deprived of their Liberty*.

268. Article 9 of the *Convention on the Rights of the Child*; Principle 6 of the *Declaration on the Rights of the Child*; and Principle O of the *Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa*.

269. 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*; Principle O of the *Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa*; Principle III(1) of the *Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas*.

270. Article 10(2)(b) of the *International Covenant on Civil and Political Rights*; 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 on Human Rights*; Article 17 (2)(b) of the *African Charter on the Rights and Welfare of the Child*; Principle O of the *Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa*; Principle XIX of the *Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas*.

Notification to family: When a child suspected of having infringed the law is arrested or apprehended, his or her parents or guardian must be notified immediately, unless it would be detrimental to the interests of the child. If immediate notification is not possible, they should be notified as soon as possible thereafter.²⁷¹

Interaction with state officials: 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.²⁷²

Detention to be avoided where possible: 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 must be given the highest priority and handled as quickly as possible to ensure that the period of pre-trial detention is as short as possible.²⁷³

Minimum age: States should establish laws which set a minimum age below which a child may not be deprived of his or her liberty.²⁷⁴

Access to legal assistance: Like adults, children who are detained are entitled to prompt access to legal assistance and to challenge the lawfulness of their detention. Decisions regarding release or the continuation of detention are to be made without delay.²⁷⁵

Right to care and protection: Juveniles are entitled to care, protection and assistance – social, educational, professional, psychological, medical and physical – if detained prior to trial.²⁷⁶

271. 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* and Principle O of the *Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa*.

272. Rule 10.3 of *The Beijing Rules* and Principle O of the *Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa*.

273. Article 10(2)(b) of the *International Covenant on Civil and Political Rights*; 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*; Principle O of the *Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa*; and Principle III(1) of the *Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas*.

274. Rule 11(a) of the *UN Rules for the Protection of Juveniles Deprived of their Liberty* and Principle O of the *Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa*, which states that “[n]o child below the age of 15 shall be arrested or detained on allegations of having committed a crime”.

275. Article 37(d) of the *Convention on the Rights of the Child*; Rule 10.2 of *The Beijing Rules*; Principle O of the *Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa*.

276. 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*; Principle X of the *Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas*.

Right not to be held incommunicado: Detained children are entitled to correspond with, and to receive visits from, their family, save in exceptional circumstances.²⁷⁷

Right not to be ill-treated: 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.²⁷⁸ In addition, detained children are to be treated in a manner which takes into account the needs of their age.²⁷⁹

5. Children's Rights During Trial

Right to a fair trial: Juveniles are to enjoy at least the same guarantees and protection as are accorded to adults.²⁸⁰

Respect for children's rights: 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.²⁸¹

Privacy: To protect the privacy of children, trials and hearings involving juveniles should be closed to the public and press.²⁸² The Committee on the Rights of the Child has stated that in order for a child's right to privacy to be fully respected, it must be guaranteed at all stages of the proceedings.²⁸³ This implies that "[n]o information shall be published that may lead to the identification of a child offender because of its effect of stigmatization, and possible impact on his/her ability to have access to education, work, housing or to be safe".²⁸⁴ Public hearings in juvenile justice should only be possible in well-defined cases and at the written decision of the court. Such a decision should be open for appeal by the child.²⁸⁵

277. Article 37(c) of the *Convention on the Rights of the Child*; Principle XXII of the *Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas*.

278. Article 37(a) and (c) of the *Convention on the Rights of the Child*; Article 54 of the *Riyadh Guidelines*.

279. Article 37(c) of the *Convention on the Rights of the Child*; Article 17 of the *African Charter on the Rights and Welfare of the Child*; and Principle O of the *Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa*.

280. Human Rights Committee, *General Comment No. 32: Article 14: Right to equality before courts and tribunals and to a fair trial*, para. 42. and Committee on the Rights of the Child, *General Comment No. 10*, para. 46.

281. Article 14(4) of the *International Covenant on Civil and Political Rights*; paragraph 1 of the *UN Rules for the protection of Juveniles Deprived of their Liberty*; Article 17 of the *African Charter on the Rights and Welfare of the Child*; and Principle O of the *Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa*.

282. Article 40(2)(b)(vii) of the *Convention on the Rights of the Child*; Article 6(1) of the *European Convention for the Protection of Human Rights and Fundamental Freedoms*; see, Article 14(1) of the *International Covenant on Civil and Political Rights* and Principle O of the *Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa*.

283. Committee on the Rights of the Child, *General Comment No. 10*, para. 64.

284. *Ibid.*

285. *Ibid.*, para. 65.

Legal representation: Throughout the whole judicial process juveniles have the right to be represented by counsel.²⁸⁶ Furthermore, the juvenile has the right to receive any other appropriate assistance in the preparation and presentation of his/her defence.²⁸⁷

Right to be heard: 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.²⁸⁸

6. Judgments

Pre-trial alternatives: The Committee on the Rights of the Child has pointed out that “[the decision to initiate a formal criminal law procedure does not necessarily mean that this procedure must be completed with a formal court sentence for a child [and] that the competent authorities – in most States the office of the public prosecutor – should continuously explore the possibilities of alternatives to a court conviction”.²⁸⁹ In this process of alternatives to a ruling, human rights and procedural guarantees of the juvenile must be scrupulously respected.

Publicity: To avoid stigmatising 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.²⁹⁰

7. Punishments

Consideration of the best interests of the child: The best interests of the child are to be a primary consideration when ordering or imposing penalties on juveniles found to have infringed the criminal law. Any such order or penalty should take into account the juvenile’s well-being and needs and have the objective of promoting his/her reintegration.²⁹¹

286. Article 40(2)(b)(ii) of the *Convention on the Rights of the Child*; Rule 15 of *The Beijing Rules*; Article 17 of the *African Charter on the Rights and Welfare of the Child*; Principle O of the *Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa*.

287. Committee on the Rights of the Child, *General Comment No. 10*, para. 49.

288. Article 12 of the *Convention on the Rights of the Child*; and Principle O of the *Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa*.

289. Committee on the Rights of the Child, *General Comment No. 10*, para. 68.

290. Article 14(1) of the *International Covenant on Civil and Political Rights*; see, Article 40(2)(b)(vii) of the *Convention on the Rights of the Child*; Article 17 (2,d) of the *African Charter on the Rights and Welfare of the Child*.

291. Article 40(1 and 4) of the *Convention on the Rights of the Child*; Rule 17 of *The Beijing Rules*. See, Article 14(4) of the *International Covenant on Civil and Political Rights*; Article 7 of the *Declaration of the Rights of the Child*; and Principle O of the *Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa*.

Proportionality: Any penalty must be proportionate to the gravity of the offence and the circumstances of the young person, as well as age, diminished responsibility, the circumstances and needs of the young person and other social needs.²⁹²

Deprivation of liberty a measure of last resort: 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.²⁹³

Imprisoned children: Children in prison shall, in general, be segregated from adults and must be afforded treatment which is appropriate to their age and legal status.²⁹⁴

Right not to be held incommunicado: Imprisoned children are entitled to correspond with, and to receive visits from, their family, save in exceptional circumstances.²⁹⁵

8. Prohibited Punishments

Protection from torture and ill-treatment: 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.²⁹⁶

Prohibition of cruel, inhuman or degrading punishment: These include corporal punishment,²⁹⁷ placement in a dark cell, closed or solitary confinement, reduction of diet, restriction or denial of contact with family members, collective punishment,

292. Article 40(4) of the *Convention on the Rights of the Child*; Rules 5 and 17(1) of *The Beijing Rules*; Principle O of the *Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa*.

293. 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*; and Principle O of the *Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa*.

294. Article 10(3) of the *International Covenant on Civil and Political Rights*; 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*; Article 17 (2)(b) of the *African Charter on the Rights and Welfare of the Child*; and Principle XIX of the *Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas*.

295. Article 37(c) of the *Convention on the Rights of the Child*; and Principles III and XXII of the *Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas*.

296. Principle 54 of the *Riyadh Guidelines*; Principle O of the *Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa*.

297. Committee on the Rights of the Child, *General Comment No. 8: The right of the child to protection from corporal punishment and other cruel or degrading forms of punishment* (arts. 19; 28, para. 2; and 37, *inter alia*), paras. 23 *et seq.* and *General Comment No. 10, doc. cit.*, para. 71. See also European Court of Human Rights, Judgment of 25 April 1978, *Tyrer v. United Kingdom*, Application no. 5856/72 and African Commission on Human and Peoples' Rights, *Curtis Francis Doebbler v. Sudan*, Communication No. 236/2000 (2003).

or any other punishment that may compromise the physical or mental health of the juvenile.²⁹⁸

Life imprisonment: Sentences of life imprisonment may not be imposed on people who were under the age of 18 at the time the crime was committed if there is no possibility of release or parole.²⁹⁹ This means that a child’s sentence must be periodically reviewed.³⁰⁰

Death penalty: Regardless of the age of majority set by national law, or the age of the accused at the time of trial or sentencing, or the nature of the criminal offence, the death penalty may not be imposed on people who were under the age of 18 at the time that the crime was committed.³⁰¹

B. Death Penalty

Any person charged with a crime punishable by death is entitled to the strictest observance of all fair trial guarantees and to certain additional safeguards. The Human Rights Committee has pointed out that “[i]n cases of trials leading to the imposition of the death penalty scrupulous respect of the guarantees of fair trial is particularly important. The imposition of a sentence of death upon conclusion of a trial, in which the provisions of Article 14 of the [ICCPR] have not been respected, constitutes a violation of the right to life (Article 6 of the ICCPR).”³⁰²

The Human Rights Committee has also pointed out that “as article 6 of the [ICCPR, right to life] is non-derogable in its entirety, any trial leading to the imposition of the death penalty during a state of emergency must conform to the provisions of the Covenant, including all the requirements of article 14 of the [ICCPR, Right to a fair trial].”³⁰³ Under international law, the imposition of death penalty, as a result of an unfair trial, constitutes a summary execution.

1. Towards Abolition of the Death Penalty

International human rights standards generally encourage abolition of the death penalty (see Article 6(6) of the ICCPR and Articles 4(2) and 4(3) of the American

298. Rule 67 of the *UN Rules for the Protection of Juveniles Deprived of their Liberty*; Rule 17.3 of *The Beijing Rules*; Principle O of the *Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa*.

299. Article 37(a) of the *Convention on the Rights of the Child*.

300. Committee on the Rights of the Child, *General Comment No. 10*, para. 77 and Article 25 of the *Convention on the Rights of the Child*.

301. Article 6(5) of the *International Covenant on Civil and Political Rights*; 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 7 of the *Arab Charter on Human Rights*; Article 4(5) of the *American Convention on Human Rights*; and Principle O of the *Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa*.

302. Human Rights Committee, *General Comment No. 32: Article 14: Right to equality before courts and tribunals and to a fair trial*, para. 59.

303. *Ibid.*, para. 6.

Convention). Indeed, the international community has adopted various treaties that are specifically aimed at the 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* all prohibit executions and require the abolition of the death penalty in peacetime. The Statutes of the International Criminal Tribunals for the Former Yugoslavia, Rwanda and Sierra Leone, as well as the Statue of the International Criminal Court, exclude the death penalty from the penalties they can impose. The jurisprudence of international and regional treaty-monitoring bodies and human rights experts also encourages the abolition of the death penalty.

2. Prohibition against Retroactive Application and Right to Benefit Retroactively from a More Benign Penalty

A penalty heavier than the one applicable at the time the crime was committed may not be imposed.³⁰⁴ In particular, the death penalty may not be imposed unless it was a punishment prescribed by law for the crime at the time that the crime was committed.³⁰⁵

A person convicted of a crime should, however, benefit when a change of law imposes a lighter penalty for that crime³⁰⁶. Therefore, a person under sentence of death should benefit from a lighter penalty if the law is reformed at any time after his or her conviction.³⁰⁷

3. Scope of Crimes Punishable by Death

In countries which have not yet abolished the death penalty, sentence of death may only be imposed for the most serious crimes³⁰⁸. Given that the death penalty is an exceptional measure³⁰⁹ and that crimes punishable by death should “not go beyond

304. Article 11 of the *Universal Declaration of Human Rights*; Article 15 of the *International Covenant on Civil and Political Rights*; Article 9 of the *American Convention on Human Rights*; Article 7 of the *European Convention for the Protection of Human Rights and Fundamental Freedoms*; Article 7 of the *African Charter on Human and Peoples' Rights*.

305. Article 6(2) of the *International Covenant on Civil and Political Rights*; Paragraph 2 of the *Death Penalty Safeguards*; Article 4(2) of the *American Convention on Human Rights*; Article 2(1) of the *European Convention for the Protection of Human Rights and Fundamental Freedoms*.

306. Article 15(1) of the *International Covenant on Civil and Political Rights*; Article 9 of the *American Convention on Human Rights*.

307. Safeguard 2 of the *Safeguards guaranteeing protection of the rights of those facing the death penalty*.

308. Article 6(2) of the *International Covenant on Civil and Political Rights*; Article 4(2) of the *American Convention on Human Rights*; Paragraph 1 of the *Death Penalty Safeguards*; Article 6 of the *Arab Charter on Human Rights*; Principle N (9)(b) of the *Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa*.

309. Human Rights Committee: *General Comment No. 6: Article 6 – Right to life*, para. 7; Views of 31 October 1995, *Lubuto v. Zambia*, Communication No.390/1990, para.7.2; Views of 18 October 2005, *Webby Chisanga v. Zambia*, Communication No.1132/2002, para. 7.4; Views of 18 October 2000, *Eversley Thompson v. St. Vincent & the Grenadines*, Communication No. 806/1998, para. 8.2.

intentional crimes with lethal or other extremely grave consequences”,³¹⁰ the notion of the “most serious crime” must be interpreted restrictively.

Under the *American Convention on Human Rights* (article 4.4), political crimes or politically-motivated criminal offences must not be punished with capital punishment.

The UN Human Rights Committee has concluded that the mandatory imposition of the death penalty based solely upon the category of crime, without giving the judge any margin to evaluate the circumstances of the specific offence, deprives the person of the benefit of the most fundamental of rights, the right to life, and does not give the judge the opportunity to assess whether this exceptional form of punishment is appropriate in the circumstances of the case.³¹¹

4. People who May Not be Executed

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, the nature of the crime or the age of majority under domestic law.³¹²

The Elderly: According to the *American Convention on Human Rights*, the execution of people who, at the time the crime was committed, were over the age of 70 is prohibited.³¹³

The mentally disabled: The execution of people who are mentally ill is prohibited.³¹⁴

Pregnant women and new mothers: The death penalty may not be imposed on pregnant women.³¹⁵ Nor may it be imposed on “new mothers”.³¹⁶

310. Safeguard 1 of the *Safeguards guaranteeing protection of the rights of those facing the death penalty*.

311. Human Rights Committee: Views of 31 October 1995, *Lubuto v. Zambia*, Communication No.390/1990, para. 7.2; Views of 18 October 2005, *Webby Chisanga v. Zambia*, Communication No.1132/2002, para. 7.4; Views of 18 October 2000, *Eversley Thompson v. St. Vincent & the Grenadines*, Communication No. 806/1998, para. 8.2. See also: Inter-American Court of Human Rights, Judgment of 21 June 2002, *Hilaire, Constantine and Benjamin et al. v. Trinidad and Tobago*, Series C No. 94, paras. 103, 104, 105 and 108.

312. Article 6(5) of the *International Covenant on Civil and Political Rights*; 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 on Human Rights*; Article 7 of the *Arab Charter on Human Rights*; Article 77n (5) of *Additional Protocol I* and Article 6(4) of *Additional Protocol II to the Geneva Conventions of 1949*; Principle N (9) (c) of the *Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa*.

313. Article 4(5) of the *American Convention on Human Rights*.

314. Paragraph 3 of the *Death Penalty Safeguards*

315. Article 6(5) of the *International Covenant on Civil and Political Rights*; Article 4(5) of the *American Convention on Human Rights*; Article 7 of the *Arab Charter on Human Rights*; Principle N (9,c) of the *Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa*; Article 76 (3) of *Additional Protocol I* and Article 6(4) of *Additional Protocol II to the Geneva Conventions of 1949*.

316. Paragraph 3 of the *Death Penalty Safeguards*.

5. Strict Compliance with All Fair Trial Rights

In view of the irreversible nature of the death penalty, trials in capital cases must scrupulously respect all international and regional standards protecting the right to a fair trial. 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.”³¹⁷

The Human Rights Committee has pointed out that “[i]n cases involving capital punishment, it is axiomatic that the accused must be effectively assisted by a lawyer at all stages of the proceedings.”³¹⁸ The Human Rights Committee also affirmed that:

“[t]he right of appeal is of particular importance in death penalty cases. A denial of legal aid by the court reviewing the death sentence of an indigent convicted person constitutes not only a violation of article 14, paragraph 3 (d) [of the ICCPR], but at the same time also of article 14, paragraph 5, as in such cases the denial of legal aid for an appeal effectively precludes an effective review of the conviction and sentence by the higher instance court.”³¹⁹

Where a person sentenced to death seeks available judicial review of irregularities in a criminal trial but does not have sufficient means to meet the costs of legal assistance in order to pursue such remedy, the State is obliged to provide legal assistance.

6. Right to Seek Pardon and Commutation

Anyone sentenced to death has the right to seek pardon or commutation of their sentence.³²⁰ The State has a duty to implement a fair and transparent procedure by which an offender sentenced to death may make use of all favourable evidence deemed relevant to the granting of mercy.³²¹

317. Paragraph 5 of the *Death Penalty Safeguards*.

318. Human Rights Committee, *General Comment No. 32: Article 14: Right to equality before courts and tribunals and to a fair trial*, para. 38.

319. Human Rights Committee, *General Comment No. 32: Article 14: Right to equality before courts and tribunals and to a fair trial*, para. 51.

320. Article 6(4) of the *International Covenant on Civil and Political Rights*, Safeguard 7 of the *Death Penalty Safeguards*; Article 4(2) of the *American Convention on Human Rights*, Article 4 (6) of the *American Convention on Human Rights* and Article 6 of the *Arab Charter on Human Rights*.

321. Inter-American Court of Human Rights, Judgment of 21 June 2002, *Hilaire, Constantine and Benjamin et al. v. Trinidad and Tobago*, Series C No. 94, paras. 185 *et seq.*

7. No Executions While Appeals or Clemency Petitions are Pending

The death penalty may not be carried out as long as:

- i. all rights to appeal have not been exhausted;
- ii. the time limits for filing such appeals have not passed;
- iii. recourse proceedings, including applications to international bodies, have not been completed;³²²
- iv. requests for pardon and commutation have not been exhausted.³²³

The death penalty may only be carried out after a final judgment by an independent, impartial and competent court.³²⁴

8. 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.³²⁵

C. Special Courts or Tribunals and Special Criminal Proceedings

1. General Principle

The right to be tried by an independent, impartial and competent tribunal established by law and fair trial guarantees apply to trials in all courts, whether ordinary

322. *Ibid.*, paras. 196 *et seq.*

323. Safeguard 8 of the *Death Penalty Safeguards*, Article 4 (6) of the *American Convention on Human Rights* and Article 6 of the *Arab Charter on Human Rights*. See also Articles 14 (5) and 6 (4) of the *International Covenant on Civil and Political Rights*.

324. Article 6(2) of the *International Covenant on Civil and Political Rights*; Safeguard 5 of the *Death Penalty Safeguards*; Article 4(2) of the *American Convention on Human Rights*; and Article 6 of the *Arab Charter on Human Rights*.

325. *UN Standard Minimum Rules for the Treatment of Prisoners*; Articles 7 and 10 of the *International Covenant on Civil and Political Rights*; Articles 1, 2 and 16 of the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*; Articles 8 and 20 of the *Arab Charter on Human Rights*; Article 5 of the *American Convention on Human Rights*; Article 5 of the *African Charter on Human and Peoples' Rights*; and Article 3 of the *European Convention for the Protection of Human Rights and Fundamental Freedoms*. See also Human Rights Committee, Views of 16 March 2004, Communication No. 797/1998, *Dennis Lobban v. Jamaica*, paras 8.1 and 8.2.

court system or specialised jurisdictions.³²⁶ The same principle applies also to special courts or tribunals, set up outside the framework of ordinary or specialised jurisdictions, regardless of their name. These kinds of tribunals and their criminal proceedings must comply with international standards on fair trial.

The Human Rights Committee considered that “it is inherent to the proper exercise of judicial power, that it be exercised by an authority which is independent, objective and impartial in relation to the issues dealt with”.³²⁷ The Human Rights Committee has also considered that “a situation where the functions and competences of the judiciary and the executive are not clearly distinguishable or where the latter is able to control or direct the former is incompatible with the notion of an independent and impartial tribunal.”³²⁸ The Human Rights Committee has unequivocally stated that the right to be tried by an independent and impartial tribunal “is an absolute right that may suffer no exception.”³²⁹

2. Necessity of Reasonable and Objective Criteria to Justify Special Tribunals or Proceedings

Most international standards do not prohibit *per se* the establishment of special courts. Such courts must, however, be competent, independent, and impartial. They must also afford applicable judicial guarantees so as to ensure that the proceedings are fair. According to the principle of equality before courts and tribunals, similar cases must be dealt with in similar proceedings.³³⁰ In addition, Principle 5 of the UN *Basic Principles on the Independence of the Judiciary* states that “[e]veryone shall

326. Human Rights Committee, General Comment No. 32: *Article 14, Right to equality before courts and tribunals and to a fair trial*, para. 22; European Court of Human Rights, Judgment of 4 May 2006, *Ergin v. Turkey* (No. 6), Application No. 47533/99 and Judgment of 10 May 2001, *Cyprus v. Turkey*, Application No. 25781/94; African Commission on Human and Peoples’ Rights, Judgment of 6 November 2000, Communication 224/98, *Media Rights Agenda v. Nigeria*, paras. 60 *et seq.* and Judgment of 7 May 2001, Communication 218/98 (Nigeria), para. 44; and Inter-American Court of Human Rights, Judgment of 30 May 1999, *Castillo Petruzzi et al. v. Peru*, Series C No. 52, para. 129, and Judgment of 18 August 2000, *Cantoral Benavides v. Peru*, Series C No. 69, paras. 74 and 114.

327. Human Rights Committee, Views of 22 March 1996, *Vladimir Kulomin v. Hungary*, Communication No. 521/1992, para. 11.3.

328. Human Rights Committee, Views of 20 October 1993, *Angel N. Oló Bahamonde v. Equatorial Guinea*, Communication No. 468/1991, para. 9.4.

329. See *inter alia*: Human Rights Committee, General Comment No. 32: *Article 14: Right to equality before courts and tribunals and to a fair trial*, para. 19; Views of 28 October 1992, *M. Gonzalez del Río v. Peru*, Communication No. 263/1987, para. 5.2.

330. Human Rights Committee, General Comment No. 32: *Article 14: Right to equality before courts and tribunals and to a fair trial*, para. 14.

have the right to be tried by ordinary courts or tribunals using established legal procedures.”³³¹

However, international human rights law accepts the existence or functioning of special tribunal and/or special criminal proceedings. As pointed out by the Human Rights Committee, “the right to equality before the law and to equal protection of the law without any discrimination does not make all differences of treatment discriminatory”.³³² However, as the Human Rights Committee has repeatedly stated, a difference in treatment, such as exceptional criminal procedures or specially constituted courts or tribunals for determining certain categories of cases, is only acceptable if it is founded on reasonable and objective criteria.³³³ When there are no reasonable and objective grounds to justify such difference in judicial treatment, the Human Rights Committee has concluded that such special tribunals or special criminal proceeding are incompatible with the fundamental guarantee of a fair trial.³³⁴

3. Trial Observers and Special Tribunals or Proceedings

Observers should be aware that procedures in special courts frequently offer fewer fair trial guarantees than the ordinary courts. Indeed, the reason for the establish-

331. See also the UN *Model Treaty on Extradition*, adopted by the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders held in Milan from 26 August to 6 September 1985 and endorsed by General Assembly resolutions 40/32 of 29 November 1985 and 40/146 of 13 December 1985. Article 4 of the Treaty states that “[e]xtradition may be refused in any of the following circumstances: [...] g) If the person whose extradition has been requested has been sentenced or would be liable to be tried in the requesting State by an extraordinary or *ad hoc* court or tribunal”. It is in the Americas where this type of clause has long existed in the context of extradition.

332. Human Rights Committee: Views of 9 April 1987, *S. W. M. Brooks v. the Netherlands*, Communication No. 172/1984, para. 13. See also, among others, Views of 9 April 1987, *Zwaan-de-Vries v. The Netherlands*, Communication No. 182/1984, para. 13; Views of 3 April 1989, *Ibrahima Gueye and others v. France*, Communication No. 196/1985; and Views of 19 July 1995, *Alina Simunek v. The Czech Republic*, Communication No. 516/1992.

333. Human Rights Committee, *General Comment No. 32: Article 14: Right to equality before courts and tribunals and to a fair trial*, para. 14; Human Rights Committee, Views of 4 April 2001, *Joseph Kavanagh v. Ireland*, Communication No. 819/1998, paras. 10.1 and 10.2; Views of 20 July 1994, *Roberto Zelaya Blanco v. Nicaragua*, Communication No. 328/1988; *Concluding Observations of the Human Rights Committee on: Nigeria*, CCPR/C/79/Add.65 and CCPR/C/79/Add.64; *Morocco*, A/47/40, 23 October 1991, paras. 48-79; *France*, CCPR/C/79/Add.80, 4 August 1997, para. 23; *Iraq*, CCPR/C/79/Add.84, 19 November 1997, para. 15; and *Egypt*, A/48/40, 9 August 1993, para. 706.

334. See, for example, the *Concluding Observations of the Human Rights Committee: Gabon*, CCPR/CO/70/GAB, 10 November 2000, para. 11; *Preliminary concluding observations of the Human Rights Committee: Nigeria*, CCPR/C/79/Add.64, 3 April 1996, para. 11; *Concluding Observations of the Human Rights Committee: Guinea*, CCPR/C/79/Add.20, 29 April 1993, para. 3; *Senegal*, CCPR/C/79/Add.10, 28 December 1992, para. 3; *Nigeria*, CCPR/C/79/Add.65, paras. 15 and 17 and CCPR/C/79/Add.64, para.11; *Morocco*, A/47/40, 23 October 1991, paras. 48-79, and CCPR/C/79/Add.113, 1 November 1999, para. 18; *France*, CCPR/C/79/Add.80, 4 August 1997, para. 23; *Iraq*, CCPR/C/79/Add.84, 19 November 1997, para. 15; *Egypt*, CCPR/C/79/Add.113, 9 August 1993, paras. 9 and 11; Views of 20 July 1994, *Roberto Zelaya Blanco v. Nicaragua*, Communication No. 328/1988; Views of 6 November 1997, *Víctor Alfredo Polay Campos v. Peru*, Communication No 577/1994, and Views of 27 July 2000, *María Sybila Arredondo v. Peru*, Communication No 688/1996.

ment of such courts is often to allow the application of exceptional procedures that do not comply with normal standards of justice.

When analysing the fairness of such special or extraordinary courts and/or special criminal proceedings, trial observers should generally focus on the following issues:

- i. Are there reasonable and objective grounds to justify the special or extraordinary court and/or special criminal proceedings?
- ii. Is the court established by law?
- iii. Does the jurisdiction of the court violate the guarantees of non-discrimination and equality before the law and tribunals?
- iv. Are the judges of the special tribunal independent of the executive and other authorities, especially when ruling on cases?
- v. Are the judges of the special tribunal competent and impartial?
- vi. Do the procedures in the special/extraordinary court meet the minimum procedural guarantees of a fair trial set out in international standards?

D. Military Courts

Military courts have been established in many countries to try military personnel. In several countries, civilians are also tried in military courts and, in some, military tribunals are competent to try military or police personnel for gross human rights violations that constitute crimes under international law, including torture, extrajudicial executions and enforced disappearances, all of which constitute crimes under international law.

1. General Principles

International human rights law does not prohibit military tribunals. As with any other court, military tribunals must comply with international standards on fair trial to the same extent as the ordinary courts. The Human Rights Committee,³³⁵ the European

335. Human Rights Committee, *General Comment No. 32: Article 14: Right to equality before courts and tribunals and to a fair trial*, 2007, CCPR/C/GC/32, para. 22.

Court of Human Rights,³³⁶ the Inter-American Court of Human Rights,³³⁷ the Inter-American Commission on Human Rights³³⁸ and the African Commission on Human and Peoples' Rights³³⁹ have all pointed out that the principle of the independence of the tribunal and the provisions on fair trial are also applicable to military courts.

In addition, international human rights law has established certain criteria with regard to the scope of jurisdiction of military tribunals. These principles and criteria have been codified in the *Draft principles governing the administration of justice through military tribunals*, adopted by the former UN Sub-Commission on the Promotion and Protection of Human Rights.³⁴⁰ Even though they are Draft Principles, the European Court of Human Rights has stated that they reflect the evolution of international human rights law in the field of military tribunals and it has used them as a source of law.³⁴¹ These Principles, developed from jurisprudence and several international instruments, stipulate that:

- i. Jurisdiction of military tribunals shall be confined to military offences committed by military personnel;³⁴²
- ii. Military tribunals are not competent to try military personnel for gross human rights violations, as they constitute ordinary criminal offences under the

336. European Court of Human Rights, Judgment of 4 May 2006, *Ergin v. Turkey* (No. 6), Application No. 47533/99, and Judgment of 10 May 2001, *Cyprus v. Turkey*, Application No. 25781/94.

337. Inter-American Court of Human Rights, Judgment of 30 May 1999, *Castillo-Petruzzi et al. v. Peru*, Series C No. 52, paras. 129 and 131; Judgment of 18 August 2000, *Cantoral-Benavides v. Peru*, Series C No. 69, paras. 75 and 114.

338. See *inter alia*, *Resolution on "Terrorism and Human Rights"*, 12 December 2001.

339. African Commission on Human and Peoples' Rights, Decision of 6 November

340. UN Document CN.4/2006/58 of 13 January 2006.

341. European Court of Human Rights, Judgment of 4 May 2006, *Ergin v. Turkey* (No. 6), Application No. 47533/99 and Judgment of 21 September 2006, *Maszni v. Romania*, Application No. 59892/00.

342. Principle 29 of the *Updated Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity*; Principle 8 of the *Draft principles governing the administration of justice through military tribunals*; Principle L of the *Principles and Guidelines on the right to a fair trial and legal assistance in Africa*. See, Inter-American Court of Human Rights, Judgment of 16 August 2000, *Durand and Ugarte v. Peru*, Series C No. 68, paragraph 117. See also, Judgment of 22 November 2005, *Palamara Iribarne v. Chile* Series C No. 135, Judgement of 15 September 2005, Case of the *Mapiripán Massacre v. Colombia*, Series C No. 134; Judgement of 25 November 2004, *Lori Berenson-Mejia v. Peru*, Series C No. 119; Judgement of 5 July 2004, *19 Tradesmen v. Colombia*, Series C No. 109; Judgment of 6 December 2001, *Las Palmeras v. Colombia*, Series C No. 90; and Judgment of 18 August 2000, *Cantoral-Benavides v. Peru*, Series C No. 69; European Court of Human Rights, Judgment of 4 May 2006, *Ergin v. Turkey* (No. 6), Application No. 47533/99. African Commission of Human and Peoples' Rights: Decision of 6 November 2000, Communication No. 223/98, Sierra Leone, para. 60; Decision of April 1997, Communication No. 39/90, Cameroon; Decision of 31 October 1998, Communication No. 137/94, 139/94, 154/96 and 161/97, Nigeria; Decision of 15 November 1999, Communication No. 151/96; Decision of 15 November 1999, Communication No. 206/97, Nigeria; Decision of 1995, Communication No. 60/91, Nigeria; and Decision of 1995, Communication No. 87/93, Nigeria.

jurisdiction of ordinary courts and cannot be considered as criminal offences related to military service;³⁴³

iii. In principle, military tribunals are not competent to try civilians.³⁴⁴ However, human rights jurisprudence accepts that civilians can be tried by military tribunals in exceptional circumstances:

- when it is allowed under international humanitarian law;³⁴⁵ or

343. Article 16 (2) of the *Declaration on the Protection of All Persons from Enforced Disappearance*; Principle 29 of the *Updated Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity*; Principles 8 and 9 of the *Draft principles governing the administration of justice through military tribunals* (transmitted to the Commission on Human Rights by the UN Sub-Commission on the Promotion and Protection on Human Rights through resolution 2005/15 of 10 August 2006, E/CN.4/2006/58 of 13 January 2006; Article IX of the *Inter-American Convention on Forced Disappearance* and Principle L of the *Principles and Guidelines on the right to a fair trial and legal assistance in Africa*. See also, Human Rights Committee: *Concluding Observations of the Human Rights Committee: Bolivia*, CCPR/C/79/Add.74, para. 11; *Brazil*, CCPR/C/79/Add.66, 24 July 1996, para. 10; *Chile*, CCPR/C/79/Add.104, 30 March 1999, para. 9; *Colombia*, CCPR/C/79/Add.2, 25 September 1992, para. 393 and CCPR/C/79/Add.76, 5 May 1997, para. 18; *Croatia*, CCPR/C/79/Add.15, 28 December 1992, para. 9; *Dominican Republic*, CCPR/CO/71/DOM, 26 April 2001, para. 10; *El Salvador*, CCPR/C/79/Add.34, 18 April 1994, para. 5; *Ecuador*, CCPR/C/79/Add.92, 18 August 1998, para. 7; *Guatemala*, CCPR/CO/72/GTM, 27 August 2001, paras. 10 & 20; *Lebanon*, CCPR/C/79/Add.78, 1 April 1997, para. 14; *Peru*, CCPR/C/79/Add.8, 25 September 1992, para. 8; *Venezuela*, CCPR/C/79/Add.13, 28 December 1992, para. 7. See also Committee Against Torture: *inter alia*, *Concluding Observations on Peru*, A/55/44, 16 November 1999, paras. 61 & 62; *Concluding Observations on Colombia*, A/51/44, 9 July 1996, paras. 76 & 80; *Concluding Observations on Jordan*, A/50/44, 26 July 1997, para. 175; *Concluding Observations on Venezuela*, A/54/44, 5 May 1999, para. 142; and *Concluding Observations on Guatemala*, A/53/44, 27 May 1998, para. 162 (e). See, Inter-American Court of Human Rights: Judgment of 16 August 2000, *Durand and Ugarte v. Peru*, Series C No. 68, para. 118. See also, Judgement of 15 September 2005, *Case of the Mapiripán Massacre v. Colombia*, Series C No. 134; Judgment of 5 July 2004, *19 Tradesmen v. Colombia*, Series C No. 109 and Judgment of 6 December 2001, *Las Palmeras v. Colombia*, Series C No. 90.

344. Principle 5 of the *Draft principles governing the administration of justice through military tribunals* and Principle L of the *Principles and Guidelines on the right to a fair trial and legal assistance in Africa*. Human Rights Committee: *Concluding Observations of the Human Rights Committee: Peru*, CCPR/CO/70/PER, para. 11. See also *Concluding Observations of the Human Rights Committee: Egypt*, CCPR/CO/76/EGY, 1 November 2002, para. 16(b); *Russian Federation*, CCPR/C/79/Add.54, 26 July 1995, para. 25; *Kuwait*, CCPR/CO/69/KWT, 27 July 2000, paras. 17 and 18; *Slovakia*, CCPR/C/79/Add.79, 4 August 1997, para. 20; *Uzbekistan*, CCPR/CO/71/UZB, 26 May 2001, para. 15; *Cameroon*, CCPR/C/79/Add.116, 4 November 1999, para. 21; *Algeria*, CCPR/C/79/Add.1, 25 September 1992, para. 5; *Nigeria*, CCPR/C/79/Add.64, 3 April 1996; *Poland*, CCPR/C/79/Add.110, 29 July 1999, para. 21; *Lebanon*, CCPR/C/79/Add.78, 1 April 1997, para. 14.; *Chile*, CCPR/C/79/Add.104, 30 March 1999, para. 9; *Syria*, CCPR/CO/71/SYR, para. 17; *Venezuela*, CCPR/C/79/Add.13, 28 December 1992, para. 8. Inter-American Court of Human Rights, Judgment of 30 May 1999, *Castillo Petruzzi et al. v. Peru*, Series C No. 52; Judgment of 29 September 1999, *Cesti Hurtado v. Peru*, Series C No. 56. Inter-American Commission on Human Rights: *Report on Terrorism and Human Rights*, OEA/Ser.L/V/II.116, Doc. 5 rev. 1 corr., 22 October 2002. European Court of Human Rights, Judgment of 10 May 2001, *Cyprus v. Turkey*, Application No. 25781/94 and Judgment of 4 May 2006, *Ergin v. Turkey* (No. 6), Application No. 47533/99.

345. See, for example, Articles 64 and 66 of the *Convention relative to the Protection of Civilian Persons in Time of War* of 12 August 1949.

- when no civilian court exists, or where trial by such courts is materially impossible, or the regular civilian courts are unable to undertake the trials;³⁴⁶
- iv. Whether trying members of the military or, in exceptional circumstances, civilians, trials in military courts must afford the accused all guarantees of the right to a fair trial set out in international standards.

2. Trial Observers and Military Tribunals

When analysing the fairness of proceedings in a military court, trial observers should generally focus on the following issues:

- i. Does the military court have material jurisdiction? (Is the offence under consideration a military offence, ordinary offence or a human rights violation?)
- ii. Does the military court have personal jurisdiction? (Is the accused a member of the military or a civilian?)
- iii. Are the judges competent, independent and impartial?
- iv. Is the tribunal free from interference and/or influence from superiors and other sources outside of the chain of command?
- v. Does the tribunal have the judicial capacity to administer justice properly?
- vi. Do the procedures in the military court comply with the minimum procedural guarantees of a fair trial set out in international standards?

E. Fair Trial Rights During States of Emergency

Frequently, states of emergency³⁴⁷ are used to limit judicial guarantees of fair trial and/or to establish special tribunals or special criminal proceedings.

1. General Principles

The *International Covenant on Civil and Political Rights*, the *European Convention on Human Rights*, the *American Convention on Human Rights* and the *Arab Charter*

346. Human Rights Committee, *General Comment No. 32: Article 14: Right to equality before courts and tribunals and to a fair trial*, para. 22; and Inter-American Commission of Human Rights, Resolution on “Terrorism and Human Rights”, 12 December 2001 and *Report on Terrorism and Human Rights*, OEA/Ser.L/V/II.116, Doc. 5 rev. 1 corr., 22 October 2002.

347. States of emergency are often given different names in national legislation, for example, “*état de siege*”, “state of exception”, “martial law”, “suspension of guarantees”, “*état d’urgence*”, etc. Whatever name it has, States have an international obligation to fully comply with the provisions of international law relating to states of emergency.

on *Human Rights* all envisage that in time of public emergency, States may derogate from their obligations to respect and protect certain rights.³⁴⁸

In time of public emergency and under strict conditions laid down in international human rights law, States may restrict and/or limit certain rights and freedoms. Such limitations or derogations of rights in times of emergency must be based on the principles of public declaration, legality, legitimacy, necessity and proportionality and be of limited duration. They must not affect rights that are non-derogable under treaty or customary law and *jus cogens* prohibitions. Rights that are subject to lawful limitation in times of emergency can never be deemed to have disappeared: derogation does not mean obliteration.³⁴⁹

Certain rights enshrined in human rights treaties may not be derogated from at any time (non-derogable rights), even in times of public emergency.³⁵⁰

A number of rights, while not explicitly designated under conventions as non-derogable, have attained that status. Indeed, as pointed out by the Human Rights Committee:

*“[A]rticle 4 of the Covenant cannot be read as justification for derogation from the [ICCPR] if such derogation would entail a breach of the State’s other international obligations, whether based on treaty or general international law. [...] The enumeration of non-derogable provisions in Article 4 [of the ICCPR] is related to, but not identical with, the question whether certain human rights obligations bear the nature of peremptory norms of international law. [...] States parties may in no circumstances invoke article 4 of the Covenant as justification for acting in violation of humanitarian law or peremptory norms of international law for instance by [...] deviating from fundamental principles of fair trial, including the presumption of innocence”.*³⁵¹

348. The *International Covenant on Civil and Political Rights*, Article 4; the *European Convention for the Protection of Human Rights and Fundamental Freedoms*, Article 15; the *Arab Charter on Human Rights*, Article 4; and the *American Convention on Human Rights*, Article 27. The *African Charter on Human and Peoples’ Rights* does not specifically allow derogation but does grant the power to limit many rights in certain circumstances.

349. Sub-Commission on Human Rights, *Study of the implications for human rights of recent developments concerning situations known as states of siege or emergency*, E/CN.4/Sub.2/1982/15.

350. *International Covenant on Civil and Political Rights*, Articles 6, 7, 8.1, 8.2, 11, 15, 16 and 18; *European Convention for the Protection of Human Rights and Fundamental Freedoms*, Articles 2, 3, 4.1 and 7; *American Convention on Human Rights*, Articles 3, 4, 5, 6, 9, 12, 17, 18, 19, 20, 23 and 27.2; *Arab Charter on Human Rights*, Articles 4, 5, 8, 9, 10, 13, 14, 15, 18, 19, 30, 20, 22, 27, 28, and 29; *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, Article 2.2; the *International Convention for the Protection of All Persons from Enforced Disappearance*, Article 1; the *Inter-American Convention to Prevent and Punish Torture*, Article 5; and the *Inter-American Convention on Forced Disappearance of Persons*, Article X.

351. Human Rights Committee, *General Comment No. 29*, paras. 9 and 11.

2. States of Emergency and Fair Trial

As a fundamental principle of the rule of law, only the judicial organs of the State are authorised to dispense justice. This was reiterated by the Human Rights Committee when it stated that, even in time of war or in a state of emergency, “[o]nly a court of law may try and convict a person for a criminal offence”.³⁵² The Inter-American Commission on Human Rights has also taken the view that “[i]n a constitutional and democratic state based on the rule of law, in which the separation of powers is respected, all punishments set forth in law must be imposed by the judiciary after the person’s guilt has been established with all due guarantees at a fair trial. The existence of a state of emergency does not authorize the State to ignore the presumption of innocence, nor does it empower the security forces to exert an arbitrary and uncontrolled *ius puniendi*”.³⁵³

As far as the deprivation of liberty and fair trial are concerned, both international human rights law and jurisprudence have deemed the following rights and principles to be non-derogable:

- i. the right to challenge the lawfulness of detention (*habeas corpus, amparo*);³⁵⁴
- ii. the right to a judicial remedy for human rights violations;³⁵⁵
- iii. the principle of legality of offences (*nullum crimen sine lege*);³⁵⁶

352. *Ibid.*, para. 16.

353. Inter-American Commission on Human Rights, Report No. 49/00 of 13 April 2000, Case No. 11.182, *Rodolfo Gerbert, Ascencio Lindo et al. (Peru)*, para. 86.

354. Human Rights Committee, *General Comment No. 29*, paras. 15-16, and the *Concluding Observations of the Human Rights Committee: Albania*, CCPR/CO/82/ALB, 2 December 2004, para. 9. See also, the *American Convention on Human Rights*, Article 27; Inter-American Court of Human Rights, Advisory Opinion OC-8/87 of 30 January 1987, *Habeas corpus in emergency situations*, Series A No. 8; and Advisory Opinion OC-9/87 of 6 October 1987, *Judicial guarantees in states of emergency*, Series A No. 9; the *Arab Charter on Human Rights*, Article 4(b); Article 17.2(f) of the *International Convention for the Protection of All Persons from Enforced Disappearance*; and Article 7 of the *Declaration on the Protection of All Persons from Enforced Disappearances*.

355. Human Rights Committee, *General Comment No. 29*, paras. 13 and 14.

356. The *International Covenant on Civil and Political Rights*, Article 4.2, the *European Convention for the Protection of Human Rights and Fundamental Freedoms*, Article 15; the *Arab Charter on Human Rights*, Article 4(b); the *American Convention on Human Rights*, Article 27; Human Rights Committee, *General Comment No. 29, States of emergency (Article 4)*, para. 7; *Concluding Observations of the Human Rights Committee: Estonia*, CCPR/CO/77/EST, 15 April 2003, para. 8; Inter-American Court of Human Rights, Judgment of 30 May 1999, *Castillo Petruzzi et al. v. Peru*, Series C No. 52 para. 119 *et seq.*; and Inter-American Commission on Human Rights, *Report on Terrorism and Human Rights*, OEA/Ser.L/V/II.116, Doc. 5 rev. 1 corr., 22 October 2002, para. 218.

- iv. the principle of individual criminal responsibility and the prohibition of collective punishment;³⁵⁷
- v. the principle of non-retroactivity of criminal law;³⁵⁸
- vi. the right to be tried by an independent, impartial and competent tribunal.³⁵⁹

As far as fair trial judicial guarantees are concerned, human rights jurisprudence has deemed the fundamental procedural rights of fair trial to be non-derogable. Following this line of thinking, the Human Rights Committee has identified the following judicial guarantees as non-derogable:

- i. the principle of presumption of innocence;
- ii. the right not to be compelled to testify against oneself or to confess guilt;
- iii. the prohibition on using statements, confessions or other evidence obtained under torture or ill-treatment; and
- iv. the principle that, in the case of trials resulting in the imposition of the death penalty during states of emergency, all judicial guarantees established in article 14 of the ICCPR must be applied.³⁶⁰

However, the Human Rights Committee has pointed out that “[a]s certain elements of the right to a fair trial are explicitly guaranteed under international humanitarian law during armed conflict, the Committee finds no justification for derogation from these guarantees during other emergency situations.”³⁶¹ In this context it is relevant to take into account that the basic judicial guarantees provided by article 75 (4) of

357. See, *inter alia*, Article 4 of the *International Covenant on Civil and Political Rights*; Article 27 of the *American Convention on Human Rights*; Article 4 of the *Arab Charter of Human Rights*; Article 15 of the *European Convention for the Protection of Human Rights and Fundamental Freedoms*; Human Rights Committee, *General Comment No. 29*, para. 11. See, among others, the *Geneva Convention IV of 12 August 1949*, Article 33, the *Additional Protocol I of 1977 to the Geneva Conventions of 12 August 1949 relating to the Protection of Victims of International Armed Conflicts*, Article 75.4(b), *Additional Protocol II of 1977 to the Geneva Conventions of 12 August 1949 relating to the Protection of Victims of Non-International Armed Conflicts*, Article 6.2(b), the *Second Protocol for the Protection of Cultural Property in the Event of Armed Conflict*, Articles 15 and 16, the *Statute of the International Criminal Tribunal for the Former Yugoslavia*, Article 7, the *Statute for the International Criminal Tribunal for Rwanda*, Article 6, the *Rome Statute*, Article 25 and the *Statute of the Special Tribunal for Sierra Leone*, Article 6.

358. The *International Covenant on Civil and Political Rights*, Article 15; the *European Convention for the Protection of Human Rights and Fundamental Freedoms*, Article 7; the *African Charter on Human and Peoples’ Rights*, Article 7; the *Arab Charter on Human Rights*, Article 15; and the *American Convention on Human Rights*, Article 9.

359. Human Rights Committee, *General Comment No. 32: Article 14: Right to equality before courts and tribunals and to a fair trial*, para. 19; and Views of 28 October 1992, *M. Gonzalez del Río v. Peru* Communication No. 263/1987, para. 5.2. See also, the *Arab Charter on Human Rights* (Article 4,b), which prescribes that the right to a fair trial before an independent and impartial tribunal is non-derogable.

360. Human Rights Committee, *General Comment No. 29: States of emergency*, para. 15; and *General Comment No. 32*, para. 6.

361. Human Rights Committee, *General Comment No.29: States of emergency*, para.16.

the *Protocol Additional to the Geneva Conventions of 12 August 1949 and relating to the Protection of Victims of International Armed Conflicts (Protocol I)* and Article 6 of the *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II)* have been deemed essential judicial guarantees by the International Committee of the Red Cross (ICRC).³⁶² In general terms, article 75 (4) of Protocol I reiterates the judicial guarantees set out in article 14, paragraphs 2, 3 and 5 of the ICCPR, and also those mentioned in article 15 of the same. As the ICRC has highlighted, article 75 is not subject to any possibility of derogation or suspension and consequently it is these provisions which will play a decisive role in the case of armed conflict.³⁶³ The ICRC has concluded that the norm that states that “[n]o one may be convicted or sentenced, except pursuant to a fair trial affording all essential judicial guarantees [...constitutes...] a norm of customary international law applicable in both international and non-international armed conflicts”.³⁶⁴ In this context, the view expressed by Mr. Emmanuel Decaux, the Expert on the issue of the administration of justice through military tribunals, appointed by the Sub-Commission on the Promotion and Protection of Human Rights, should be noted: “If respect for these judicial guarantees [those contained in Article 75(4) of Protocol 1] is compulsory during armed conflicts, it is not clear how such guarantees could not be absolutely respected in the absence of armed conflict. The protection of rights in peacetime should be greater if not equal to that recognized in wartime.”³⁶⁵

In this context, the following elements of the right to a fair trial should be considered non-derogable:

- i. The right to be tried by an independent, impartial, competent and regularly constituted court;
- ii. The presumption of innocence;
- iii. The principle of individual criminal responsibility;
- iv. The principle of non-retroactivity of criminal law;
- v. The principle of *non bis in idem*;
- vi. The right to be informed of the nature and cause of any charges;

362. Jean-Marie Henckaerts and Louise Doswald-Beck, *Customary International Humanitarian Law, Volume I: Rules*, Ed. ICRC, 2007, p. 401.

363. ICRC Commentary on Article 75 (4), para 3092, available at the ICRC's website: <http://www.cicr.org/ihl.nsf/COM/470-750096?OpenDocument>.

364. Rule No. 100 in International Committee of the Red Cross, *Customary International Humanitarian Law, Volume I: Rules*, Cambridge Press University, 2005, p. 352.

365. Emmanuel Decaux, *Administration of Justice, rule of law and democracy: Issue of the administration of justice through military tribunals*, E/CN.4/Sub.2/2004/7, 14 June 2004, para. 13.

- vii. The rights required for defence and the means of ensuring them, including: the right to a legal defence; the right to free legal assistance if the interests of the justice so require; the right to sufficient time and facilities to prepare the defence; and the right for the accused to communicate freely with counsel;
- viii. The right to be tried without delay;
- ix. The right to examine witnesses or have them examined on one's behalf;
- x. The principle of equality of arms;
- xi. The right to the assistance of an interpreter, if the accused cannot understand the language used in the proceedings;
- xii. The right not to be compelled to testify against oneself or to confess guilt;
- xiii. The right to have the judgment pronounced publicly;
- xiv. The right to appeal and judicial review of one's conviction.³⁶⁶

366. Rule No. 100 in International Committee of the Red Cross, *Customary International Humanitarian Law, Volume I: Rules*, Cambridge Press University, 2005, pp. 352 *et seq.*, and Article 75 (4) of the *Protocol Additional to the Geneva Conventions of 12 August 1949 relating to the Protection of Victims of International Armed Conflicts*, Protocol I.

VIII. The Rights of Victims and Criminal Proceedings

Over the last decade, there has been a strong and emerging trend in international law towards recognition of the legal status and rights of victims of gross human rights violations, criminal offences and crimes against international law. In particular, international human rights bodies have paid particular attention to the role of victims in criminal proceedings. The adoption of the *Rome Statute*³⁶⁷, the *Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography*³⁶⁸, the *Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime*³⁶⁹ and, in particular, the *UN Basic principles and guidelines on the right to a remedy and reparation for victims of gross violations of international human rights and serious violations humanitarian law*³⁷⁰ and the *Updated Set of principles for the protection and promotion of human rights through action to combat impunity*³⁷¹ all reflect this trend at the universal level. The issue has also been taken up through the international criminal jurisdictions.³⁷² At the regional level, various instruments addressing the issue of the rights during criminal proceedings of victims of criminal offences, which include gross human rights violations that amount to criminal offences, have been adopted.³⁷³

In this chapter, we examine the rights of victims of gross human rights violations that constitute crimes under international law, such as torture, extrajudicial execution and enforced disappearance, and the international standards applicable to

367. Articles 68 (3) and 75 of the *Rome Statute of the International Criminal Court* recognise a certain level of participation in the proceedings by victims. The rules of procedure and evidence allow the participation of the victim in proceedings before the Court.

368. See in particular Article 8 of the *Optional Protocol*.

369. See in particular Article 6 (2) of the *Protocol*.

370. Adopted by the UN Commission on Human Rights (resolution 2005/35) and the General Assembly of the United Nations (resolution 60/147).

371. Recommended by the former UN Commission on Human Rights in Resolution 2005/81, E/CN.4/RES/2005/81 of 21 April 2005. The Set of Principles was published in UN document E/CN.4/2005/102/Add.1 of 8 February 2005. In particular, see principle 19 (para. 2).

372. See, *inter alia*, the *Rules of procedure and evidence of the International Criminal Court*; the *Internal Rules of the Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed during the Period of Democratic Kampuchea*, Rule 23; and the *Statute of the Special Tribunal for Lebanon*, Articles 17 and 28.

373. See, *inter alia*, the Recommendation (85) 11 E, of the Committee of Ministers of the Council of Europe, on the position of the victim in the framework of criminal law and procedure (28 June 1985); the *Guidelines on the Protection of Victims of Terrorist Acts* adopted by the Committee of Ministers of the Council of Europe (2005); the *Principles and Guidelines on the Rights to a Fair Trial and Legal Assistance in Africa* of the African Commission on Human and Peoples' Rights (2003); and the *Council Framework Decision on the standing of victims in criminal proceedings* of the Council of European Union (2001).

these victims during criminal proceedings.³⁷⁴ We also look at the rights of victims of serious human rights abuses perpetrated by private individuals or entities impairing the effective enjoyment of human rights which constitute offences under national or international law, such as murder and kidnapping.

A. General Considerations Relating to the Rights of Victims

Traditionally, international law (both human rights and criminal law) has approached criminal trials from the perspective of their function in punishing and deterring crime. The interests of victims of crime have been addressed to only a very limited extent, with the emphasis being on their need for protection, their right to have information about the proceedings and to be able to present their views and concerns to the justice system.³⁷⁵ However, as noted above, over the past decade, the strong and emerging trend in international law (both human rights and criminal law) is towards recognising both the legal status of victims of crimes and gross human rights violations as well as their position and rights in criminal proceedings. This trend is largely due to developments in international jurisprudence and doctrine on human rights with regard to the right to an effective remedy and reparation, as well as the issue of impunity.

The UN *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*,³⁷⁶ which were adopted by consensus at the UN General Assembly in 2005, consolidate the existing international standards on this issue.³⁷⁷ The Principles state that:

- “[t]he obligation to respect, ensure respect for and implement international human rights law and international humanitarian law as provided for under the respective bodies of law, includes, inter alia, the duty to: [...]
 - (c) Provide those who claim to be victims of a human rights or humanitarian law violation with equal and effective access to justice, as described below, irrespective of who may ultimately be the bearer of responsibility for the violation; and

374. With regard to the rights of victims of serious human rights violations, see: International Commission of Jurists, *The right to a remedy and to reparation for gross human rights violations*, Practitioners Guide No. 2, Ed. ICJ, Geneva, 2006.

375. The *Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power* (adopted by the UN General Assembly in resolution 40/34 of 29 November 1985) reflects this traditional approach.

376. Adopted by the UN General Assembly through its Resolution No. 60/147 of 16 December 2005.

377. The Principles state in their preamble that: “the Basic Principles and Guidelines contained herein do not entail new international or domestic legal obligations but identify mechanisms, modalities, procedures and methods for the implementation of existing legal obligations under international human rights law and international humanitarian law which are complementary though different as to their norms”.

(d) Provide effective remedies to victims, including reparation” (Principle 3);

- “[r]emedies for gross violations of international human rights law and serious violations of international humanitarian law include the victim’s right to the following as provided for under international law: a) Equal and effective access to justice...” (Principle 11);
- “[a] victim of a gross violation of international human rights law or of a serious violation of international humanitarian law shall have equal access to an effective judicial remedy as provided for under international law [...]. Obligations arising under international law to secure the right to access justice and fair and impartial proceedings shall be reflected in domestic laws” (Principle 12);
- “[i]n addition to individual access to justice, States should endeavour to develop procedures to allow groups of victims to present claims for reparation and to receive reparation, as appropriate” (Principle 13).

In addition, the *Updated Set of principles for the protection and action to combat impunity* stipulate that:

*“[a]lthough the decision to prosecute lies primarily within the competence of the State, victims, their families and heirs should be able to institute proceedings, either on an individual or a collective basis, particularly as parties civiles or as persons conducting private prosecutions in States whose law of criminal procedure recognises these procedures. States should guarantee broad legal standing in the judicial process to any wronged party and to any person or non-governmental organisation having a legitimate interest therein”.*³⁷⁸

From the perspective of international human rights law, the rights of the victims vis-à-vis the criminal proceedings are legally based on three core and essential human rights that are protected under international law:

- i. The right to an effective remedy, which includes, *inter alia*, the right to an investigation;
- ii. The right to a fair and public hearing by a competent, independent and impartial tribunal established by law, in the determination of any rights; and
- iii. The right to reparation.

These fundamental rights are not confined to victims of gross human rights violations that are committed by State agents or others acting in an official capacity either

378. Principle 19, para. 2.

at their own instigation or with the consent or acquiescence of State officials. They also apply to the victims of gross human rights abuses that are committed by private persons or entities, which impair the enjoyment of human rights and constitute crimes under national or international law. In respect of criminal offences committed by private persons or entities, the State has a duty to exercise due diligence to prevent such crimes, investigate them, try and punish those responsible and ensure reparation for any harm suffered, as well as to provide an effective remedy to the victim.³⁷⁹

Universal and regional treaties and international instruments guarantee the right to an effective remedy to all persons who allege that their human rights have been violated.³⁸⁰ The UN Human Rights Committee has underlined that the obligation to provide an effective remedy constitutes “a treaty obligation inherent in the [ICCPR] as a whole” and that even in times of emergency, “the State party must comply with the fundamental obligation, under article 2, paragraph 3, of the [ICCPR] to provide a remedy that is effective.”³⁸¹ The right to a remedy guarantees, primarily, the right to claim one’s rights before an independent and impartial body, with a view to obtaining recognition of the violation, cessation of the violation if it is ongoing, and adequate reparation.

Although remedies may vary in nature depending on the right that has been breached or the seriousness of the violation, in the case of gross human rights violations, crimes against international law or criminal acts committed by private individuals or entities, the effective remedy must be a judicial remedy before an

379. See *inter alia*: Human Rights Committee, *General Comment No. 31, The Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, para. 8; Committee against Torture, *General Comment No. 2, Implementation of article 2 by States parties*; Inter-American Court of Human Rights, Judgment of 15 September 2005, *Case of the Mapiripán Massacre v. Colombia* (Merits, Reparations and Costs), Series C No. 134, paras. 111 *et seq.*

380. *International Covenant on Civil and Political Rights*, Article 2.3; *Convention against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment*, Article 13; *International Convention on the Elimination of Racial Discrimination*, Article 6; *International Convention for the Protection of All Persons from Enforced Disappearance*, Articles 12, 17.2 (f) and 20; *Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children which supplements the UN Convention against Transnational Organized Crime*, Article 6.2; *Universal Declaration of Human Rights*, Article 8; *Declaration on the Protection of All Persons from Enforced Disappearance*, Articles 9 and 13; *Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions*, Principles 4 and 16; *Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power*, Principles 4-7) *Vienna Declaration and Programme of Action*, para. 27; *Declaration and Programme of Action of the World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance*, paras. 13, 160-162 and 165; *Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms*, Article 9; *European Convention for the Protection of Human Rights and Fundamental Freedoms*, Article 13; *Charter of Fundamental Rights of the European Union*, Article 47; *American Convention on Human Rights*, Articles 7.1(a) and 25; *American Declaration of the Rights and Duties of Man*, Article XVIII; *Inter-American Convention on Forced Disappearance of Persons*, Article III (1); *Inter-American Convention to Prevent and Punish Torture*, Article 8.1; *African Charter on Human and Peoples’ Rights*, Article 7(a); and *Arab Charter on Human Rights*, Article 9.

381. Human Rights Committee, *General Comment No. 29 on derogations during a state of emergency*, 31 August 2001, para 14.

independent and impartial tribunal established by law.³⁸² In addition, the remedy must be substantiated in accordance with the rules of due process of law and fair trial requirements.³⁸³

B. The Rights and Standards Applicable to Victims of Crime

1. General Standards on the Treatment of Victims by the Authorities

Victims must be treated with humanity and respect for their dignity and human rights. Appropriate measures should be taken to ensure the security, physical and psychological well-being and privacy of both victims and their families.

Victims and their relatives shall be treated with humanity and with respect for their dignity and human rights by law enforcement officials, investigating authorities, prosecutors and judicial authorities at all stages of criminal proceedings, including during any preliminary and pre-trial investigation.

Victims and their relatives must be free from discrimination based on race, colour, ethnic, national or social origin, sex, sexual orientation, gender identity, language, religion, political or other opinion, birth, economic status or any other kind of social status.

At all stages of criminal proceedings, including during pre-trial investigation, law enforcement officials, investigating authorities, authorities responsible for bringing the charges and the prosecutors and judicial authorities must respect the private and family life of victims. Any measures taken should cause as little inconvenience as possible to the victims and their relatives.

States must take appropriate measures to ensure the safety, physical and psychological well-being and privacy of victims as well as of their families. Nevertheless,

382. See, *inter alia*: Human Rights Committee, Views of 2 November 1989, *Birindwa and Tshisekedi v. Zaire*, Communications Nos. 241 and 242/1987, para. 14; Views of 27 October 1995, *Nydia Erika Bautista v. Colombia*, Communication No. 563/1993, para. 8.2. See also the Views of 29 July 1997, *Arhuaco v. Colombia*, Communication No. 612/1995, para. 8.2; Committee on the Elimination of Discrimination against Women, *General Recommendation No. 19 on Violence against Women*, 29 January 1992, A/47/38, para. 24 (t); and African Commission on Human and Peoples' Rights, *Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa*, Principle C (a).

383. Inter-American Court of Human Rights: Judgment of 25 November 2000, *Bámaca Velásquez v. Guatemala*, Series C No. 70, paras. 184-196; Judgment of 7 June 2003, *Juan Humberto Sánchez v. Honduras*, Series C No. 99, paras. 114-136; Judgment of 25 November 2003, *Myrna Mack Chang v. Guatemala*, Series C No. 101, paras. 159-218; and Judgment of 27 November 2003, *Maritza Urrutia v. Guatemala*, Series C No. 103, para. 111.

such measures must not prejudice the right of the accused to a fair and impartial hearing or be incompatible with that right.³⁸⁴

When, because of a criminal investigation, it is necessary to interfere lawfully into the private life of a victim or his/her relatives, the authorities should take steps to minimise the inconvenience caused to the victim and his/her relatives and, where appropriate, protect them against unlawful interference with their privacy.

The State should ensure that, to the extent possible, its domestic laws stipulate that victims who have suffered violence or trauma should benefit from special consideration and care so that they are not subjected to further trauma in the course of judicial proceedings. In particular, in cases of human trafficking and sexual offences, measures should be taken to ensure that court proceedings do not put them at risk of secondary victimisation.³⁸⁵

2. Right to be Protected Against Ill-Treatment and Intimidation

Victims of crime and their relatives must be protected against any form of retaliation as a consequence of their complaint, testimony, or participation in criminal proceedings.

At all stages of criminal proceedings, including during preliminary investigations, victims and their relatives shall be protected against attack, ill-treatment, death threats, harassment, intimidation, retaliation or reprisal as a consequence of their complaint, testimony, participation in the criminal proceedings or any evidence given.

The competent authorities must act with due diligence and take appropriate measures to ensure the safety and integrity of victims and their relatives, not only when such attacks take place but also in order to prevent them.

Where necessary, the protection of victims and their relatives should be organised before, during and after the trial.

384. See, for example, Principle 27 of the *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*; Article 16 (4) of the *Declaration on the Protection of all Persons from Enforced Disappearance*; Article 11 (33) of the *International Convention for the Protection of All Persons from Enforced Disappearance*; and Article 8 (6) of the *Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography*.

385. See, *inter alia*: Article 8 of the *Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography* and Article 9 (1)(b) of the *Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the UN Convention against Transnational Organized Crime*.

The nature of any protective measures taken depends on the specific circumstances of each case and must take into consideration the nature and gravity of the criminal offence, the vulnerability of the victim and his/her relatives, and the personalities and criminal record of the alleged perpetrators, as well as their legal status (for example, if they are members of the army or of a state security body).

In exceptional circumstances, and under judicial supervision, investigating authorities or the prosecutor may refuse to disclose the identity of the victim or his/her relatives during the criminal investigation. However, in all cases, the identity of anonymous victims must be made known to the parties to the proceedings sufficiently in advance of the trial commencing to ensure that it is fair.

In criminal proceedings involving juvenile offenders, victims who are minors or who have been subjected to sexual violence, a judicial decision may be taken to hold the trial *in camera*.

States shall ensure that persons suspected of having committed a criminal offence are not in a position to influence the progress of an investigation by means of pressure or acts of intimidation or reprisal targeted at the victim or his/her relatives or those participating in the investigation or criminal proceedings.³⁸⁶

State authorities must take all necessary steps to investigate and punish any attack or act of intimidation or reprisal against a victim and/or his/her relatives.

3. Right to Report a Crime to Law Enforcement Officials

Victims or their relatives who file an official complaint of a crime or report it to law enforcement officials have the right to receive the fullest possible support from them.

Law enforcement officials should treat all victims of crime and their relatives with courtesy, impartiality and due respect for their dignity, age, gender, race, ethnicity, sexual orientation, culture, religion, political or other views, language, disability or any other special needs.

Facilities within police stations should be designed so as to avoid placing victims under unnecessary pressure and prevent the possibility of secondary victimisation.

386. See, *inter alia*: Article 13 of the UN Declaration on the Protection of all Persons from Enforced Disappearance; Article 12 of the International Convention for the Protection of All Persons from Enforced Disappearance; Principle 3 of the UN Principles on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment; Principle 15 of the UN Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions.

Law enforcement officials should inform victims and/or their relatives about their right to an effective remedy, the opportunities available to them to obtain legal assistance and other assistance as well as for obtaining reparation from the offender or the State.

Victims and/or their relatives should have the opportunity to provide relevant information to the criminal justice personnel responsible for making decisions with regard to their case.

The views and concerns of victims and/or their relatives should be presented and considered at appropriate stages of the proceedings whenever their personal interests may be affected.

Law enforcement officials should provide victims of crime and/or their relatives with information about the procedure for investigating the crime and, if requested to do so, provide them with periodic updates on the status of the investigation.

In all reports to the judicial and/or prosecuting authorities, law enforcement officials should provide precise, clear and full details of all information given to them by the victim. They should also report any injuries the latter may have suffered.

4. Right to Receive Information

Victims of crime and/or their relatives have the right to receive information that is relevant to their case and necessary for the protection of their interests and the exercise of their rights.

States should ensure that victims, or their relatives, have access to information that is relevant to their case and necessary for the protection of their interests and the exercise of their rights.

At a minimum, such information should include the following:

- i. the type of support they can obtain;
- ii. the type of services or organisations to which they can turn for support;
- iii. where and how they can report an offence;
- iv. the procedures that will be followed after such a report is made and their role in them;
- v. how and under what conditions they can obtain protection;
- vi. how and on what terms they can receive legal advice;

- vii. how and in what circumstances the victim can obtain reparation from the offender;
- viii. how to apply for State reparation, if eligible;
- ix. if they are nationals of another State, any special arrangements that may be available to them so that their interests can be protected.

Such information should be provided as soon as the victim or his/her relatives come into contact with law enforcement officials, investigating authorities, prosecutors or judicial authorities. It should be communicated orally or in writing, and in a language that is understood by the victim or his/her relatives.

States should ensure that victims or their relatives are kept informed in an appropriate way of:

- i. the outcome of their complaint; and
- ii. the relevant stages in the progress of criminal proceedings, including the preliminary investigation stage.

Victims or their relatives should be given the opportunity to say if they do not wish to receive such information.

Victims or their relatives should be informed of any progress in the investigation unless doing so would jeopardise an ongoing criminal investigation. However, in cases of enforced disappearance, kidnapping or hostage-taking, the competent authority should communicate regularly and without delay with the relatives of the victim to let them know the results of the investigation into the fate and whereabouts of the person concerned.

5. Right to an Effective Remedy

Victims and their relatives have the right to an effective remedy before a competent, independent and impartial tribunal established by law as well as to file a criminal complaint, participate in criminal proceedings and have legal standing in such proceedings.

The victim and/or his/her relatives have the right to make a complaint to a competent, independent and impartial judicial authority and to have that complaint immediately, thoroughly and impartially investigated.

The victim and/or his/her relatives have the right to a public hearing before a competent, independent and impartial tribunal established by law so that their rights can be determined.

The victim and/or his/her relatives have the right to participate in any such criminal proceedings.

To guarantee the right to an effective judicial remedy, States should guarantee broad legal standing in criminal proceedings to victims and/or their relatives. Such legal standing in criminal proceedings should allow the victims and/or their relatives to, *inter alia*:

- i. submit evidence and propose witnesses;
- ii. have access to documents and evidence;
- iii. compel the attendance of witnesses;
- iv. examine and cross-examine witnesses;
- v. challenge or rebut the evidence put forward by the defence;
- vi. secure the participation of experts; and
- vii. challenge and appeal any decisions taken by the judge or the court, including the final verdict.

Victims and/or their relatives, either as individuals or collectively, should be able to institute proceedings, especially as *parties civiles* or by means of a private prosecution, in States whose legislation on criminal procedure recognises such criminal proceedings.

6. Right to an Effective Investigation

Victims of crime and/or their relatives have the right to an effective investigation. The right to a remedy and reparation cannot be effectively guaranteed if State authorities fail to seriously investigate gross human rights violations that constitute crimes under national or international law or deliberately deflect such investigations or conceal the facts. The right to an effective investigation is a crucial element of the right to an effective remedy.

Victims of crimes or their relatives, especially in cases of gross human rights violations or abuses, have the right to a prompt, effective, independent and impartial investigation.³⁸⁷

In cases of gross human rights violations or abuses, investigations must be launched *ex officio*, in other words, regardless of whether or not the victims or their relatives have filed a complaint.³⁸⁸

For such an investigation to be independent, it must be carried out by an independent authority. This means that the person(s) or bodies responsible for carrying out the investigation should be independent of any institution, agency or person who may fall within the scope of the investigation. It means not only that there should be no hierarchical or operational subordination but also that there is genuine institutional independence.³⁸⁹

Independence can be compromised if investigations into alleged violations by members of the armed forces are carried out by the armed forces themselves. In the case of human rights violations committed by members of the armed forces that

387. Human Rights Committee: *General Comment No 31 on the Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, 26 May 2004, CCPR/C/21/Rev.1/Add.13, para. 8; Inter-American Court of Human Rights, *Velásquez Rodríguez v. Honduras*, Judgment of 29 July 1988, Series C No. 4, para. 172; Inter-American Commission on Human Rights: Report No. 42/00 of 13 April 2000, Case No. 11.103, *Pedro Peredo Valderrama (Mexico)*, paras. 41 *et seq*; Report No. 54/01 of 16 April 2001, Case No. 12.051, *Maria Da Penha Maia Fernandes (Brazil)*, paras. 37 *et seq*; *Report on the Situation of the Rights of Women in Ciudad Juárez, Mexico: The Right to be Free from Violence and Discrimination*, OEA/Ser.L/V/II.117 Doc. 44, 7 March 2003, paras. 131 *et seq*; European Court of Human Rights, Judgment of 28 July 1998, *Ergi v. Turkey*, Application No. 23818/94, para. 82; Judgment of 8 July 1999, *Ta[n]rikulu v. Turkey*, Application No. 23763/94, para. 103; and Judgment of 21 November 2000, *Demiray v. Turkey*, Application No. 27308/95, para. 50; and African Commission on Human and Peoples' Rights, *The Social and Economic Disappearance Action Center and the Center for Economic and Social Rights v. Nigeria*, Communication 155/96.

388. Inter-American Court of Human Rights: *Velásquez Rodríguez v. Honduras*, Judgment of 29 July 1988, Series C No 4, para. 176; and *Tibi v. Ecuador*, Judgment of 7 September 2004, Series C No. 114, para. 159; European Court of Human Rights: Judgment of 18 December 1996, *Aksoy v. Turkey*, Application No. 21987/93, para. 99; and Judgment of 4 May 2001, *Hugh Jordan v. the United Kingdom*, Application No. 24746/94, para. 141. See also: *Convention against Torture and Other Forms of Cruel, Inhuman or Degrading Treatment or Punishment* (Article 12); *International Convention for the Protection of All Persons from Enforced Disappearance* (Article 12.2); *Declaration on the Protection of all Persons from Enforced Disappearance* (Article 13.1); *Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions* (Principle 9); *Principles on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment* (Principle 2); and the *Inter-American Convention to Prevent and Punish Torture* (Article 8).

389. See, *inter alia*: the UN *Principles on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (Principle 2); the UN *Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions* (Principle 11); European Court of Human Rights: Judgment of 4 May 2001, *McKerr v. the United Kingdom*, 28883/95, para. 112; and Judgment of 1 July 2003, *Finucane v. the United Kingdom*, Application No. 29178/95, para. 68

may constitute crimes under national or international law, investigations should be carried out by civilian authorities.³⁹⁰

The aim of the investigation should be to identify those responsible for the violations.³⁹¹ It must be directed at establishing the truth, investigating, prosecuting, capturing, trying and convicting all those responsible for the crime.³⁹² This means also that the investigation report must be disclosed to the judicial authorities without manipulation.

7. Rights in Relation to the Investigation and Prosecution of a Crime

Victims of crime have a right to provide relevant information to the prosecuting authorities, to have their views and concerns taken into consideration as part of any decision on prosecution, to be informed of any final decision concerning prosecution and to be able to challenge any decision not to prosecute the alleged offenders or to close the case.

Victims should have the opportunity to put forward their views, opinions and concerns and to present evidence to the investigating and/or prosecuting authorities responsible for making decisions on the case. This means that:

- i. the testimony of the victim or his/her relatives must be heard;
- ii. the victim or his/her relatives must have access to any relevant information; and
- iii. the victim or their relatives must have the right to present evidence.

390. See, *inter alia*: the Concluding Observations of the Human Rights Committee on: *Venezuela* (CCPR/CO/71/ VEN of 26 April 2001, para. 8); *Kyrgyzstan* (CCPR/CO/69/KGZ of 24 July 2000, para. 7); *Chile* (CCPR/C/79/ Add.104 of 30 March 1999, para. 10); *Belarus* (CCPR/C/79/Add.86 of 19 November of 1997, para. 9); *Former Yugoslav Republic of Macedonia* (CCPR/C/79/Add.96 of 18 August 1998, para. 10); *Cameroon* (CCPR/C/79/Add.116 of 4 November 1999, para. 20); *Mauritius* (CCPR/C/79/Add.60 of 4 June 1996); and *Brazil* (CCPR/C/79/Add.66 of 24 July 1996, para. 22).

391. European Court of Human Rights, Judgment of 1 July 2003, *Finucane v. the United Kingdom*, Application No. 29178/95, para. 69; Judgment of 27 September 1995, *McCann and others v. the United Kingdom*, Application No. 18984/91, para. 161; Judgment of 19 February 1998, *Kaya v. Turkey*, Application No. 22729/93, para. 86; Judgment of 28 October 1998, *Assenov and others v. Bulgaria*, Application No. 24760/94, para. 102; and Judgment of 20 May 1999, *Ogur v. Turkey*, Application No. 21594/93, para. 88; Inter-American Court of Human Rights: *Juan Humberto Sánchez v. Honduras*, *doc. cit.*, para. 186; and *Tibi v. Ecuador*, *doc. cit.*, para. 159.

392. Inter-American Court of Human Rights, *La Rochela Massacre v. Colombia*, Judgment of 11 May 2007, Series C No. 163, para. 148.

In cases of murder and extrajudicial, arbitrary or summary execution, the relatives of the victim have the right to have a medical or other qualified representative present at the autopsy.³⁹³

In cases of torture or ill-treatment, the victim has the right to have access to the medical report of the investigation as well as to request that his/her views are recorded in the report.³⁹⁴

Victims and/or their relatives have the right to participate effectively in the investigation, which includes the right to submit and rebut evidence, to be informed of any progress in the investigation and to have access to the proceedings. It also implies the right to receive legal assistance and, where necessary, interpretation and translation.

Where national legislation allows victims or their relatives to have legal standing in criminal proceedings, they shall have the following minimum rights:

- i. to be informed, prior to the commencement of the trial, of the final charges to be issued against the accused and the reasons for any changes to the original charge(s);
- ii. to be informed as soon as possible of any decision not to proceed with prosecution or to stay proceedings or close the case;
- iii. to be informed as soon as possible of any decision to proceed with the case by following procedures other than those of a criminal trial;
- iv. to be informed, should they not be satisfied with any of the decisions taken in (i), (ii) or (iii) above, of the right to challenge such decisions before a higher prosecuting authority or court.

In the event that the victim or his/her relatives have filed a criminal complaint, they should be kept fully informed of any progress or developments in the criminal proceedings and be given advance notification of hearing dates, adjournments and grants of bail to the defendant.

393. See Principle 16 of the UN *Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions*.

394. See Principle 6 of the UN *Principles on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*.

8. Rights During Trial Before a Court

Victims of crime and/or their relatives have the right to participate in criminal proceedings. When national legislation does not provide for victims and/or their relatives to have legal standing in criminal proceedings, they should nevertheless be afforded certain minimum rights during any trial. Victims of crime and/or their relatives have the right to testify freely in court without intimidation.

When victims and/or their relatives are not granted broad legal standing in criminal proceedings under national law, they should, as an expression of the right to an effective remedy, be afforded at least the right to participate in the criminal trial. The effective exercise of the right to participate in the criminal trial requires that victims and/or their relatives be afforded the following minimum rights:

- i. to be informed of the date and place of trial hearings;
- ii. to be informed of the charges against the accused (including the facts of the case and the actual criminal offence(s) involved);
- iii. to be informed of the timetable and scope of the trial;
- iv. to be informed of their role in the trial;
- v. to be able to state their case in court during the proceedings;
- vi. to be able to give evidence;
- vii. to be informed of the possibilities available to them to obtain reparation in the course of the criminal proceedings in question;
- viii. to obtain legal assistance and advice; and
- ix. to be told how they can obtain a copy of the judgment.

In all cases, but in particular when a trial verdict has negative consequences for the rights of the victim and/or their relatives to obtain reparation and truth, those concerned have the right to seek an effective remedy against the verdict, including the right to challenge it before a court.

States should ensure that contact between victims and offenders within court premises is avoided, unless the criminal proceedings in question require such contact. To this end, where appropriate, States should provide special waiting areas for victims within court premises.

If called to make a statement or give testimony during criminal proceedings, the victim should be questioned in a manner which gives due consideration to his/her personal situation, rights and dignity. This means that:

- i. Victims should only be questioned to the extent that is necessary for the purposes of the trial proceedings;
- ii. Special assistance should be given to vulnerable victims, such as minors and the victims of rape and sexual abuse;
- iii. In principle, minors and people with mental or physical disabilities should make statements and be questioned in the presence of their parents, guardians or others responsible for their care or legal representation.³⁹⁵

As in the case of any other witness, when victims or their relatives participate as witnesses in a criminal trial, they should be able to testify freely without being subjected to intimidation or pressure of any kind.

Victims who participate in criminal proceedings as parties or witnesses should be able to claim reimbursement of any expenses incurred as a result of their legitimate participation in such proceedings.

9. Rights in Relation to the Release of Defendants or Convicted Persons

Victims of crime have the right to be informed if a defendant or convicted prisoner is released.

Where necessary, in cases where the release of a defendant or convicted prisoner who has been in custody and who may present a danger to the safety of the victim has been ordered, the victim should be notified.

Victims should have the right to choose not to be informed of the release of a defendant or convicted prisoner unless the national rules of criminal procedure stipulate that they must be notified.

395. Article 12 of the *Convention on the Rights of the Child* and Articles 12 and 13 of the *Convention on the Rights of Persons with Disabilities*.

10. Right to Protection of Privacy

Victims of crime and their relatives are entitled to have their private life respected.

States should take appropriate measures to protect the private lives of victims and their families so as to ensure that they are protected from any publicity that might unduly affect their private life or dignity or expose them to further victimisation, intimidation or reprisal during any stage of criminal proceedings.

States should, where necessary, ensure that it is possible to adopt, as part of the court proceedings, appropriate measures to safeguard the privacy of victims and their relatives or people in a similar position and prevent photographic images of them from appearing. In certain circumstances, this may mean that the trial is held *in camera* or that the circulation or publication of personal information on the victims or their relatives is restricted.

States shall require all agencies, whether statutory or non-governmental, who are in contact with victims, to adopt clear standards by which they may disclose or provide information on a victim or his/her relatives to a third party, on the condition that:

- i. the victim has explicitly consented to such disclosure; or
- ii. a legally-authorized request for such information to be provided has been made.

In both cases, there must be clear rules of procedure to be followed when supplying such information.

In cases of an enforced disappearance, personal information, including medical and genetic data, which is collected and/or transmitted within the framework of the search for a disappeared person shall not be used or made available for purposes other than the search for the disappeared person. This is without prejudice to the use of such information in criminal proceedings relating to an offence of enforced disappearance or the exercise of the right to obtain reparation.³⁹⁶

Medical reports in cases of torture or ill-treatment must be confidential and communicated to the victim and the authorities responsible for the investigation and/or charge(s), as well as to the tribunal or court that is competent to hear the case and

396. Article 19 of the *International Convention for the Protection of All Persons against Enforced Disappearance*.

the parties to the proceedings. No one else shall have access to them unless consent of the subject has been obtained or the authorisation of a competent tribunal.³⁹⁷

11. The Right to Support and Assistance

Victims of crime and/or their relatives have the right to receive the support and assistance they require.

States should take steps to ensure that victims and/or their relatives receive whatever material, legal, medical, psychological and social assistance they may need through governmental, voluntary, community-based and indigenous means.³⁹⁸

Such services should:

- i. be easily accessible;
- ii. provide victims with emotional, medical, social and material support as well as legal assistance;
- iii. be competent and qualified to deal with the problems faced by the victims they serve;
- iv. provide victims with information on their rights and on the services available;
- v. refer victims to other services when necessary;
- vi. respect confidentiality when providing services;
- vii. be provided free of charge at least in the immediate aftermath of the crime;
- viii. when appropriate, be provided in a language understood by the victim.

States should ensure that victims who are particularly vulnerable, because of their personal characteristics or due to the circumstances of the crime, are able to benefit from special measures appropriate to their situation.

397. Principle 6 (c) of the *Principles on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*.

398. Principle 14 of the *Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power* and Principle 12 of the *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*.

12. Right to Reparation and to Know the Truth

Victims of crime and their relatives have the right to receive reparation from the guilty party and/or, when appropriate, from the State.

Victims and/or their relatives and any other persons who have suffered harm or damage as a consequence of a crime have the right to obtain reparation.

Reparation should be proportionate to the gravity of the crime and the harm suffered, and cover the material and moral damages suffered.

Reparation is a general term that comprises many different types of compensation for harm, including:

- i. Restitution: whenever possible, aimed at restoring the victim to the situation that prevailed before the crime was committed;
- ii. Compensation: this covers any economically assessable damage resulting from the crime. It can include: physical or mental harm; lost opportunities, especially those related to employment, education and social benefits; material damage and loss of income, including loss of earning potential; moral damage; and the costs of legal or expert assistance, medicine and medical services and psychological and social services.
- iii. Rehabilitation: this includes medical and psychological care as well as legal and social services;
- iv. Satisfaction: this is a non-financial form of reparation for moral damage or damage to dignity or personal reputation. Conviction in itself is generally accepted to be a means of providing satisfaction, given that an independent and impartial tribunal has stated with legal authority that a person has been the victim of a crime.

The different forms of reparation are usually cumulative. However, this is generally not the case for restitution and compensation. Compensation is due when restitution cannot be obtained, even though, the commission of a crime often gives rise to the right to restitution (for example, of property) as well as to compensation for moral damage.

In the case of crimes or gross human rights violations, that constitute crimes under national or international law, and which have been committed by State actors or individuals or groups of individuals acting with the authorisation, support or acquiescence of the State, the guilty party and the State have a duty to provide reparation to the victim and/or his/her relatives, as well as other persons who may have suffered harm or damage as a consequence of the crime.

In the case of crimes committed by private individuals or groups of individuals who are acting without the authorisation, support or acquiescence of the State, the guilty party has a duty to provide reparation to the victim and/or their relatives, as well as to anyone else who has suffered harm or damage as a consequence of the crime.

States have a duty to ensure that victims and anyone else who is entitled to reparation as a consequence of a crime have access to justice and judicial proceedings so that reparation can be obtained. However, not all national legislation allows the victims of crimes or others entitled to reparation to obtain it in the course of criminal trials. In such cases, victims of crime and others usually have to request reparation by means of civil proceedings (civil claim) or other judicial proceedings.

Victims and/or their relatives have the right to know the truth about the crime, including the reasons that gave rise to it and the identity of the perpetrators. Although the right to know the truth is widely accepted in the case of crimes against humanity, war crimes and gross human rights violations that constitute crimes under international law (such as torture, enforced disappearance and extrajudicial execution),³⁹⁹ *mutatis mutandis* it should also apply in the case of serious crimes, at the very least.

In principle, a criminal trial is the natural forum for satisfying the rights of victims and/or their relatives to an effective remedy, to reparation and to know the truth. However, not all national legislations allow the victims of crime and others who are entitled to reparation and to know the truth to have these rights vindicated and satisfied in the course of a criminal trial. In all cases, victims and others entitled to these rights have the right to receive a judicial decision on the matter within a reasonable time limit.

When national legislation allows victims and/or their relatives to obtain reparation in criminal proceedings (i.e., as a *partie civile*, through a private prosecution, etc), the victim and anyone else who is entitled to reparation has the right:

- i. to obtain, within a reasonable time, a judgment ordering full reparation for the (material and/or moral, physical or mental) harm suffered;
- ii. to obtain, within a reasonable time, a judgment that reveals the truth about the crime, including the motives and circumstances in which it was

399. See, *inter alia*: *International Convention for the Protection of All Persons from Enforced Disappearance*, Article 24; the UN *Updated Set of Principles for the protection and promotion of human rights through action to combat impunity*; Principles 11, 22(b) and 24 of the *Basic principles and guidelines on the right to a remedy and reparation for victims of gross violations of international human rights and serious violations of humanitarian law*; the UN *Guiding Principles on Internal Displacement*, Principle 16 (1), E/CN.4/1998/53/Add.2; *Revised final report of the Special Rapporteur on the question of impunity of perpetrators of human rights violations (civil and political)*, E/CN.4/Sub.2/1997/20/Rev.1, 2 October 1997, para. 17; Office of the High Commissioner for Human Rights, *Study on the right to the truth*, E/CN.4/2006/91, 9 January 2006; and Rule 117 in International Committee of the Red Cross, *Customary International Humanitarian Law, Volume I, Rules*, ICRC, pp. 477 and 620.

committed and the identity of the perpetrators and the degree to which they were involved; and

iii. to challenge the judgment before a higher court (right of appeal).

International and Regional Standards

Some international norms and standards concerning victims' rights to an effective remedy, reparation and knowledge of the truth in the context of criminal proceedings

International

Universal Declaration of Human Rights — Articles 8 and 10

International Covenant on Civil and Political Rights — Articles 2 (3), 9 (5) and 14 (1)

Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment — Articles 13 and 14

International Convention on the Elimination of All Forms of Racial Discrimination — Article 6

Convention on the Elimination of All Forms of Discrimination against Women — Article 2 (c)

International Convention for the Protection of All Persons from Enforced Disappearance — Articles 12 and 24

Convention on the Rights of Persons with Disabilities — Article 13

Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography — Articles 8 and 9

Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime — Articles 2 (2), 6, 7, 8 and 9

International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families — Articles 15, 16 (9) and 18 (1)

Rome Statute of the International Criminal Court — Articles 15 (3), 19 (3), 43 (6), 54, 57, 64, 68, 75 and 82

Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power — Articles 1 to 21

Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law — Principles 1 to 27

Declaration on the Protection of All Persons from Enforced Disappearance — Articles 9, 13 and 19

Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions — Principles 15, 16 and 20

Principles on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment — Principles 3 (b), 4 and 6

Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms — Article 9

Updated Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity — Principles 1, 2, 3, 4, 5, 10, 15, 19, 31, 32, 33 and 34

Regional and Inter-Governmental

Council of Europe

European Convention for the Protection of Human Rights and Fundamental Freedoms — Articles 5 (5), 6 (1), 13 and 50

European Convention on the Compensation of Victims of Violent Crimes

Recommendation (85) 11 E of the Committee of Minister of the Council of Europe on the Position of Victims in the Framework of Criminal Law and Procedure, 28 June 1985

Recommendation Rec(2006)8 of the Committee of Ministers to Members States on Assistance to Victims of Crime

Guidelines on the Protection of Victims of Terrorist Acts adopted by the Committee of Ministers of the Council of Europe (2005)

European Union

Charter of Fundamental Rights of the European Union — Article 47

Framework Decision on the Standing of Victims in Criminal Proceedings of the Council of the European Union (2001)

Inter-American System

American Declaration of the Rights and Duties of Man — Article XVIII

American Convention on Human Rights — Article 8 (1), 25 and 63 (1)

Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women — Articles 4 (g) and 7

Inter-American Convention to Prevent and Punish Torture — Articles 8 and 9

African System

African Charter on Human and Peoples' Rights — Article 7 (1)

Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa — Articles 4 (1), 8 and 25

Principles and Guidelines on the Rights to a Fair Trial and Legal Assistance in Africa of the African Commission on Human and Peoples' Rights (2003) — Principles A (1), A (2), A (3,e), B (a), C, E, F (i) and P

Arab System

Arab Charter on Human Rights — Articles 8 (2), 12, 13 (1) and 14 (7)

Commonwealth

Commonwealth Secretariat Guidelines for the Treatment of Victims of Crime: Best Practice (2002)

Ibero-American Community of Nations

Ibero-American Convention on Rights of Youth — Article 13 (1) and (2)

Organization for Security and Cooperation in Europe

Decision No 2/03 Combating Trafficking in Human Beings

ix. Criminal Trials and Impunity

The criminal justice system has a crucial role to play in combating impunity in relation to crimes against humanity (including genocide and apartheid), war crimes and gross human rights violations that constitute crimes under international law, such as torture, extrajudicial executions and enforced disappearances.⁴⁰⁰

Under international law, impunity is defined as:

*“a failure by States to meet their obligations to investigate violations; to take appropriate measures in respect of the perpetrators, particularly in the area of justice, by ensuring that those suspected of criminal responsibility are prosecuted, tried and duly punished; to provide victims with effective remedies and to ensure that they receive reparation for the injuries suffered; to ensure the inalienable right to know the truth about violations; and to take other necessary steps to prevent a recurrence of violations”.*⁴⁰¹

Although this broad definition covers several issues, this chapter takes a traditional criminal approach to impunity: the failure, *de jure* or *de facto*, to comply with the obligation to investigate crimes, prosecute and bring to trial the alleged perpetrators and, should the latter be found guilty, impose penalties that are proportionate to the gravity of the offence. In other words, the total or partial failure to investigate, capture, prosecute, bring to trial and convict those responsible for crimes amounts to impunity.

In this chapter, we examine the legal duty under international law to combat impunity in the context of criminal justice.

A. The International Legal Duty to Combat Impunity

Under international law, States have the following obligations: to investigate crimes against international law (crimes against humanity, genocide, apartheid, war crimes and gross human rights violations, such as torture, extrajudicial executions and enforced disappearances), to prosecute and bring to trial the alleged perpetrators, and, should they be found guilty, to impose penalties that are proportionate to the gravity of the offence.

The basis in law for the obligations to investigate, bring to trial and punish the perpetrators of crimes against international law are to be found in both international

400. For further development of this issue, see: International Commission of Jurists, *Guía para Profesionales No.3, Impunidad y Graves Violaciones de Derechos Humanos (Impunity and Gross Human Rights Violations; Practitioners Guide No. 3*, Ed. ICJ), Geneva, 2008.

401. Principle 1 of the UN *Updated Set of principles for the protection and action to combat impunity*, which was recommended by the former UN Commission on Human Rights in its Resolution 2005/81. The *Updated Principles* were published in UN Document E/CN.4/2005/102/Add.1.

treaties and other declarative instruments and in customary international law. This principle was established early on in international law. One of the first jurisprudential precedents on the matter being the arbitral award made by Professor Max Huber on 1 May 1925 concerning British claims for damages caused to British subjects in the Spanish part of Morocco. In his judgment, Professor Huber recalled that, under international law:

*“The State may become accountable [...] also as a result of insufficient diligence in criminally prosecuting the offenders. [...] It is generally recognised that the curbing of crime is not only a legal obligation incumbent on the competent authorities but also [...] an international duty that is incumbent on the State”.*⁴⁰²

The obligations to investigate crimes against international law and bring to trial and punish the perpetrators are explicitly enshrined in numerous human rights treaties.⁴⁰³ Several declaratory instruments also recognise these obligations.⁴⁰⁴ A number of other treaties contain non-specific provisions on the obligation to try and punish the perpetrators of gross human rights violations.⁴⁰⁵ Nevertheless, human rights jurisprudence has concluded that, by virtue of the duty of guarantee enshrined in human rights treaties, as well as the general principles of law, these

402. *Recueil de sentences arbitrales*, United Nations, Volume II, pp. 645 and 646 [French original, unofficial translation].

403. Those from the universal system include: Articles 4, 5 and 7 of the *Convention against Torture and Other Forms of Cruel, Inhuman or Degrading Treatment or Punishment*; Articles 3, 4, 5, 6 and 7 of the *International Convention for the Protection of All Persons from Enforced Disappearance*; Articles 3 and 4 of the *International Convention on the Elimination of All Forms of Racial Discrimination*; Article 2 of the *Convention on the Elimination of All Forms of Discrimination against Women*; Article 4 of the *Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict*; Articles 3, 4 and 5 of the *Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography*; Article 5 of the *Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime*; and Articles IV, V and VI of the *Convention on the Prevention and Punishment of the Crime of Genocide*. At the regional level, the following are worth mentioning: the *Inter-American Convention to Prevent and Punish Torture*, Articles 1 and 6, the *Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women*, Article 7 and the *Inter-American Convention on Forced Disappearance of Persons*, Articles I and IV.

404. See, *inter alia*: the *Declaration on the Protection of All Persons from Enforced Disappearance*, the *Principles on the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions*, the *Code of Conduct for Law Enforcement Officers*, the *Basic Principles on the Use of Force and Firearms by Law Enforcement Officials*, and the *Principles of International Cooperation in the Detection, Arrest, Extradition and Punishment of Persons Guilty of War Crimes and Crimes against Humanity*.

405. This is the case for the *International Covenant on Civil and Political Rights*, the *European Convention for the Protection of Human Rights and Fundamental Freedoms*, the *American Convention on Human Rights*, the *Arab Charter on Human Rights* and the *African Charter of Human and Peoples' Rights*.

treaties impose an obligation to investigate, bring to trial and punish those responsible for gross human rights violations.⁴⁰⁶

The State has these same obligations with regard to criminal acts committed by individuals or groups of persons, especially when such criminal offences hinder the effective enjoyment of human rights and/or when they constitute crimes under international law.⁴⁰⁷

Impunity resulting from non-compliance with these obligations can manifest itself in a number of ways. Doctrine talks about *de jure* and *de facto* impunity. Impunity *de jure* refers to impunity which stems directly from legal norms such as amnesties, procedural immunity, the improper application of due obedience, etc.

In general, *de facto* impunity refers to all other situations or when, in the words of the UN Expert on the right to restitution, compensation and rehabilitation, “the State authorities fail to investigate the facts and to establish criminal responsibility”.⁴⁰⁸ De facto impunity includes, *inter alia*:

- i. complicit inertia on the part of the authorities, frequent passivity on the part of investigators and bias, intimidation and corruption within the judiciary;

406. See, *inter alia*: Human Rights Committee: *General Comment No. 31, The Nature of the General Legal Obligation Imposed on States Parties to the Covenant*; Views of 27 October 1995, *Bautista v. Colombia*, Communication No. 563/1993; Views of 29 July 1997, *José Vicente y Amado Villafañe Chaparro, Luis Napoleón Torres Crespo, Angel María Torres Arroyo y Antonio Hugues Chaparro Torres v. Colombia*, Communication No. 612/1995. Committee against Torture: *General Comment No. 2, Implementation of article 2 by States parties*, and the Decision concerning communications 1/1988, 2/1988 and 3/1988 (Argentina), 23 November 1989, para. 7; Inter-American Court of Human Rights: *Velásquez Rodríguez v. Honduras*, Judgment of 21 July 1989, Series C No. 7; *Godínez Cruz v. Honduras*, Judgment of 21 July 1989, Series C No. 8; *Caballero Delgado and Santana v. Colombia*, Judgment of 8 December 1995, Series C No. 22; *El Amparo v. Venezuela*, Judgment of 14 September 1996, Series C No. 28; *Castillo Páez v. Peru*, Judgment of 3 November 1997, Series C No. 34; *Suárez Rosero v. Ecuador*, Judgment of 12 November 1997, Series C No. 35; and *Nicholas Blake v. Guatemala*, Judgment of 24 January 1998, Series C No. 36. European Court of Human Rights: Judgment of 28 October 1998, *Osman v. The United Kingdom*, Application No. 23452/94; Judgment of 18 December 1996, *Aksoy v. Turkey*, Application No. 21987/93; Judgment of 23 September 1998, *A. v. the United Kingdom*, Application No. 25599/94; Judgment of 25 May 1998, *Kurt v. Turkey*, Application No. 24276/94; Judgment of 28 March 2000, *Mahmut Kaya v. Turkey*, Application No. 22535/93; and Judgment of 28 March 2000, *Kiliç v. Turkey*, Application No. 22492/93. African Commission on Human and Peoples' Rights: *Malawi African Association et al v. Mauritania*, Communications 54/91, 61/91, 98/93, 164/97, 196/97, 210/98 (May 2000) and *The Social and Economic Rights Action Center and the Center for Economic and Social Rights v. Nigeria*, Communication 155/96 (October 2001).

407. See, *inter alia*: Human Rights Committee: *General Comment No 31, Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, para. 8; Committee against Torture, *General Comment No. 2, Implementation of Article 2 by States parties*; Inter-American Court of Human Rights: *Velásquez Rodríguez v. Honduras*, Judgment of 29 July 1988, Series C No. 4; *Mapiripán v. Colombia*, Judgment of 15 September 2005, Series C No. 134; and *Pueblo Bello Massacre v. Colombia*, Judgment of 31 January 2006, Series C No. 140; European Court of Human Rights: Judgment of 9 June 1998, *L.C.B. v. The United Kingdom*, Application No. 23413/94; Judgment of 28 October 1998, *Osman v. The United Kingdom*, Application No. 23452/94; and Judgment of 26 November 2002, *E and others v. The United Kingdom*, Application No. 33218/96; African Commission on Human and Peoples' Rights: Decision concerning Communication No. 155/96, *The Social and Economic Rights Action Center and the Center for Economic and Social Rights v. Nigeria*.

408. *Study Concerning the Right to Restitution, Compensation and Rehabilitation for Victims of Gross Violations of Human Rights and Fundamental Freedoms: 2nd Progress Report*, E/CN.4/Sub.2/1992/8, para. 52.

- ii. when the authorities do not meet their obligation to investigate or if the investigation is not carried out promptly and diligently in accordance with international standards on investigation;
- iii. when the authorities do not investigate all the offences committed in a particular case or they do not ensure that all those allegedly responsible for such offences are brought to trial;
- iv. when the authorities do not ensure that sentences passed are served;
- v. when victims and/or their relatives are denied their right to an effective remedy and/or access to justice;
- vi. when criminal proceedings are not conducted by an independent, impartial and competent tribunal in accordance with the international standards applicable to due process;
- vii. when the case has been tried in such a way that it is inconsistent with the intention of bringing the alleged perpetrators to justice;
- viii. when derisory penalties that are not proportionate to the gravity of the crimes committed are imposed.

In order to combat impunity, States have the following general obligations:

- i. to investigate crimes and identify the alleged perpetrators; and
- ii. to take appropriate measures within the justice system with regard to the alleged perpetrators to ensure that they are investigated, prosecuted, tried and duly punished.

B. Fundamental International Standards on the Fight against Impunity

The majority of the international standards concerning the issue of impunity are to be found throughout many different norms, including both treaties and declarative instruments, as well as in international jurisprudence. However, the *Updated Set of principles for the protection and promotion of human rights through action to combat impunity*, recommended by the former UN Commission on Human Rights,⁴⁰⁹ provides a systematic synopsis of the vast majority of existing international standards on the issue. Both the Updated Set and the earlier version have been used

409. The set of principles was initially drawn up and adopted by the former UN Sub-Commission on Prevention of Discrimination and Protection of Minorities in 1997 (E/CN.4/Sub.2/1997/20/Rev.1 of 2 October 1997). The former Human Rights Commission arranged for it to be up-dated and once that had been done, in 2005, recommended that all States implement the said principles in their efforts to combat impunity (Resolution 2005/81 of 21 April 2005). The Updated Set can be found in UN Doc. E/CN.4/2005/102/Add.1 as well as in *Impunidad y Graves Violaciones de Derechos Humanos, Practitioners' Guide No. 3, op. cit.*

as legal references by international human rights bodies and national authorities, including the judiciary.⁴¹⁰

1. General Standards

States should conduct prompt, thorough, independent, impartial and effective investigations into crimes.

An independent investigation requires that the investigating body and the investigators not be involved in the crime and that they be independent of the suspected perpetrator(s) and the institution or agency they serve. An independent investigation also requires that the investigating body and the investigators have no hierarchical or institutional connection with the alleged perpetrator(s) or the body they serve. The independence of investigations can be compromised if investigations into crimes allegedly committed by members of the armed forces are conducted by members of the armed forces themselves.

An impartial investigation requires that those conducting the investigation be completely free of preconceived ideas or prejudice.

For an investigation to be effective, it must seek to identify those responsible for the crime, determine the circumstances and motives of the crime, prosecute and bring to trial those responsible.

Where there are reasonable grounds for believing that a gross violation of human rights or a crime under international law has been committed, the investigating authorities, including the prosecutor and/or examining magistrate, must undertake an investigation, even if there has been no formal complaint.

States should take appropriate measures in respect of alleged perpetrators to ensure that they are prosecuted, tried and, if found guilty, receive penalties that are proportionate to the gravity of the crime.

410. See, for example, Inter-American Court of Human Rights: *Bámaca Velásquez v. Guatemala*, Judgment of 22 February 2002, Series C No. 91; *Castillo Páez v. Peru*, Judgment of 27 November 1998, Series C No. 43; and *Trujillo Oroza v. Bolivia*, Judgment of 27 February 2002, Series C No. 92. Inter-American Commission on Human Rights: Report No. 136/99 of 22 December 1999, Case No. 10.488, *Ignacio Ellacuría, S.J. et al. (El Salvador)*; Report No. 37/00 of 13 April 2000, Case No. 11.481, *Monsignor Oscar Arnulfo Romero y Galdámez (El Salvador)*; Report No. 45/00 of 13 April 2000, Case No. 10.826, *Manuel Mónago Carhuaricra and Eleazar Mónago Laura (Peru)*; Report No. 44/00 of 13 April 2000, Case No. 10.820, *Américo Zavala Martínez (Peru)*; Report No. 43/00 of 13 April 2000, Case No. 10.670, *Alcides Sandoval et al. (Peru)*; Report No. 130/99 of 19 November 1999, Case No. 11.740, *Víctor Manuel Oropeza (Mexico)*; Report No. 133/99 of 19 November 1999, Case No. 11.725, *Carmelo Soria Espinoza (Chile)*; and Report No. 46/00 of 13 April 2000, Case No. 10.904, *Manuel Meneses Sotacuro and Félix Inga Cuya (Peru)*. See also: Argentina, Decree No. 1259 on the creation of the *Archivo Nacional de la Memoria*, National Memory Archive, of 16 December 2003; Constitutional Court of Colombia, Judgment C-426/06 of 31 May 2006, case D-5935; and Supreme Court of Justice of Colombia (Criminal Division), Decision dated 11 July 2007 concerning the appeal in the case of *Orlando César Caballero Montalvo / Tribunal Superior de Antioquia*.

Alleged perpetrators must be prosecuted, tried and duly punished in accordance with international standards on fair trial and due process (see Chapters IV, V and VI of this Guide). There can be no grounds for limiting the application of those standards in any way due to the grave nature of the crimes committed.

Alleged perpetrators of gross human rights violations or abuses or crimes against international law directed at civilians must be tried by a competent, independent and impartial tribunal established by law.

Alleged perpetrators of crimes against humanity, genocide, apartheid and others gross human rights violations or abuses (such as torture, extrajudicial executions and enforced disappearances) must be tried only by the competent ordinary courts and not by military courts:

- These crimes cannot be deemed to be military offences nor offences that are service-related nor committed in the line of duty;
- The jurisdiction of military courts must be confined solely to strictly military offences committed by military personnel.

In the case of war crimes, the competent court may be an ordinary court or a military court depending on the nature of each offence (whether military or non-military) and the status of the victim (whether a civilian or member of the military).

Although the decision to prosecute lies primarily within the competence of the State, victims, their families and heirs should be able to bring proceedings, on either an individual or a collective basis.

States should guarantee broad legal participation in the judicial process to any wronged party and to any person or non-governmental organisation having a legitimate interest therein.

2. Standards on Criminal Responsibility

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 grounds for exoneration from criminal responsibility or as justification for a crime under international law.

Due obedience and crimes under international law: No order or instruction from any public authority, be it civilian, military or of any other kind, may be invoked to justify a crime under international law. The fact that the perpetrator of the crime acted on the orders of his or her Government or of a superior does not exempt him or her from criminal responsibility but may be considered as grounds for reducing the sentence.

Criminal responsibility of a superior: A commander or hierarchical superior, including civilians or members of the military, is criminally liable for crimes committed by his subordinates, troops or persons under his effective control, when he or she:

- i. knew or consciously disregarded information which clearly indicated that subordinates under his or her effective authority and control were committing or were about to commit a crime;
- ii. exercised effective responsibility for and control over activities which were connected with the crime; and
- iii. failed to take all necessary and reasonable measures within his or her power to prevent or stop the crime from being committed or to bring it to the attention of the competent authorities so that it could be investigated and prosecuted.

Official standing of the perpetrator: The fact that the person who commits an act that constitutes a crime under international law holds the office of Head of State, Head of Government, Government member, member of parliament, elected representative or Government official or performs any other official function shall in no case exempt him/her from criminal responsibility or justify any reduction in sentence or be seen as a mitigating circumstance.

The fact that national legislation does not criminalise or punish an act that constitutes a crime against international law does not exempt the person who committed the crime from criminal responsibility under international law.

Crimes under treaty law: The fact that an act or omission was not a criminal offence under national law at the time it was committed, does not prevent the perpetrator being tried and convicted for an act or omission which, at the time it was committed, was a crime under a treaty.

Crimes under international customary law: The fact that an act or omission was not a criminal offence under national or international treaty law at the time it was committed, does not prevent the perpetrator from being tried and convicted for acts or omissions which, at the time when they were committed, were crimes according to the general principles of law recognised by the international community (crime under international customary law, *crimen iuris gentium* or *jus cogens* crime).

3. Standards relating to Statutes of Limitation

No statutory limitation shall apply to crimes against humanity, genocide, apartheid and war crimes.

In the case of gross human rights violations that are crimes under international law (such as torture, extrajudicial executions and enforced disappearances) but which do not amount to crimes against humanity (widespread or systematic) or war crimes

(committed in the context of an armed conflict), and when statutory limitation is applicable under national legislation for criminal matters:

- i. Statutes of limitations relating to such crimes shall be of long duration and commensurate with the extreme seriousness of the crimes in question;
- ii. In the case of continuous or permanent crimes, such as enforced disappearance and hostage taking, the statutory limitation period starts from the moment when the crime ceases (for example, in the case of an enforced disappearance, when the fate or whereabouts of the disappeared person has been established with certainty);
- iii. When judicial remedies are no longer effective, statutory limitation periods shall be suspended until the efficacy of such remedies has been restored.

However, in national criminal systems that apply statutes of limitation, attention needs to be paid to whether there are specific national regulations or jurisprudence that prevent or do not recognise the application of such statutes to gross human rights violations.

4. Standards relating to Amnesty Laws and other Similar Measures

Amnesty: The alleged perpetrators of crimes against humanity (including genocide and apartheid), war crimes and gross human rights violations or abuses that amount to crimes against international law shall not benefit from amnesties or other similar measures that might have the effect of exonerating them from criminal responsibility and/or exempting them from criminal proceedings or punishment.

The alleged perpetrators shall not benefit from any type of general immunity prior to trial.

Provisions of national criminal law that exonerate State actors from criminal responsibility if the offence was committed in the course of a military operation or operation to combat terrorism or organised crime cannot be applied to crimes against humanity (including genocide and apartheid), war crimes and gross human rights violations.

5. Standards relating to the Non-Political Nature of Crimes under International Law

Although crimes against humanity, genocide, apartheid, war crimes and other gross human rights violations may be committed for political or ideological reasons, international law does not consider them to be political offences or offences connected with a political offence or politically-motivated offences. Therefore, the consequences envisaged under international law in the case of political offences do not apply to these kinds of crimes, especially for the purposes of extradition and asylum.

Right to asylum: States shall not grant asylum to persons in respect of whom there are serious reasons to believe that they have committed any of the above-mentioned crimes against international law.

Extradition: For the purposes of extradition, the above-mentioned crimes against international law shall not be regarded as political offences or offences connected with a political offence or politically-motivated offences. Accordingly, requests for extradition in connection with such crimes against international law cannot be denied on the grounds that they are political offences.

Requests for extradition should, however, always be denied if the individual concerned risks the death penalty, and/or where there are well-founded grounds for believing that he or she would be in danger of being subjected to gross violations of human rights, such as torture, enforced disappearance or extrajudicial execution. If extradition is denied on these grounds, the requested State shall submit the case to its own competent authorities so that criminal proceedings can be opened.

6. Standards concerning *Ne bis in idem* and *Res Judicata*

Ne bis in idem: The fact that an individual has previously been tried in connection with a crime against humanity, genocide, apartheid, war crime or other gross human rights violations that are crimes under international law shall not prevent his or her prosecution, trial and punishment for the same crime if:

- i. the purpose of the first trial was to shield the person concerned from criminal responsibility; or
- ii. the first trial was not conducted independently or impartially in accordance with the standards relating to fair trial and due process recognised by international law; or
- iii. the first trial was conducted in a manner that, given the circumstances, was inconsistent with an intent to bring the person concerned to justice.

Res Judicata: *Res judicata* no longer has any validity and cannot be invoked if the verdict in question is the result of:

- i. a trial which has been conducted in breach of the fundamental judicial guarantees inherent in a fair trial;
- ii. a court that is neither independent, impartial nor competent;
- iii. enforcing an amnesty law or other similar measures that are incompatible with the international obligations to prosecute, bring to trial and punish the perpetrators of crimes against humanity, genocide, apartheid, war crimes and other gross human rights violations that are crimes under international law; or

- iv. a trial which was intended to exonerate the person from criminal responsibility.

7. Standards concerning Penalties and Extenuating, Mitigating and Aggravating Circumstances

Punishment imposed by courts or judges following a fair trial must comply with the principle of proportionality of the penalty and must not constitute cruel, inhuman or degrading punishment (see Chapter VI).

Penalties for crimes against humanity, genocide, apartheid, war crimes and other gross human rights violations that are crimes under international law must be appropriate and proportionate to the extreme gravity of such offences and take into account the level of criminal responsibility and degree of culpability and involvement in the crime of the person convicted

The failure to impose penalties that are commensurate with the gravity of the crime (derisory sentences) or to take steps to enforce sentences (for example, capturing a person who has been sentenced to imprisonment) may be indicative of an evasion of justice and constitute a form of impunity;

In the case of crimes against humanity, genocide, apartheid, war crimes and other gross human rights violations that are crimes under international law, and taking into account the nature and gravity of such crimes, a judge or court may recognise that extenuating or mitigating circumstances apply if those found guilty:

- i. have helped clarify the crime committed or identified other perpetrators; or
- ii. have made efforts to alleviate the suffering of the victim or to limit the number of victims.

In the case of crimes against humanity, genocide, apartheid, war crimes and other gross human rights violations that are crimes under international law, the court or judge must recognise the existence of, and apply, aggravating circumstances if the victims of the offence were pregnant women, minors, persons with disabilities or other particularly vulnerable individuals.

x. The Right to an Effective Remedy and to Obtain Reparation for Violations of the Right to a Fair Trial

In this chapter we examine the issue of the right to an effective remedy and to obtain reparation for anyone who has had their right to a fair trial and due process violated in the course of criminal proceedings. Even though victims, their relatives and other parties to criminal proceedings may have their right to a fair trial violated and are therefore entitled to seek an effective remedy and reparation, this chapter focuses on those who have been charged with, prosecuted for or convicted of a criminal offence.

1. General Features of the Right to an Effective Remedy and to Obtain Reparation

Everyone who has had their human rights violated has the right to an effective remedy and to obtain reparation for the harm suffered.

It is a long-acknowledged principle of international law that any breach of an international obligation involves an obligation to make reparation.⁴¹¹ International human rights law equally applies to this general principle. Any transgression of the obligation to guarantee the effective enjoyment of human rights and to refrain from violating them entails the obligation to provide an effective remedy and reparation. As pointed out by the UN Independent Expert on the right to restitution, compensation and rehabilitation for victims of gross violations of human rights and fundamental freedoms, “the issue of State responsibility comes into play when a State is in breach of the obligation to respect internationally recognised human rights. Such obligation has its legal basis in international agreements, in particular international human rights treaties, and/or in customary international law, in particular those norms of customary international law which have a peremptory character (*ius cogens*)”.⁴¹² In December 2005, the UN General Assembly adopted the *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*, which constitute the legal benchmark on the subject.

411. See: Permanent Court of International Justice, Judgment of 13 September 1928, *Case Concerning the Factory at Chorzów (Germany v. Poland)*, Series A, No. 17; International Court of Justice: Judgment on the Merits, *Corfu Channel case*, June 1949; and Judgment on the Merits, *Military and paramilitary activities in and against Nicaragua (Nicaragua v. United States of America)*, 1984.

412. *Study concerning the right to restitution, compensation and rehabilitation for victims of gross violations of human rights and fundamental freedoms*, UN document E/CN.4/Sub.2/1993/8, 2 July 1993, para. 41.

The right to an effective remedy⁴¹³ ensures, first and foremost, that every individual has the right to claim his/her rights before an independent and impartial body so that the violation in question can be recognised, brought to an end if it is ongoing and adequate reparation provided. The right to a remedy is also bound up in various ways with the right to obtain reparation.

The right to reparation for human rights violations has been reaffirmed in numerous treaties and declarative instruments and reiterated by international human rights courts and bodies.⁴¹⁴ The Inter-American Court of Human Rights has said that the State's obligation to make reparation, in correlation with the right to reparation from which victims of human rights violations benefit, is "an unwritten law that is one of the basic principles of contemporary international law regarding the responsibility of the States. Thus, when an illicit fact occurs that is attributable to a State, there immediately arises an international responsibility of that State due to the violation of an international rule, with the consequent duty to redress and to make cease the consequences of the violation".⁴¹⁵

Reparation can take many different forms, including: restitution, compensation, rehabilitation, satisfaction and guarantees of non-recurrence. It must be adequate, fair and prompt. It can be individual or collective, depending on the right violated and the group of human beings affected.

2. Right to an Effective Remedy and Reparation and the Right to a Fair Trial

Anyone charged with, prosecuted for or convicted of an offence who has suffered a breach of his/her right to a fair trial and due process or wrongly found guilty has the right to an effective remedy and to obtain reparation.

Anyone charged with, prosecuted for or convicted of an offence who has suffered a breach of his/her right to a fair trial and due process or wrongly found guilty has

413. Article 2 (3) of the *International Covenant on Civil and Political Rights*; Article 25 of the *American Convention on Human Rights*; Article 7 (1) (a) of the *African Charter on Human and Peoples' Rights*; Article 9 of the *Arab Charter on Human Rights*; Article 13 of the *European Convention on Human Rights*; and Article 47 of the *Charter of Fundamental Rights of the European Union*.

414. In this regard, see: International Commission of Jurists, *The Right to a Remedy and to Reparation for Gross Human Rights Violations – Practitioners' Guide No.2*, ICJ, Geneva, 2006.

415. Inter-American Court of Human Rights, *Caracazo v. Venezuela*, Judgment of 29 August 2002, Series C No. 95, para. 76.

the right to an effective remedy and to obtain reparation.⁴¹⁶ In addition to situations in which the person charged, prosecuted or convicted has been unlawfully deprived of his/her liberty,⁴¹⁷ international human rights law stipulates two other situations that give rise to reparation:

- i. if a person has been finally convicted as the result of a miscarriage of justice⁴¹⁸; or
- ii. if the rules and standards relating to fair trial and due process in criminal proceedings have been breached.⁴¹⁹

3. Reparation for Miscarriages of Justice

Anyone who, in a final court decision, has been wrongly convicted of a criminal offence as the result of a miscarriage of justice has the right to obtain reparation.

A wrongful conviction or verdict refers to a situation in which a person has been found guilty by a final court decision that stems from a miscarriage of justice. Such a decision may be the result of proceedings that are consistent with standards relating to due process and have been handed down by an independent, impartial and competent court. However, the decision constitutes a miscarriage of justice (for example, the convicted person did not commit the offence or the offence was

416. See, *inter alia*: Human Rights Committee, Views of 22 July 2003, *Gómez Casafranca v. Peru*; Communication No. 981/2001; Views of 6 November 1997, *Polay Campos v. Peru*, Communication No. 577/1994; and Views of 27 July 2000, *Arredondo v. Peru*, Communication No. 688/1996; European Court of Human Rights Judgment of 8 April 2004, *Assanidze v. Georgia*, Application No. 71503/01 paras. 202-203, and Judgment of 8 July 2004, *Ilascu and others v. Moldova and Russia*, Application No. 48787/99; Inter-American Court of Human Rights Judgment of 17 September 1997, *Loayza-Tamayo v. Peru*, Series C No. 33; Judgment of 30 May 1999, *Castillo-Petrucci et al. v. Peru*, Series C No. 52; and Judgment of 31 August 2004, *Ricardo Canese v. Paraguay*, Series C No. 111; Inter-American Commission on Human Rights, Report No. 15/87 of 30 June 1987, Case 9635 (Argentina); and African Commission on Human and Peoples' Rights (*Constitutional Rights Project and Civil Liberties Organization v. Nigeria*, Communication 102/93; *Centre for Free Speech v. Nigeria*, Communication 206/97; *Constitutional Rights Project and Civil Liberties Organization v. Nigeria*, Communications 143/95 and 150/96; and *Constitutional Rights Project and Civil Liberties Organization v. Nigeria*, Communication 148/96).

417. Article 9 (5) of the *International Covenant on Civil and Political Rights*; Article 5 (5) of the *European Convention on Human Rights*; Article 14 (7) of the *Arab Charter on Human Rights*; and Principle M (1, h) of the *Principles and Guidelines on the Rights to a Fair Trial and Legal Assistance in Africa*.

418. Article 14(6) of the *International Covenant on Civil and Political Rights*; Article 3 of Protocol No. 7 to the 1950 *European Convention for the Protection of Human Rights and Fundamental Freedoms*; Article 10 of the *American Convention on Human Rights*; and Principle N (10, c) of the *Principles and Guidelines on the Rights to a Fair Trial and Legal Assistance in Africa*.

419. Article 2 (3) of the *International Covenant on Civil and Political Rights*; Article 13 of the *European Convention for the Protection of Human Rights and Fundamental Freedoms*; Articles 8 and 25 of the *American Convention on Human Rights*; Article 7 (1) (a) of the *African Charter on Human and Peoples' Rights* and Article 9 of the *Arab Charter on Human Rights*.

never committed) and is later reversed or the person is subsequently pardoned on the ground that a new or newly discovered fact has shown conclusively that a miscarriage of justice has taken place.⁴²⁰ Nevertheless, this situation applies only to convictions from a final court decision and does not cover convictions that have been overturned on appeal to a higher court. Similarly, any decision to reverse a judgment or grant a pardon must be based on the existence of a miscarriage of justice. Pardons or other measures that quash convictions on humanitarian grounds, grounds of fairness, for political reasons or as the result of criminal or prison policy do not fall into the category of reparation.

Although some international standards refer to the awarding of compensation in the case of convictions based on miscarriages of justice, the State's obligation to provide reparation does not end with the payment of compensation. It must take all necessary steps to reverse or nullify all the consequences of a wrongful conviction. In addition to the payment of compensation and depending on the circumstances of each case, this may involve other forms of reparation such as:

- i. social rehabilitation and measures to restore the honour and reputation of the person who has been wrongfully convicted;
- ii. restoration of legal rights if, as a result of such wrongful conviction, the person has effectively been deprived of them;
- iii. legal rehabilitation by taking steps to correct the person's criminal record.

States must enact legislation to ensure that anyone who has been wrongfully convicted of a criminal offence by a final court decision has an effective remedy available to them to enable them to receive payment of compensation within a reasonable time as well as to obtain other forms of reparation.

4. An Effective Remedy and Reparation for Breaches of the Right to a Fair Trial

Anyone who is charged, prosecuted or convicted in contravention of the international rules and standards on fair trial and due process has the right to an effective remedy and to obtain reparation.

Breaches of the international rules and standards on fair trial and due process may be many and varied. Some of them may affect the trial as a whole while others may just affect some aspects or stages of the proceedings. As a result, the remedies and

420. Human Rights Committee, General Comment No. 32, *Article 14, Right to equality before courts and tribunals and to a fair trial*, para. 52.

types of reparation applicable can vary in nature and scope depending on the kind of breach involved.

The general principle is that, if a breach of due process is the consequence of a decision handed down by a court or judge, then that decision must be rescinded, its effects reversed and its consequences rectified, even if it is a final decision that has the status of *res judicata*. For the latter to be the case, it is essential for the judicial decision to have been taken by a competent, independent and impartial court and for the proceedings in question to have fully observed the judicial guarantees of due process.⁴²¹ Sentences which emanate from criminal proceedings that have flagrantly violated international standards on fair trial and due process or which have been handed down by judicial bodies that do not meet the required levels of independence, impartiality and/or competence cannot be considered *res judicata*.

In such cases, international jurisprudence has thus taken the view that the right to an effective remedy and reparation means that the people in question must either be released or have their conviction reviewed in accordance with fair trial requirements, including through the re-opening of the proceedings and the holding of a new trial, and that they must be awarded compensation.⁴²² Such measures have been ordered by international jurisprudence in the case of:

- i. people who have been tried and convicted by “secret” or “anonymous” judges;⁴²³
- ii. people who have been tried and convicted in proceedings in which fundamental fair trial guarantees are lacking, for example, where there has been a

421. Human Rights Committee, Views of 6 November 1997, *Polay Campos v. Peru*, Communication No. 577/1994; Inter-American Court of Human Rights, Judgment of 30 May 1999, *Castillo Petruzzi et al. v. Peru*, Series C No. 52, paras. 218 and 219; Inter-American Commission on Human Rights, Report No. 15/87 of 30 June 1987, Case 9635 (Argentina); and African Commission on Human and Peoples’ Rights, judgments in the cases of *Media Rights Agenda v. Nigeria*, Communication N° 224/98, and *Avocats sans Frontières (Gaëtan Bwampamye)*, Communication N° 231/99.

422. See, *inter alia*: Human Rights Committee, Views of 28 October 1981, *Sendic v. Uruguay*, Communication No. 63/1979; and Views of 27 July 2000, *Arredondo v. Peru*, Communication No. 688/1996; European Court of Human Rights Judgment of 8 April 2004, *Assanidze v. Georgia*, Application No. 71503/01, Judgment of 8 July 2004, *Ilascu and others v. Moldova and Russia*, Application No. 48787/99; Judgment of 18 December 2003, *Ükünç and Günes v. Turkey*, Application No. 42775/98; Judgment of 23 October 2003, *Gençel v. Turkey*, Application No. 53431/99; Judgment of 18 May 2004, *Somogyi v. Italy*, Application No. 67972/01; and Judgment of 24 March 2005, *Stoichkov v. Bulgaria*, Application No. 9808/02; Inter-American Court of Human Rights, Judgment of 17 September 1997, *Loayza Tamayo v. Peru*, Series C No. 33, and Judgment of 25 November 2004, *Lori Berenson Mejía v. Peru*, Series C No. 119; and African Commission on Human and Peoples’ Rights (*Constitutional Rights Project and Civil Liberties Organization v. Nigeria*, Communication 102/93; *Centre for Free Speech v. Nigeria*, Communication 206/97; *Constitutional Rights Project and Civil Liberties Organization v. Nigeria*, Communications 143/95 and 150/96; and *Constitutional Rights Project and Civil Liberties Organization v. Nigeria*, Communication 148/96).

423. See, *inter alia*: Human Rights Committee, Views of 22 July 2003, *Gómez Casafranca v. Peru*; Communication No. 981/2001; Views of 6 November 1997, *Polay Campos v. Peru*, Communication No. 577/1994; Views of 27 July 2000, *Arredondo v. Peru*, Communication No. 688/1996; Inter-American Court of Human Rights, Judgment of 30 May 1999, *Castillo Petruzzi et al. v. Peru*, Series C No. 52; Judgment of 25 November 2004, *Lori Berenson Mejía v. Peru*, Series C No. 119.

breach of the principle of the presumption of innocence, the right to a public hearing (where there are no reasonable objective grounds for restricting that right), the right to be tried within a reasonable time, the right to examine and cross-examine witnesses and challenge the evidence put forward by the prosecution;⁴²⁴

- iii. civilians who have been tried and convicted by military courts;⁴²⁵ and
- iv. people who have been tried and convicted by emergency courts that do not comply with the level of independence and impartiality required of a judicial body or whose existence is not founded on reasonable objective grounds that justify proceedings and/or a court other than those available under ordinary jurisdiction.⁴²⁶

In the case of death sentences that have been handed down in proceedings that violate the procedural guarantees of due process (such as, for example, breaches of the rights of defence or appeal), international jurisprudence has concluded that an effective remedy and adequate reparation entail the release of the convicted person and their right to appeal against the sentence or to have a new trial.⁴²⁷

In the case of breaches of the right to appeal against conviction, international jurisprudence has concluded that an effective remedy against such breaches of due process means that the convicted person must have a judicial remedy available to

424. See, *inter alia*: Human Rights Committee, Views of 30 March 2005, *Vazgen Arutyuniantz v. Uzbekistan*, Communication No. 971/2001, Views of 20 July 2000, *Gridin v. the Russian Federation*, Communication No. 770/1997, and Views of 11 July 2006, *Barney v. Colombia*, Communication No. 1298/2004. See also: Inter-American Court of Human Rights, Judgment of 31 August 2004, *Ricardo Canese v. Paraguay*, Series C No. 111, and Inter-American Commission on Human Rights, Report No. 15/87 of 30 June 1987, Case 9635 (Argentina).

425. See, *inter alia*: Human Rights Committee, Views of 27 October 1987, *Cariboni v. Uruguay*, Communication No. 159/1983, and Views of 6 November 1997, *Polay Campos v. Peru*, Communication No. 577/1994; Inter-American Court of Human Rights, Judgment of 30 May 1999, *Castillo Petrucci et al. v. Peru*, Series C No. 52, and Judgment of 18 August 2000, *Cantoral-Benavides v. Peru*, Series C No. 69; Inter-American Commission on Human Rights, Report No. 22/78 of 18 November 1978, Case 2266 (Argentina); European Court of Human Rights, Judgment of 4 May 2006, *Ergin v. Turkey (No. 6)*, Application No. 47533/99 and Judgment of 21 September 2006, *Maszni v. Romania*, Application No. 59892/00; African Commission on Human and Peoples' Rights, Judgment of 6 November 2000, Communication No. 223/98 (Sierra Leone), and Judgment of 15 November 1999, Communication No. 206/97 (Nigeria).

426. See, *inter alia*: Human Rights Committee, Views of 20 July 1994, *Blanco v. Nicaragua*, Communication No. 328/1988, and Views of 4 April 2001, *Joseph Kavanagh v. Ireland*, Communication No. 819/1998; European Court of Human Rights, Judgment of 9 June 1998, *Incal v. Turkey*, Application No. 22678/93; Judgment of 28 October 1998, *Çiraklar v. Turkey*, Application No. 19601/92.

427. Human Rights Committee, Views of 1 November 1991, *Henry v. Jamaica*, Communication No. 230/1987, and Views of 31 March 1998, *McLeod v. Jamaica*, Communication No. 734/1997. See also: Inter-American Commission on Human Rights, Report No. 127/01 of 3 December 2001, Case No. 12.183, *Joseph Thomas (Jamaica)*; and Report No. 52/02 of 10 October 2002, Case No. 11.753, *Ramón Martínez Villareal (United States)*.

them so that they can appeal against conviction to a higher court. It has determined this to be the case if:

- i. the person concerned has been convicted in proceedings with no right of appeal to a higher court; or
- ii. a person who has been acquitted in the first instance is convicted on appeal and the decision and/or sentence handed down by the second instance court cannot be referred to a higher court for appeal or review; or
- iii. the remedy for appealing the decision to convict is confined solely to the formal and procedural aspects or just to some of the grounds (the facts or the law), thus preventing a full and genuine review of the judgment or sentence.⁴²⁸

As well as the payment of compensation, the re-opening of criminal proceedings, the holding of a new trial or the lodging of appeals against conviction, it is possible that other legal rights that have been violated as a consequence of the proceedings may need to be restored. “Restoring legal rights” means re-recognising the rights that have been denied to a person as a consequence of criminal proceedings or a conviction that have violated international standards on fair trial and due process. The most important example of this is the need to correct the criminal record of the person in question in the wake of a trial and conviction that have breached fair trial and due process standards.⁴²⁹

428. Human Rights Committee: Views of 11 July 2006, *Capellades v. Spain*, Communication No. 1211/2003; Views of 30 July 2003, *Semey v. Spain*, Communication No. 986/2001; Views of 31 October 2006, *Conde v. Spain*, Communication No. 1325/2004; Views of 28 March 2006, *Yuri Bandajevsky v. Belarus*, Communication No. 1100/2002; Views of 30 March 2005, *Khalilov v. Tajikistan*, Communication No. 973/2001; Views of 6 April 1998, *Domukovsky et al. v. Georgia*, Communications Nos. 623 to 627/1995, para 18.11; Views of 8 July 2004, *Saidov v. Tajikistan*, Communication No. 964/2001; and Views of 17 March 2003, *Gelazauskas v. Lithuania*, Communication No. 836/1998.

429. Inter-American Court of Human Rights, Judgment of 27 November 1998, *Loayza Tamayo v. Peru*, Series C No. 42; Judgment of 20 January 1999, *Suárez Rosero v. Ecuador*, Series C No. 44; and Judgment of 3 December 2001, *Cantoral Benavides v. Peru*, Series C No. 88. See also: Council of Europe, Committee of Ministers, Interim Resolution ResDH(2001)106, 23 July 2001, on *Violations of Freedom of Expression in Turkey: Individual Measures*; Interim Resolution ResDH(2004)13 on *Dorigo Paolo v. Italy*; Interim Resolution ResDH(99)258 of 15 January 1999; and Interim Resolution ResDH(2002)30 of 19 February 2002 (reopening of judicial proceedings in violation of the European Convention on Human Rights).