

ARREST AND DETENTION OF LAWYERS IN TURKEY

THE RIGHT TO

PRE-TRIAL RELEASE AT INTERNATIONAL LAW

Introduction

1. In Turkey, lawyers are subject to arbitrary arrest, detention and judicial harassment for merely defending their clients' rights in politically sensitive cases.

2. As a signatory to the *International Covenant on Civil and Political Rights (ICCPR)*, the *Optional Protocol to the International Covenant on Civil and Political Rights*, the *International Convention on the Elimination of All Forms of Racial Discrimination (CERD)* and the *European Convention on Human Rights (ECHR)*, Turkey is legally obligated to ensure that individuals within its territory enjoy, without discrimination, the right to be presumed innocent, the right not to be arbitrarily arrested or detained, the right to pre-trial release and to be brought to trial within a reasonable time and the right to obtain a remedy in relation to any violation of these rights. As Turkey is a member of the Council of Europe, the relevant recommendations of the Committee of Ministers on pre-trial detention and release apply.

Background

3. Turkish lawyers who defend their client's civil and political rights in politically sensitive cases are frequently subjected to judicial harassment because the state identifies them with either their clients or their clients' cause.¹ "Sensitive" issues include, "in particular expressing alternative identities (ethnic and religious minorities' rights, particularly the Kurdish issue, and sexual minorities), and criticising the State and its institutions (the functioning of the institutions, including the independence of the judiciary and the impunity of the State and the army for human rights violations)."²

4. Defence lawyers representing imprisoned Kurdistan Workers Party (PKK) leader, Mr. Abdullah Öcalan, have been particularly at risk. At least 68 of them have been the

¹ The Observatory for the Protection of Human Rights Defenders, *Turkey: Human Rights Defenders, Guilty Until Proven Innocent: International Fact-Finding Mission Report* (May 2012,) at p.36.

² *Ibid.*, at p. 5.

subject of more than one hundred criminal cases since 2005 that accuse them of violating Article 314 of the Turkish Penal Code (TPC) and Articles 6 and 7 of the *Anti-Terrorism Law (ATL)* and of “complicity with a terrorist organisation”.³

5. Recently, and most seriously, on November 22, 2011, under an operation aiming to dismantle an alleged terrorist network known as the Kurdish Communities Union (KCK) - an organisation said to be the “urban branch” of the PKK, a campaign of arrest targeted 39 lawyers and one legal worker. 36 lawyers remain in custody and faced trial on 16-18 July 2012 in Istanbul.

6. In a Mission to Turkey in 2007, the Working Group on Arbitrary Detention discovered numerous persons accused of terrorism being held in remand detention for “unacceptably long periods, in some cases more than 10 years, without having been judged.”⁴

7. In 2011, following his visit to Turkey, the Commissioner for Human Rights of the Council of Europe expressed concern about the “the excessive resort to remands in custody and their length, notably in light of the case-law of the ECtHR”.⁵ The report noted that the “European Court of Human Rights...delivered more than 2200 judgments against Turkey in the period 1995-2010. Almost 700 of these judgments concerned violations of the right to a fair trial, and more than 500 related to the right to personal liberty and security.”⁶ As of September 2011, 144 judgments of the European Court of Human Rights, primarily concerning the excessive resort to and length of detention on remand, were under supervision of execution by the Committee of Ministers.⁷

8. While the Commissioner noted that, in recent years, important reforms have been made to bring Turkish legislation into line with European Court of Human Rights standards and the letter and spirit of the Turkish Constitution, the case law of the European Court of Human Rights still identifies many procedural shortcomings. The Commissioner also noted continued defective reasoning in decisions concerning detention in custody; the failure to resort to existing alternatives to detention – bail is almost never accepted by courts; long time limits for detention – while the new Turkish Code of Criminal Procedure (TCCP) introduced upper limits for detention, these are “still very long, especially for crimes against state security”; and the lack of an effective domestic remedy and compensation for unlawful detention.⁸

³ *Ibid.*, at 36.

⁴ Human Rights Council, Report of the Working Group on Arbitrary Detention, A/HRC/4/40/Add.5 , 7 February 2007, at p.2.

⁵ Council of Europe, Report by Thomas Hammarberg, Commissioner for Human Rights of the Council of Europe following his visit to Turkey from 10 to 14 October 2011, at p.2.

⁶ *Ibid.*, at p.5.

⁷ *Ibid.*, at p.9.

⁸ *Ibid.*, at pp.10-12.

International standards

9. There is an extensive array of international instruments governing pre-trial detention, which is viewed in international law as an option to be used only when strictly necessary and as a last resort. A presumption in favour of pre-trial release is based on the presumption of innocence and the right to liberty and security of the person and must be afforded to all persons equally.

10. Pre-trial detention is permitted by international law, under certain, limited circumstances only, consistent with the following fundamental principles:

- the right not to be arbitrarily detained or imprisoned;
- the right to know the reasons for arrest and to promptly challenge the legitimacy of detention;
- the right to trial within a reasonable time or release;
- a presumption in favour of pre-trial release (with or without conditions); and
- the right to a remedy for unlawful deprivation of liberty.

11. This section provides a general overview of the international legal standards surrounding a right to pre-trial release.⁹ Standards contained in international and regional human rights conventions are binding on states that have ratified or acceded to these instruments. Other standards may be binding, to the extent that they enunciate principles contained in international conventions or reflect customary international law. While many of the principles, guidelines, standards and recommendations are not binding *per se*, they provide moral authority and practical guidance for State conduct and there is an expectation that States will respect them.

12. The relevant international instruments in relation to arbitrary arrest and detention in Turkey include: the *Universal Declaration of Human Rights* (UDHR)¹⁰, *International Covenant on Civil and Political Rights* (ICCPR),¹¹ *Optional Protocol to the International Covenant on Civil and Political Rights*,¹² the *Convention on the Rights of the Child*

⁹ Useful sources consulted in the preparation of this section include: Office of the UN High Commissioner for Human Rights in association with the International Bar Association (2003), *Human Rights in the Administration of Justice: A Manual on Human Rights for Judges, Prosecutors and Lawyers* (United Nations), particularly, Chapter 5, “Human Rights and Arrest, Pre-trial Detention and Administrative Detention”; UN Centre for Human Rights (1994) Professional Training Series No.3: *Human Rights and Pre-trial Detention – A Handbook of International Standards relating to Pre-trial Detention* (United Nations); and American Bar Association Rule of Law Initiative, *Handbook of International Standards on Pretrial Detention Procedure* (2010).

¹⁰ *Universal Declaration of Human Rights*, adopted 10 Dec. 1984, online at: <http://www.un.org/en/documents/udhr/index.shtml>.

¹¹ *International Covenant on Civil and Political Rights*, 16 Dec. 1966, U.N. Doc. A/6316, 999 U.N.T.S. 171, entered into force 23 March 1976, online at: <http://www2.ohchr.org/english/law/ccpr.htm>.

¹² *Optional Protocol to the International Covenant on Civil and Political Rights*, adopted 16 December 1966, 999 U.N.T.S. 171, entered into force 23 March 1976, online at: <http://www2.ohchr.org/english/law/ccpr-one.htm>.

(CRC),¹³ *International Convention on the Elimination of All Forms of Racial Discrimination* (CERD),¹⁴ *Convention on the Elimination of All Forms of Discrimination against Women* (CEDAW)¹⁵ *Standard Minimum Rules for the Treatment of Prisoners* (“Standard Minimum Rules”)¹⁶, *United Nations Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment* (“Body of Principles”)¹⁷, *United Nations Standard Minimum Rules for Non-custodial Measures* (“The Tokyo Rules”)¹⁸, *United Nations Standard Minimum Rules for the Administration of Juvenile Justice* (“The Beijing Rules”)¹⁹, *United Nations Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders* (“The Bangkok Rules”)²⁰, *United Nations Rules for the Protection of Juveniles Deprived of their Liberty* (“Havana Rules”)²¹ and *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law* (“Basic Principles and Guidelines on the Right to a Remedy and Reparation”).²²

13. Regional instruments include the *European Convention on Human Rights*²³ (ECHR), *Recommendation Rec(2006)2 of the Committee of Ministers to member*

¹³ *Convention on the Rights of the Child*, adopted 20 Nov. 1989, entered into force 2 Sept. 1990, UN Doc. A/44/49, at 166 (1989), online at: <http://www2.ohchr.org/english/law/crc.htm>.

¹⁴ *International Convention on the Elimination of All Forms of Racial Discrimination*, adopted 21 December 1965, entered into force 4 January 1969, 660 U.N.T.S. 195, online at: <http://www2.ohchr.org/english/law/cerd.htm>.

¹⁵ *Convention on the Elimination of All Forms of Discrimination against Women*, adopted 18 December 1979, entered into force 3 September 1981, UN Doc. A/34/46, at 193 (1979), online at: <http://www2.ohchr.org/english/law/cedaw.htm>.

¹⁶ *Standard Minimum Rules for the Treatment of Prisoners*, *United Nations Secretariat, Report of First United Nations Congress on the Prevention of Crime and the Treatment of Offenders*, Geneva, Switzerland (Aug. 22-Sept. 3, 1955), annex I.A. Approved by Economic and Social Council, E.S.C. Res. 663C XXIV (July 31, 1957). Amended by the Economic and Social Council, E.S.C. Res. 2076 LXII (May 13, 1997), online at: <http://www2.ohchr.org/english/law/treatmentprisoners.htm>.

¹⁷ *Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment*, G.A. Res. 43/173, U.N. Doc. A/RES/43/173 (Dec. 9, 1988), online at: <http://www2.ohchr.org/english/law/bodyprinciples.htm>.

¹⁸ *United Nations Standard Minimum Rules for Non-custodial Measures (The Tokyo Rules)*, G.A. Res. 45/110, U.N. Doc. A/RES/45/110 (Dec. 14, 1990), online at: <http://www2.ohchr.org/english/law/tokyorules.htm>.

¹⁹ *United Nations Standard Minimum Rules for the Administration of Juvenile Justice ("The Beijing Rules")*, G.A. Res. 40/33, U.N. Doc. A/RES/40/33 (Nov. 29, 1985), online at: <http://www2.ohchr.org/english/law/beijingrules.htm>.

²⁰ *United Nations Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders (the Bangkok Rules)*, adopted by General Assembly Resolution 65/229 of 21 December 2010, online at: <http://daccess-ods.un.org/TMP/7960160.97068787.html>.

²¹ *United Nations Rules for the Protection of Juveniles Deprived of their Liberty (Havana Rules)*, G.A. Res. 45/113, U.N. Doc. A/RES/45/113 (Dec. 14, 1990), online at: http://www2.ohchr.org/english/law/res45_113.htm.

²² *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*, adopted and proclaimed by General Assembly resolution 60/147 of 16 December 2005, online at: <http://www2.ohchr.org/english/law/remedy.htm>

²³ *European Convention for the Protection of Human Rights and Fundamental Freedoms*, Nov. 4, 1950, 213 U.N.T.S. 222, entered into force 3 September 1953, online at:

states on the European Prison Rules (“Council of Europe, Recommendation (2006)2”),²⁴ Recommendation Rec(2006)13 of the Committee of Ministers to member states on the use of remand in custody, the conditions in which it takes place and the provision of safeguards against abuse (“Council of Europe, Recommendation (2006)13”),²⁵ and Recommendation CM/Rec(2008)11 of the Committee of Ministers to member states on the European Rules for juvenile offenders subject to sanctions or measures (“Council of Europe, Recommendation (2008)11”).²⁶

14. While these standards are concerned primarily with pre-trial detention and release, also relevant are other due process rights, including the right to counsel, the right to a fair trial and the right to participation, and the rights of persons in detention, generally.

Presumption of Innocence

15. As a member of the United Nations, Turkey is obligated to respect the presumption of innocence, as set out in the *Universal Declaration of Human Rights (UDHR)*, the *ICCPR* and the *ECHR*.

A. International Instruments

UDHR, Article 11(1):

11. (1) Everyone charged with a penal offence has the right to be presumed innocent until proved guilty according to law in a public trial at which he has had all the guarantees necessary for his defence.

ICCPR, Articles 10(2)(a) and 14(2):

10. (2)(a) Accused persons shall, save in exceptional circumstances, be segregated from convicted persons and shall be subject to separate treatment appropriate to their status as unconvicted persons;

14. (2) Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law.

<http://conventions.coe.int/treaty/Commun/QueVoulezVous.asp?NT=005&CM=7&DF=24/07/2012&CL=ENG>.

²⁴ Recommendation Rec(2006)2 of the Committee of Ministers to member states on the European Prison Rules, adopted by the Committee of Ministers on 11 January 2006, online at:

http://www.coe.int/t/DGHL/STANDARDSETTING/PRISONS/Recommendations_en.asp.

²⁵ Recommendation Rec(2006)13 of the Committee of Ministers to member states on the use of remand in custody, the conditions in which it takes place and the provision of safeguards against abuse, adopted by the Committee of Ministers on 27 September 2006, online at:

http://www.coe.int/t/DGHL/STANDARDSETTING/PRISONS/Recommendations_en.asp.

²⁶ Recommendation CM/Rec(2008)11 of the Committee of Ministers to member states on the European Rules for juvenile offenders subject to sanctions or measures, adopted by the Committee of Ministers on 5 November 2008, online at:

http://www.coe.int/t/DGHL/STANDARDSETTING/PRISONS/Recommendations_en.asp.

CRC, Article 40(2)(b)(i):

40. (2)(b) Every child alleged as or accused of having infringed the penal law has at least the following guarantees:

...(i) To be presumed innocent until proven guilty according to law;

Standard Minimum Rules, Rule 84(2):

84. (2) Unconvicted prisoners are presumed to be innocent and shall be treated as such.

B. Regional Instruments

ECHR, Article 6(2):

6. (2) Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.

Council of Europe, Recommendation (2006)2, paragraph 95(1):

95. (1) The regime for untried prisoners may not be influenced by the possibility that they may be convicted of a criminal offence in the future.

Council of Europe, Recommendation (2008)11, paragraph 108:

108. All detained juvenile offenders whose guilt has not been determined by a court shall be presumed innocent of an offence and the regime to which they are subject shall not be influenced by the possibility that they may be convicted of an offence in the future.

C. Interpretation

16. The Human Rights Committee, in *CCPR General Comment No. 32*, states, at paragraph 30:

According to article 14, paragraph 2 everyone charged with a criminal offence shall have the right to be presumed innocent until proven guilty according to law. The presumption of innocence, which is fundamental to the protection of human rights, imposes on the prosecution the burden of proving the charge, guarantees that no guilt can be presumed until the charge has been proved beyond reasonable doubt, ensures that the accused has the benefit of doubt, and requires that persons accused of a criminal act must be treated in accordance with this principle...²⁷

²⁷ UN Human Rights Committee (HRC), *CCPR General Comment No. 32: Article 14 (Right to equality before courts and tribunals and to a fair trial)*, 23 August 2007, CCPR/C/GC/32, para. 30, online at: <http://www2.ohchr.org/english/bodies/hrc/comments.htm>.

17. In *CCPR General Comment No. 21*, the Human Rights Committee states, at paragraph 9:

Article 10, paragraph 2 (a), provides for the segregation, save in exceptional circumstances, of accused persons from convicted ones. Such segregation is required in order to emphasize their status as unconvicted persons who at the same time enjoy the right to be presumed innocent as stated in article 14, paragraph 2...²⁸

Non-discrimination

18. Turkey is obligated to ensure that the international human rights of persons within its territory are enjoyed without distinction of any kind.

A. International Instruments

UDHR, Article 2:

2. Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. Furthermore, no distinction shall be made on the basis of the political, jurisdictional or international status of the country or territory to which a person belongs, whether it be independent, trust, non-self-governing or under any other limitation of sovereignty.

ICCPR, Articles 2(1) and 26:

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

26. All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

²⁸ UN Human Rights Committee (HRC), *CCPR General Comment 21: Article 10 (Humane treatment of persons deprived of liberty)*, 10 April 1992, *Forty-fourth session, 1992*, para. 9, online at: <http://www.unhcr.ch/tbs/doc.nsf/%28Symbol%29/3327552b9511fb98c12563ed004cbe59?Opendocument>.

CERD, Article 5(a):

5. In compliance with the fundamental obligations laid down in article 2 of this Convention, States Parties undertake to prohibit and to eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law, notably in the enjoyment of the following rights:

(a) The right to equal treatment before the tribunals and all other organs administering justice;

CEDAW, Article 15(1):

15. (1) States Parties shall accord to women equality with men before the law.

Body of Principles, Principle 5(1):

5. (1) These principles shall be applied to all persons within the territory of any given State, without distinction of any kind, such as race, colour, sex, language, religion or religious belief, political or other opinion, national, ethnic or social origin, property, birth or other status.

Standard Minimum Rules, Rule 6:

6. (1) The following rules shall be applied impartially. There shall be no discrimination on grounds of race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

(2) On the other hand, it is necessary to respect the religious beliefs and moral precepts of the group to which a prisoner belongs.

B. Regional Instruments

ECHR, Article 14:

14. The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

C. Interpretation

19. The Human Rights Committee, in *CCPR General Comment No. 32*, states, at paragraph 8, that the right to equality before courts and tribunals in general terms, guarantees, in addition to the principles mentioned in the second sentence of Article 14, paragraph 1, those of equal access and equality of arms, and ensures that the parties to the proceedings in question are treated without any discrimination.²⁹

²⁹ *CCPR General Comment No. 32, supra* note 27, at para. 8.

20. In *CCPR General Comment 18*, the Human Rights Committee states, at paragraph 1, that

Non-discrimination, together with equality before the law and equal protection of the law without any discrimination, constitute a basic and general principle relating to the protection of human rights. Thus, article 2, paragraph 1, of the International Covenant on Civil and Political Rights obligates each State party to respect and ensure to all persons within its territory and subject to its jurisdiction the rights recognized in the Covenant without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. Article 26 not only entitles all persons to equality before the law as well as equal protection of the law but also prohibits any discrimination under the law and guarantees to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.³⁰

Right to Liberty and Security of the Person – freedom from arbitrary arrest and detention

21. All persons in Turkey have an internationally-protected right to liberty and security of the person, which includes the right to be free from arbitrary arrest and detention. To be lawful under international human rights law, arrests and detentions must be carried out in accordance with both formal and substantive rules of domestic and international law, including the principle of non-discrimination, and must not be arbitrary.

22. The prohibition against “arbitrary” detention requires that the circumstances and procedures under which a person can be lawfully detained must be enshrined in domestic law. Detention decisions should be made according to established criteria.

A. International Instruments

UDHR, Articles 3 and 9:

- 3. Everyone has the right to life, liberty and security of person.
- 9. No one shall be subjected to arbitrary arrest, detention or exile.

ICCPR, Article 9 (1):

- 9. (1) Everyone has the right to liberty and security of person. No one shall be

³⁰ UN Human Rights Committee (HRC), *CCPR General Comment No. 18: Non-discrimination*, 11 October 1989, Thirty-seventh session, 1989, para. 1, online at: <http://www.unhcr.ch/tbs/doc.nsf/%28Symbol%29/3888b0541f8501c9c12563ed004b8d0e?Opendocument>.

subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.

CRC, Article 37(b):

37. (b) No child shall be deprived of his or her liberty unlawfully or arbitrarily. The arrest, detention or imprisonment of a child shall be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time...

CERD, Article 5(b):

5. In compliance with the fundamental obligations laid down in article 2 of this Convention, States Parties undertake to prohibit and to eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law, notably in the enjoyment of the following rights:...

(b) The right to security of person and protection by the State against violence or bodily harm, whether inflicted by government officials or by any individual group or institution;

Body of Principles, Principles 9, 12, 13, 36(2):

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

12. (1) There shall be duly recorded:

(a) The reasons for the arrest;

(b) The time of the arrest and the taking of the arrested person to a place of custody as well as that of his first appearance before a judicial or other authority;

(c) The identity of the law enforcement officials concerned;

(d) Precise information concerning the place of custody.

(2) Such records shall be communicated to the detained person, or his counsel, if any, in the form prescribed by law.

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

36. (2) The arrest or detention of such a person pending investigation and trial shall be carried out only for the purposes of the administration of justice on

grounds and under conditions and procedures specified by law. The imposition of restrictions upon such a person which are not strictly required for the purpose of the detention or to prevent hindrance to the process of investigation or the administration of justice, or for the maintenance of security and good order in the place of detention shall be forbidden...

The Tokyo Rules, Rule 3:

3.1 The introduction, definition and application of non-custodial measures shall be prescribed by law.

3.2 The selection of a non-custodial measure shall be based on an assessment of established criteria in respect of both the nature and gravity of the offence and the personality, background of the offender, the purposes of sentencing and the rights of victims.

3.3 Discretion by the judicial or other competent independent authority shall be exercised at all stages of the proceedings by ensuring full accountability and only in accordance with the rule of law.

Havana Rules, Rule 68 and 70:

68. Legislation or regulations adopted by the competent administrative authority should establish norms concerning the following, taking full account of the fundamental characteristics, needs and rights of juveniles:

- (a) Conduct constituting a disciplinary offence;
- (b) Type and duration of disciplinary sanctions that may be inflicted;
- (c) The authority competent to impose such sanctions;
- (d) The authority competent to consider appeals.

70. No juvenile should be disciplinarily sanctioned except in strict accordance with the terms of the law and regulations in force....

B. Regional Instruments

ECHR, Article 5:

5. (1) Everyone has the right to liberty and security of person.

No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:...

- (c) the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority of reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so...

Council of Europe Recommendation (2006)13, paragraph 8(1):

8. (1) ...objective criteria shall be applied by the judicial authorities responsible for determining whether suspected offenders shall be remanded in custody or, where this has already happened, whether such remand shall be extended.

Council of Europe Recommendation (2008)11, paragraph 3:

3. Sanctions and measures shall be imposed by a court or if imposed by another legally recognised authority they shall be subject to prompt judicial review. They shall be determinate and imposed for the minimum necessary period and only for a legitimate purpose.

C. Interpretation

23. The Human Rights Committee, in *CCPR General Comment No. 8*, states, at paragraph 1, that Article 9(1)

is applicable to all deprivations of liberty, whether in criminal cases or in other cases such as, for example, mental illness, vagrancy, drug addiction, educational purposes, immigration control, etc.³¹

24. The Committee on the Rights of the Child, in *CRC General Comment No. 10 (2007)*, paragraph 79, states:

The leading principles for the use of deprivation of liberty are: (a) the arrest, detention or imprisonment of a child shall be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time; and (b) no child shall be deprived of his/her liberty unlawfully or arbitrarily.³²

25. The Human Rights Committee has held that the obligation to ensure security of the person includes an obligation to protect non-detained individuals from threats made by persons in authority.³³

26. In cases involving preventive detention for reasons of public security or public order, the Human Rights Committee has stated in *CCPR General Comment No. 8*, at paragraph 4,

³¹ UN Human Rights Committee (HRC), *CCPR General Comment No. 8: Right to liberty and security of persons (Art. 9)*, 30 June 1982, Sixteenth session, 1982, para. 1, online at: <http://www.unhcr.ch/tbs/doc.nsf/%28Symbol%29/f4253f9572cd4700c12563ed00483bec?Opendocument>.

³² UN Committee on the Rights of the Child (CRC), *CRC General Comment No. 10 (2007): Children's rights in juvenile justice*, 25 April 2007, CRC/C/GC/10, para. 79, online at: <http://www2.ohchr.org/english/bodies/crc/comments.htm>.

³³ Communication No. 449/1991, *Barbarin Mojica v. Dominican Republic*, at para. 5.4; Communication No. 314/1988, *Bwalya v. Zambia*, at para. 6.4.

Also if so-called preventive detention is used, for reasons of public security, it must be controlled by these same provisions, i.e. it must not be arbitrary, and must be based on grounds and procedures established by law (para. 1), information of the reasons must be given (para. 2) and court control of the detention must be available (para. 4) as well as compensation in the case of a breach (para. 5). And if, in addition, criminal charges are brought in such cases, the full protection of article 9 (2) and (3), as well as article 14, must also be granted.³⁴

“In accordance with the law”

27. The Human Rights Committee has held that Article 9(1) of *ICCPR* requires that the grounds for arrest and detention must be clearly established by domestic legislation and made in accordance with that law.³⁵

28. The European Court of Human Rights has held that the requirements in Article 5(1) of the *ECHR* that arrest or detention be “lawful” and “in accordance with a procedure prescribed by law”

stipulate not only full compliance with the procedural and substantive rules of national law, but also that any deprivation of liberty be consistent with the purpose of Article 5 and not arbitrary... In addition, given the importance of personal liberty, it is essential that the applicable national law meet the standard of “lawfulness” set by the Convention, which requires that all law, whether written or unwritten, be sufficiently precise to allow the citizen – if need be, with appropriate advice – to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail...³⁶

29. The European Court of Human Rights has also ruled that the recording of accurate holding data concerning the date, time and location of detainees, as well as the ground for the detention and the name of the persons effecting it, is necessary for the detention of an individual to be compatible with the requirements of lawfulness for the purposes of Article 5(1).³⁷

“Arbitrary”

30. With respect to “arbitrary arrest”, the Human Rights Committee has explained that

The drafting history of article 9, paragraph 1, confirms that “arbitrariness” is not to be equated with “against the law”, but must be interpreted more broadly to

³⁴ *CCPR General Comment No. 8, supra* note 31, at para. 4.

³⁵ Communication No. 702/1996, *Clifford McLawrence v. Jamaica*, at para. 5.5; Communication No. 770/1997, *Dimitry L. Gridin v. Russian Federation*, at para 8.1.

³⁶ *Eur. Court HR, Steel and Others v. the United Kingdom* (App. No.67/1997/851/1058), at para. 54.

³⁷ *Eur. Court of HR, Case of Cakici v. Turkey* (App. No. 23657/94), at para. 105.

include elements of inappropriateness, injustice, lack of predictability and due process of law. As the Committee has observed on a previous occasion, this means that remand in custody pursuant to lawful arrest must not only be lawful but reasonable in all the circumstances.⁵ Remand in custody must further be necessary in all the circumstances, for example, to prevent flight, interference with evidence or the recurrence of crime.³⁸

31. According to the Human Rights Committee, when the duration of pre-trial detention is excessive, set according to the length of potential sentence or applied automatically, it may be a violation of the right to liberty and the presumption of innocence.³⁹ In *Salim Abbassi v. Algeria*, the Committee recalled its jurisprudence that, “in order to avoid a characterization of arbitrariness, detention should not continue beyond the period for which the State party can provide appropriate justification”.⁴⁰ Instances where individuals have been arrested without warrant or summons and kept in detention without a court order have been found to violate the right to freedom from arbitrary arrest and detention in Article 9(1).⁴¹ The cases say that detention should not be of a punitive character.⁴²

32. The European Court of Human Rights has stated that the “reasonableness” of the suspicion on which an arrest must be based forms an essential safeguard against arbitrary arrest and detention because:

having a "reasonable suspicion" presupposes the existence of facts or information which would satisfy an objective observer that the person concerned may have committed the offence. What may be regarded as "reasonable" will however depend upon all the circumstances.⁴³

Right to be informed of reasons for arrest and of any charges

33. Turkey is obligated to promptly inform persons arrested and detained of the reasons for an arrest and of any charges, in a language which they understand and in sufficient detail so as to be able to take proceedings to have the lawfulness of their detention decided speedily.

³⁸ Communication No. 458/1991, *Albert Womah Mukong v. Cameroon*, at para. 9.8, reaffirmed, *inter alia*, in Communication No. 1085/2002, *Abdelhamid Taright, Ahmed Touadi, Mohamed Remli and Amar Yousfi v. Algeria*, at para. 8.3, and Communication No. 1128/2002, *Rafael Marques de Morais v. Angola*, at para. 6.1.

³⁹ Human Rights Committee (2006) Concluding Observations: Italy (CCPR/C/ITA/CO/5), at para. 14.

⁴⁰ Communication No. 1172/2003, *Salim Abbassi v. Algeria*, at para. 8.4.

⁴¹ Communication No. 90/1981, *Luyeye Magana ex-Philibert v. Zaire*, at para. 8.

⁴² *de Morais v. Angola*, *supra*, note 38, at para. 6.1.

⁴³ *Eur. Court HR, Fox, Campbell and Hartley v. The United Kingdom* (App no. 12244/86, 12245/86, 12383/86), at para. 32.

A. International Instruments

ICCPR, Articles 9(2), 14(3):

9. (2) Anyone who is arrested shall be informed, at the time of arrest, of the reasons for his arrest and shall be promptly informed of any charges against him.

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

(a) To be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him;

Body of Principles, Principles 10 and 12:

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

12. (1) There shall be duly recorded:

(a) The reasons for the arrest;

...

(2) Such records shall be communicated to the detained person, or his counsel, if any, in the form prescribed by law.

Tokyo Rules, Rule 7.1:

7.1 Basic procedural safeguards such as...the right to be notified of the charges...shall be guaranteed at all stages of proceedings.

B. Regional Instruments

ECHR, Article 5(2):

5. (2) Everyone who is arrested shall be informed promptly, in a language which he understands, of the reasons for his arrest and the charge against him.

C. Interpretation

34. The Human Rights Committee, in *CCPR General Comment No. 32*, states, at paragraph 31,

The right of all persons charged with a criminal offence to be informed promptly and in detail in a language which they understand of the nature and cause of criminal charges brought against them, enshrined in paragraph 3 (a), is the first of the minimum guarantees in criminal proceedings of article 14. This guarantee applies to all cases of criminal charges, including those of persons not in detention, but not to criminal investigations preceding the laying of charges.⁶⁰ Notice of the reasons for an arrest is separately guaranteed in article 9, paragraph

2 of the Covenant.⁶¹ The right to be informed of the charge “promptly” requires that information be given as soon as the person concerned is formally charged with a criminal offence under domestic law,⁶² or the individual is publicly named as such...⁴⁴

35. In *Campbell v. Jamaica*, the Human Rights Committee has held that “one of the most important reasons for the requirement of “prompt” information on a criminal charge is to enable a detained individual to request a prompt decision on the lawfulness of his or her detention by a competent judicial authority.”⁴⁵ An arrest and detention for a “presumed connection with subversive activities” is not sufficient for the purposes of the *ICCPR*, including Article 9(2), without an explanation as to “the scope and meaning of ‘subversive activities’, which constitute a criminal offence under the relevant legislation”, particularly where the right to freedom of expression is implicated.⁴⁶

36. According to the European Court of Human Rights, Article 5(2) of the *European Convention on Human Rights*,

contains the elementary safeguard that any person arrested should know why he is being deprived of his liberty. This provision is an integral part of the scheme of protection afforded by Article 5...by virtue of paragraph 2...any person arrested must be told, in simple, non-technical language that he can understand, the essential legal and factual grounds for his arrest, so as to be able, if he sees fit, to apply to a court to challenge its lawfulness in accordance with paragraph 4 (art. 5-4)... Whilst this information must be conveyed “promptly”...it need not be related in its entirety by the arresting officer at the very moment of the arrest. Whether the content and promptness of the information conveyed were sufficient is to be assessed in each case according to its special features.⁴⁷

Right to be Promptly Brought Before a Judge or Other Judicial Officer and to trial within a reasonable time or release

37. Individuals arrested in Turkey must be brought promptly before a judicial authority so that the court may determine whether an initial detention was justified and whether or not the accused shall be remanded in custody pending trial. An individual detained is entitled to be tried within a reasonable time, or release pending trial. The judicial authority reviewing the arrest and detention must be independent of the executive, must personally hear the person concerned, and must be empowered to direct pretrial detention or release the person arrested. The courts must give reasons for decisions imposing pretrial detention or refusing a request for release. Detainees should have the right, contained in law, to appeal to a higher judicial or other competent authority a decision to detain or to revoke conditional release.

⁴⁴ CCPR General Comment No. 32, *supra* note 27, at para. 31.

⁴⁵ Communication No. 248/1987, *Campbell v. Jamaica*, at para. 6.3.

⁴⁶ Communication No. 33/1978, *Carballal v. Uruguay*, at paras. 12-13.

⁴⁷ *Fox, Campbell and Hartley v. UK*, *supra*, note 43, at para. 40.

A. International Instruments

ICCPR, Article 9(3):

9. (3) Anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release...

Body of Principles, Principles 11, 37, 38:

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

...(3) A judicial or other authority shall be empowered to review as appropriate the continuance of detention.

37. A person detained on a criminal charge shall be brought before a judicial or other authority provided by law promptly after his arrest. Such authority shall decide without delay upon the lawfulness and necessity of detention. No person may be kept under detention pending investigation or trial except upon the written order of such an authority. A detained person shall, when brought before such an authority, have the right to make a statement on the treatment received by him while in custody

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

Tokyo Rules, Rule 6.3:

6.3 The offender shall have the right to appeal to a judicial or other competent independent authority in cases where pre-trial detention is employed.

The Beijing Rules, Rule 7.1:

7.1 Basic procedural safeguards such as...the right to appeal to a higher authority shall be guaranteed at all stages of proceedings.

Havana Rules, Rule 70:

70. ...No juvenile should be sanctioned unless he or she has been informed of the alleged infraction in a manner appropriate to the full understanding of the juvenile, and given a proper opportunity of presenting his or her defence, including the right of appeal to a competent impartial authority...

B. Regional Instruments

ECHR, Article 5(3):

5. (3) Everyone arrested or detained in accordance with the provisions of paragraph 1(c) of this article shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial...

Council of Europe, Recommendation (2006)13, paragraphs 14-16 and 18:

14. (1) After his or her initial deprivation of liberty by a law enforcement officer (or by anyone else so authorised to act), someone suspected of having committed an offence shall be brought promptly before a judicial authority for the purpose of determining whether or not this deprivation of liberty is justified, whether or not it requires prolongation or whether or not the suspected offender shall be remanded in custody or subjected to alternative measures.

(2) The interval between the initial deprivation of liberty and this appearance before such an authority should preferably be no more than forty-eight hours and in many cases a much shorter interval may be sufficient.

15. The existence of an emergency in accordance with Article 15 of the European Convention on Human Rights shall not lead to an interval greater than seven days between the initial deprivation of liberty and the appearance before a judicial authority with a view to remanding in custody unless it is absolutely impossible to hold a hearing.

16. The judicial authority responsible for remanding someone in custody or authorising its continuation, as well as for imposing alternative measures, shall hear and determine the matter without delay.

18. Any person remanded in custody, as well as anyone subjected to an extension of such remand or to alternative measures, shall have a right of appeal against such a ruling and shall be informed of this right when this ruling is made.

C. Interpretation

Purpose of requirement to be brought before a judicial officer

38. The Human Rights Committee has stated that the purpose of the first sentence of Article 9(3) is to bring the detention of a person charged with a criminal offence under judicial control. “A failure to do so at the beginning of someone's detention, would thus lead to a continuing violation of article 9(3), until cured.”⁴⁸

⁴⁸ Communication No. 521/1992, *Vladimir Kulomin v. Hungary*, at para. 11.3.

39. The European Court of Human Rights has ruled that the purpose of Article 5(3) of the *European Convention on Human Rights* is

to ensure that arrested persons are physically brought before a judicial officer promptly. Such automatic expedited judicial scrutiny provides an important measure of protection against arbitrary behaviour, incommunicado detention and ill-treatment.⁴⁹

“Automatic”

40. Under the *ICCPR*, the duty to bring a detainee promptly before a judicial authority applies regardless of whether a detainee requests it.⁵⁰

41. Similarly, the European Court of Human Rights has ruled that the review must be automatic and cannot depend on the application of the detained person.⁵¹

“Scope of review”

42. In *Case of McKay v. the United Kingdom*, the European Court of Human Rights identified three strands running through the Court’s case law on Article 5(3):

the **exhaustive nature of the exceptions**, which must be interpreted strictly.. and which do not allow for the broad range of justifications under other provisions... the repeated emphasis on **the lawfulness of the detention**, procedurally and substantively, requiring scrupulous adherence to the rule of law...and the **importance of the promptness or speediness of the requisite judicial controls**...⁵² [emphasis added]

43. Under Article 5(3) of the *ECHR*, arrested or detained persons are entitled to

a review bearing upon the procedural and substantive conditions which are essential for the “lawfulness”, in the sense of the Convention, of their deprivation of liberty. This means that the competent court has to examine not only compliance with the procedural requirements set out in [domestic law] but also the reasonableness of the suspicion grounding the arrest and the legitimacy of the purpose pursued by the arrest and the ensuing detention...⁵³

“Officer”

44. The Human Rights Committee has ruled that a public prosecutor who extended an

⁴⁹ *Eur. Court HR, Medvedyev and Others v. France* (App No. 3394/03), at para. 118.

⁵⁰ Human Rights Committee, Concluding Observations: Republic of Korea, CCPR/C/79/Add.114, 1 November 1999, at para. 13.

⁵¹ *Eur. Court HR, Case of McKay v. the United Kingdom* (App. No. 543/03), at para. 34.

⁵² *Ibid.*, at para. 30.

⁵³ *Eur. Court HR, Case of Ilijkov v. Bulgaria* (App No. 33977/96), at para. 94.

individuals' pre-trial detention several times could not be regarded as having the "institutional objectivity and impartiality necessary to be considered an 'officer authorized to exercise judicial power' within the meaning of article 9(3):

The Committee considers 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.⁵⁴

45. An "officer" under Article 5(3) of the *ECHR* must be independent of the executive and the parties, must hear the individual brought before him in person and must have the power to make a binding order for the detainee's release.⁵⁵ Neither investigators before whom accused persons were brought, nor prosecutors who approved detention orders, could be considered to be "officer[s] authorised by law to exercise judicial power" within the meaning of Article 5 § 3 of the Convention."⁵⁶

46. In *Case of Erişen and Others v. Turkey*, the European Court of Human Rights held that "domestic courts dealing with requests of release during pre-trial detention must provide the "guarantees of a judicial procedure", so that the proceedings must be adversarial and must always ensure equality of arms between the parties – the prosecutor and the detainee⁵⁷.

"Promptness"

47. In *CCPR General Comment No. 8*, the Human Rights Committee states that "delays must not exceed a few days".⁵⁸ The Committee has ruled, that the term "promptly" must be determined on a case-by-case basis, the delay between the arrest of an accused and the time before he or she is brought before a judicial officer "should not exceed a few days"⁵⁹ and ideally should be made available within 48 hours.⁶⁰

48. The assessment of "promptness" under Article 5(3) of the *ECHR* must be made in the light of the object and purposes of Article 5, that is, "the protection of the individual against arbitrary interferences by the State with his right to liberty".⁶¹ No violation of Article 5(3) can arise if the arrested person is released "promptly" before any judicial control would have been feasible.⁶²

49. The European Court of Human Rights held that

the word "promptly" and in French... "aussitôt" [in Article 5(3)] is clearly

⁵⁴ *Kulomin v. Hungary*, *supra* note 48, at para. 11.3.

⁵⁵ *Eur. Court HR, Assenov and Others v. Bulgaria* (App. No. 90/1997/874/1086), at para. 146.

⁵⁶ *Eur. Court HR, Case of Shishkov v. Bulgaria* (App. No. 38822/97), at para. 52.

⁵⁷ *Eur. Court HR, Erişen and Others v. Turkey*, (App No 7067/06), at para. 52.

⁵⁸ *CCPR General Comment No. 8*, *supra* note 31, paras. 2-3.

⁵⁹ Communication No. 373/1989, *Stephens v. Jamaica*, at para. 9.6.

⁶⁰ Human Rights Committee, Concluding Observations: Zimbabwe, CPR/C/79/Add.89 (1998), at para. 17.

⁶¹ *Eur. Court HR, Case of Brogan and Others v. the United Kingdom*, at para. 58.

⁶² *Ibid.*

distinguishable from the less strict requirement in the second part of paragraph 3 (art. 5-3)(“reasonable time/”*délai raisonable*”) and even from that in paragraph 4 of Article 5... (“speedily/”*á bref délai*)...

Whereas promptness is to be assessed in each case according to its special features...the significanace to be attached to those features can never to taken to the point of impairing the very essence of the right guaranteed by Article 5 para. 3...that is to the point of effectively negating the State’s obligation to ensure a prompt release or a prompt appearance before a judicial authority.⁶³

50. Thus, a period of four days and six hours spent in police custody was determined to fall outside the strict constraints as to time permitted by the first part of Article 5(3), despite the “undoubted fact that the arrest and detention of the applicants were inspired by the legitimate aim of protecting the community as a whole from terrorism”.⁶⁴

Right to trial within a reasonable time, or to release

51. With respect to the right to be brought to trial within a reasonable time, what constitutes “reasonable time” is a matter of assessment for each particular case. The Human Rights Committee has ruled that

The lack of adequate budgetary appropriations for the administration of criminal justice alluded to by the State party does not justify unreasonable delays in the adjudication of criminal cases. Nor does the fact that investigations into a criminal case are, in their essence, carried out by way of written proceedings, justify such delays.⁶⁵

52. The European Court of Human Rights has stated that Article 5(3) of *ECHR* “cannot be understood as giving the judicial authorities a choice between either bringing the accused to trial within a reasonable time or granting him provisional release even subject to guarantees”:

The reasonableness of the time spent by an accused person in detention up to the beginning of the trial must be assessed in relation to the very fact of his detention. Until conviction, he must be presumed innocent, and the purpose of the provision under consideration is essentially to require his provisional release once his continuing detention ceases to be reasonable.⁶⁶

53. According to the European Court of Human Rights, “it is the provisional detention of accused persons which must not, according to Article 5 (3)...be prolonged beyond a reasonable time” and that the end of the period of detention is the day “on which the charge is determined, even if only by a court of first instance.”⁶⁷ It falls first to the national judicial authorities to ensure that the pre-trial detention of an accused person

⁶³ *Ibid.*, at para. 59.

⁶⁴ *Ibid.*

⁶⁵ Communication No. 336/1988, *Fillastre and Bizouarn v. Bolivia*, at para. 6.5.

⁶⁶ *Eur. Court HR, Case of Neumeister v. Austria* (App No. 1936/63), at para. 4.

⁶⁷ *Eur. Court HR, Wemhoff v. Germany*, (App No. 2122/64), at paras. 5-9.

does not exceed a reasonable time. To this end,

they must examine all the circumstances arguing for and against the existence of a genuine requirement of public interest justifying, with due regard to the principle of the presumption of innocence, a departure from the rule of respect for individual liberty and set these out in their decisions on the applications for release. It is essentially on the basis of the reasons given in these decisions and of the true facts mentioned by the detainee in his applications for release and his appeals that the Court is called upon to decide whether or not there has been a violation of Article 5 § 3.

The persistence of reasonable suspicion that the person arrested has committed an offence is a condition sine qua non for the validity of the continued detention, but, after a certain lapse of time, it no longer suffices: the Court must then establish whether the other grounds cited by the judicial authorities continued to justify the deprivation of liberty. Where such grounds were “relevant” and “sufficient”, the Court must also ascertain whether the competent national authorities displayed “special diligence” in the conduct of the proceedings...⁶⁸

Right to Release Pending Trial

54. All of the standards are based on the principle that pre-trial detention should be minimized whenever possible, and should be used only as a last resort. International and regional standards suggest that pre-trial detention can only be justified when used to prevent the accused from absconding, committing a serious offence, or interfering with the administration of justice. Whatever the justification, detention should be used only as a last resort, when, following a consideration of the widest possible range of alternatives, the Court determines that that detention remains necessary to address the risk identified.

A. International Instruments

ICCPR, Article 9(3):

9. (3) ... It shall not be the general rule that persons awaiting trial shall be detained in custody, but release may be subject to guarantees to appear for trial...

Body of Principles, Principle 39:

39. Except in special cases provided for by law, a person detained on a criminal charge shall be entitled, unless a judicial or other authority decides otherwise in the interest of the administration of justice, to release pending trial subject to the conditions that may be imposed in accordance with the law. Such authority shall keep the necessity of detention under review.

⁶⁸ *Assenov and Others v. Bulgaria*, *supra*, note 55, at para. 154.

The Tokyo Rules, Rules 2.3, 3.1, 3.4, 3.5, 5.1, 6:

2. (3) In order to provide greater flexibility consistent with the nature and gravity of the offence, with the personality and background of the offender and with the protection of society and to avoid unnecessary use of imprisonment, the criminal justice system should provide a wide range of noncustodial measures, from pre-trial to post-sentencing dispositions. The number and types of noncustodial measures available should be determined in such a way so that consistent sentencing remains possible.

3. (1) The introduction, definition and application of non-custodial measures shall be prescribed by law.

...

(4) Non-custodial measures imposing an obligation on the offender, applied before or instead of formal proceedings or trial, shall require the offender's consent.

(5) Decisions on the imposition of non-custodial measures shall be subject to review by a judicial or other competent independent authority, upon application by the offender.

5. (1) Where appropriate and compatible with the legal system, the police, the prosecution service or other agencies dealing with criminal cases should be empowered to discharge the offender if they consider that it is not necessary to proceed with the case for the protection of society, crime prevention or the promotion of respect for the law and the rights of victims. For the purpose of deciding upon the appropriateness of discharge or determination of proceedings, a set of established criteria shall be developed within each legal system. For minor cases the prosecutor may impose suitable non-custodial measures, as appropriate.

6. (1) Pre-trial detention shall be used as a means of last resort in criminal proceedings, with due regard for the investigation of the alleged offence and for the protection of society and the victim.

(2) Alternatives to pre-trial detention shall be employed at as early a stage as possible. Pre-trial detention shall last no longer than necessary to achieve the objectives stated under rule 5.1 and shall be administered humanely and with respect for the inherent dignity of human beings.

(3) The offender shall have the right to appeal to a judicial or other competent independent authority in cases where pre-trial detention is employed.

The Beijing Rules, Rule 13 and 19:

13. (1) Detention pending trial shall be used only as a measure of last resort and for the shortest possible period of time.

(2) Whenever possible, detention pending trial shall be replaced by alternative measures, such as close supervision, intensive care or placement with a family or in an educational setting or home.

19. (1) The placement of a juvenile in an institution shall always be a disposition of last resort and for the minimum necessary period.

Havana Rules, Rules 1 and 2:

1. The juvenile justice system should uphold the rights and safety and promote the physical and mental well-being of juveniles. Imprisonment should be used as a last resort;

2. ...Deprivation of the liberty of a juvenile should be a disposition of last resort and for the minimum necessary period and should be limited to exceptional cases. The length of the sanction should be determined by the judicial authority, without precluding the possibility of his or her early release.

The Bangkok Rules, Rule 58:

58. Taking into account the provisions of rule 2.3 of the Tokyo Rules, women offenders shall not be separated from their families and communities without due consideration being given to their backgrounds and family ties. Alternative ways of managing women who commit offences, such as diversionary measures and pretrial and sentencing alternatives, shall be implemented wherever appropriate and possible.

B. Regional Instruments

ECHR, Articles 5(1)(c) and 5(3):

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

(c) the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority of reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so;

5. (3) ...Release may be conditioned by guarantees to appear for trial.

Council of Europe, Recommendation (2006)13, paragraphs 3-7:

3. (1) In view of both the presumption of innocence and the presumption in favour of liberty, the remand in custody of persons suspected of an offence shall be the exception rather than the norm.

(2) There shall not be a mandatory requirement that persons suspected of an offence (or particular classes of such persons) be remanded in custody.

(3) In individual cases, remand in custody shall only be used when strictly necessary and as a measure of last resort; it shall not be used for punitive reasons.

4. In order to avoid inappropriate use of remand in custody the widest possible range of alternative, less restrictive measures relating to the conduct of a suspected offender shall be made available.

5. Remand prisoners shall be subject to conditions appropriate to their legal status; this entails the absence of restrictions other than those necessary for the administration of justice, the security of the institution, the safety of prisoners and staff and the protection of the rights of others and in particular the fulfilment of the requirements of the European Prison Rules and the other rules set out in Part III of the present text.

6. Remand in custody shall generally be available only in respect of persons suspected of committing offences that are imprisonable.

7. A person may only be remanded in custody where all of the following four conditions are satisfied:

- a. there is reasonable suspicion that he or she committed an offence; and
- b. there are substantial reasons for believing that, if released, he or she would either
 - (i) abscond, or
 - (ii) commit a serious offence, or
 - (iii) interfere with the course of justice, or
 - (iv) pose a serious threat to public order; and
- c. there is no possibility of using alternative measures to address the concerns referred to in b.; and
- d. this is a step taken as part of the criminal justice process.

Council of Europe, Recommendation CM/Rec(2008)11, paragraph 10:

10. Deprivation of liberty of a juvenile shall be a measure of last resort and imposed and implemented for the shortest period possible. Special efforts must be undertaken to avoid pre-trial detention.

C. Interpretation

Pre-trial detention as a last resort

55. The *Human Rights Committee*, states in *CCPR General Comment No. 8*, that “Pre-trial detention should be an exception and as short as possible.”⁶⁹

56. The Eighth UN Congress on the Prevention of Crime and the Treatment of

⁶⁹ *CCPR General Comment No. 8, supra* note 31, at para. 3.

Offenders expressed serious concern about, among other things, delays in the criminal justice process and the high proportion of pre-trial detainees among the prison population and recommended that Member states use pre-trial detention only if circumstances make it strictly necessary and as a last resort in criminal proceedings.⁷⁰

57. The pre-trial detention of minors should be used only as a measure of last resort; it should be as short as possible and minors should be kept apart from adults.⁷¹

Detention only if necessary

58. Chairperson-Rapporteur of the Working Group on Arbitrary Detention, Leila Zerougi, has stated that a system of mandatory denial of pre-trial release for certain crimes may, by definition be arbitrary, “since it does not allow the decision maker to take the individual circumstances into account”.⁷²

59. Under the *ICCPR*, detention before trial must be lawful, reasonable and necessary in all the circumstances, “for example, to prevent flight, interference with evidence or the recurrence of crime”.⁷³ In *Aleksander Smantser v. Belarus*, the Human Rights Committee, reaffirmed its jurisprudence that pre-trial detention should remain the exception and that bail should be granted,

except in situations where the likelihood exists that the accused would abscond or tamper with evidence, influence witnesses or flee from the jurisdiction of the State party”... The mere assumption by a State party that the author would interfere with the investigations or abscond if released on bail does not justify an exception to the rule in article 9, paragraph 3, of the Covenant.⁷⁴

60. The Human Rights Committee has held that the mere fact that the accused is a foreigner does not of itself imply that he may be held in detention pending trial”.⁷⁵

61. In *Case of Case of Grishin v. Russia*, the European Court reiterated that, under the second limb of Article 5(3),

a person charged with an offence must always be released pending trial unless the State can show that there are “relevant and sufficient” reasons to justify his

⁷⁰ Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, 27 August – 7 September, 1990, A/Conf.144/28/Rev.1, p.158.

⁷¹ *Eur. Court HR, Nart v. Turkey*, (App No. 20817/04), at para. 31. See also *Güveç v. Turkey*, (App No. 70337/01).

⁷² Laurel Townhead, “Pre-Trial Detention of Women and its Impact on their Children”, February 2007, Quaker United Nations Office, Women in Prison and Children of Imprisoned Mothers Series, at p. 13, citing comments on mandatory sentencing made by Leila Zerougi, Chairperson-Rapporteur of the Working Group on Arbitrary Detention, during the second regular session of the Human Rights Council, 20 December 2006, online: <http://www.quno.org/humanrights/women-in-prison/womenPrisonLinks.htm>.

⁷³ *Mukong v. Cameroon*, *supra* note 38, at para. 9.8.

⁷⁴ Communication No. 1178/2003, *Aleksander Smantser v. Belarus*, at para. 10.3.

⁷⁵ Communication No. 526/1993, *Hill v. Spain*, at para. 12.3.

continuing detention. The domestic courts must, paying due regard to the principle of the presumption of innocence, examine all the facts arguing for or against the existence of a genuine requirement of public interest justifying a departure from the rule of respect for individual liberty and must set them out in their decisions on the applications for release”.⁷⁶

62. The European Court of Human Rights has ruled that the burden is on the state to show why the defendant cannot be released.⁷⁷ The mere absence of a fixed residence does not give rise to a danger of flight.⁷⁸ The danger of an accused person’s absconding “cannot be gauged solely on the basis of the severity of the sentence risked”, but “must be assessed with reference to a number of other relevant factors which may either confirm the existence of a danger of absconding or make it appear so slight that it cannot justify detention pending trial”.⁷⁹ In *Case of Grishin v. Russia*, the European Court stated that the risk of flight “should be assessed with reference to various factors, especially those relating to the character of the person involved, his morals, his home, his occupation, his assets, his family ties and all kinds of links with the country in which he is being prosecuted”.⁸⁰

63. The domestic courts must explain why there is a danger of absconding and not simply to confirm the detention using “identical stereotyped terms, such as ‘having regard to the nature of the offence, the state of the evidence and the content of the case file’”.⁸¹ The European Court of Human Rights held, in *Case of Cahit Demirel v. Turkey*, that the multiple, consecutive detention periods served by the applicant should be regarded as a whole when assessing the reasonableness of the length of detention under Article 5(3) of the Convention.⁸² While the Court acknowledged that the “state of the evidence” may be relevant for the “existence and persistence of serious indications of guilt” and that the severity of the sentence faced is a relevant element in the assessment of the risk of absconding, “neither the state of evidence nor the gravity of the charges can by themselves serve to justify a length of preventive detention of over six years and four months”.⁸³ The Court further noted that

the Diyarbakır State Security Court failed to indicate to what extent the applicant’s release would have posed a risk after the passage of time, in particular in the later stages of the proceedings. Furthermore, the first-instance court never gave consideration to the application of a preventive measure, such as a prohibition on leaving the country or release on bail, other than the continued detention of the applicant...⁸⁴

⁷⁶ *Eur. Court HR, Case of Case of Grishin v. Russia* (App No. 14807/08), at para. 139.

⁷⁷ *Eur. Court HR, Case Of Ilijkov V. Bulgaria* (App No. 33977/96), at para. 85.

⁷⁸ *Eur. Court HR, Case of Sulaoja v. Estonia* (App No. 55939/00), at para. 64.

⁷⁹ *Eur. Court HR, Case of Tomasi v France* (App No 12850/87), at para. 98.

⁸⁰ *Grishin v. Russia, supra* note 77, at para. 143.

⁸¹ *Eur. Court HR, Case of Cahit Demirel v. Turkey* (App No. 18623/03), at paras. 24-25.

⁸² *Ibid.*, at para. 23.

⁸³ *Ibid.*

⁸⁴ *Ibid.*, at para. 26.

64. The existence of a strong suspicion of the involvement of the person concerned in serious offences, while constituting a relevant factor, cannot alone justify a long period of pre-trial detention.⁸⁵ When release pending trial is refused on the basis that the defendant may commit further offences prior to trial, the national court must be satisfied that the risk is substantiated. A reference to a person's antecedents cannot suffice to justify refusing release.⁸⁶

65. With respect to the risk of pressure being put on witnesses, the European Court of Human Rights states

for the domestic courts to demonstrate that a substantial risk of collusion existed and continued to exist during the entire period of the applicant's detention, it did not suffice merely to refer to an abstract risk unsupported by any evidence. They should have analysed other pertinent factors, such as the advancement of the investigation or judicial proceedings, the applicant's personality, his behaviour before and after the arrest and any other specific indications justifying the fear that he might abuse his regained liberty by carrying out acts aimed at the falsification or destruction of evidence or manipulation of witnesses...⁸⁷

66. In *Case of Öcalan v. Turkey*, the European Court of Human Rights affirmed its earlier rulings regarding detention of persons suspected of terrorist offences. It recognized that while "the investigation of terrorist offences undoubtedly presents the authorities with special problems...[t]his does not mean, however, that the investigating authorities have carte blanche under Article 5 to arrest suspects for questioning, free from effective control by the domestic courts and, ultimately, by the Convention supervisory institutions, whenever they choose to assert that terrorism is involved".⁸⁸

Duty to consider alternatives

67. Under Article 5(3) of the *ECHR*, when deciding whether a person should be released or detained the authorities have an obligation under that Article to consider alternative measures of ensuring his or her appearance at the trial.⁸⁹ Where the risk of absconding is deemed to exist, the authorities are under a duty to consider alternatives to detention which will ensure the defendant appears at trial.⁹⁰

68. When fixing a financial surety as a condition of release pending trial the national authorities must take as much care in fixing appropriate bail as in deciding whether or not the accused's continued detention is indispensable.⁹¹

⁸⁵ *Eur. Court HR, Case of Van Der Tang v. Spain* (App No 19382/92), at para. 63. See also *Case Of Ilijkov V. Bulgaria* (App No. 33977/96), at para. 81.

⁸⁶ *Eur. Court HR, Case of Muller v. France* (App No. 21802/93), at para. 44.

⁸⁷ *Grishin v. Russia, supra* note 77, at para. 148.

⁸⁸ *Case of Öcalan v. Turkey*, (App No 46221/99), at para. 104.

⁸⁹ *Eur. Court HR, Case of Yevgeniy Kuzmin v. Russia* (App No. 6479/05), at para. 34.

⁹⁰ *Eur. Court HR, Case of Khodorkovskiy v. Russia* (App No. 5829/04), at para. 186.

⁹¹ *Eur. Court HR, Case of Mangouras v. Spain* (App No. 12050/04), at para. 37.

The Right to a Prompt Review of the Lawfulness of Detention

69. Turkey is obligated to ensure that persons arrested or detained are entitled to take proceedings to challenge the lawfulness of their detention. The legality of the detention must be determined promptly and release ordered, if detention is found to be unlawful.

A. International Instruments

UDHR, Article 8:

8. Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law.

ICCPR, Articles 2(3) and 9(4):

2. (3) Each State Party to the present Covenant undertakes:

(a) To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity;

(b) To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy;

(c) To ensure that the competent authorities shall enforce such remedies when granted.

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

Optional Protocol to the International Covenant on Civil and Political Rights, Article 2:

2. Subject to the provisions of article 1, individuals who claim that any of their rights enumerated in the Covenant have been violated and who have exhausted all available domestic remedies may submit a written communication to the Committee for consideration.

CERD, Article 6:

6. States Parties shall assure to everyone within their jurisdiction effective protection and remedies, through the competent national tribunals and other State institutions, against any acts of racial discrimination which violate his human rights and fundamental freedoms contrary to this Convention, as well as the right

to seek from such tribunals just and adequate reparation or satisfaction for any damage suffered as a result of such discrimination.

Body of Principles, Principles 7 and 32:

7. (1) States should prohibit by law any act contrary to the rights and duties contained in these principles, make any such act subject to appropriate sanctions and conduct impartial investigations upon complaints.

(2) Officials who have reason to believe that a violation of this Body of Principles has occurred or is about to occur shall report the matter to their superior authorities and, where necessary, to other appropriate authorities or organs vested with reviewing or remedial powers.

(3) Any other person who has ground to believe that a violation of this Body of Principles has occurred or is about to occur shall have the right to report the matter to the superiors of the officials involved as well as to other appropriate authorities or organs vested with reviewing or remedial powers.

32. (1) A detained person or his counsel shall be entitled at any time to take proceedings according to domestic law before a judicial or other authority to challenge the lawfulness of his detention in order to obtain his release without delay, if it is unlawful.

(2) The proceedings referred to in paragraph 1 of the present principle shall be simple and expeditious and at no cost for detained persons without adequate means. The detaining authority shall produce without unreasonable delay the detained person before the reviewing authority.

Basic Principles and Guidelines on the Right to a Remedy and Reparation, paragraphs 11 and 12:

11. Remedies 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;
- (b) Adequate, effective and prompt reparation for harm suffered;
- (c) Access to relevant information concerning violations and reparation mechanisms.

12. 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. Other remedies available to the victim include access to administrative and other bodies, as well as mechanisms, modalities and proceedings conducted in accordance with domestic law. Obligations arising under international law to secure the right to access justice and fair and impartial proceedings shall be reflected in domestic laws...

14. An adequate, effective and prompt remedy for gross violations of international human rights law or serious violations of international humanitarian law should include all available and appropriate international processes in which a person may have legal standing and should be without prejudice to any other domestic remedies.

B. Regional Instruments

ECHR, Articles 5(4) and 13:

5. (4) Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.

13. Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity.

Council of Europe, Recommendation (2006)13, paragraph 19:

19. (1) A remand prisoner shall have a separate right to a speedy challenge before a court with respect to the lawfulness of his or her detention.

(2) This right may be satisfied through the periodic review of remand in custody where this allows all the issues relevant to such a challenge to be raised.

C. (a) Everyone has the right to an effective remedy by competent national

C. Interpretation

70. In *CRC General Comment No. 10 (2007)*, the Committee on the Rights of the Child states, at paragraph 84:

The right to challenge the legality of the deprivation of liberty includes not only the right to appeal, but also the right to access the court, or other competent, independent and impartial authority or judicial body, in cases where the deprivation of liberty is an administrative decision (e.g. the police, the prosecutor and other competent authority). The right to a prompt decision means that a decision must be rendered as soon as possible, e.g. within or not later than two weeks after the challenge is made.⁹²

71. The Human Rights Committee has found holding a person incommunicado and effectively barring them from challenging their arrest and detention violates Article 9(4) of the *ICCPR*.⁹³ Similarly, where an individual could, in principle, have applied for a

⁹² *CRC General Comment No. 10 (2007)*, *supra* note 32, at para. 84.

⁹³ Communication No. 84/1981, *Guillermo Ignacio Dermitt Barbato et al. v. Uruguay*, at para. 10.

writ of habeas corpus, a lack of access to legal representation throughout his detention resulted in a violation of Article 9(4) of *ICCPR*.⁹⁴ In a case where there was no evidence that either the author or his legal representative applied for a writ of habeas corpus, the Committee was unable to conclude that the author “was denied the opportunity to have the lawfulness of his detention reviewed in court without delay”.⁹⁵ Where a person was arrested on “grounds of a grave and imminent danger to security and public order” and the remedy of habeas corpus was inapplicable, the Committee determined that the author was denied an effective remedy to challenge his arrest and detention.⁹⁶

Scope of review

72. A review under Article 5(4) of *ECHR* must be wide enough to bear on those conditions which are essential to the “lawful” detention of a person according to 5(1).⁹⁷ Where an individual may face a substantial term of imprisonment and “where characteristics pertaining to his personality and level of maturity are of importance in deciding on his dangerousness”, Article 5(4) “requires an oral hearing in the context of an adversarial procedure involving legal representation and the possibility of calling and questioning witnesses”.⁹⁸ Arrested or detained persons are entitled to a remedy allowing the competent court to examine “not only the compliance with the procedural conditions but also the reasonableness of the suspicion grounding the arrest and the legitimacy of the purpose pursued by the arrest and the ensuing detention.”⁹⁹

73. A person detained on remand must be able to take proceedings at reasonable intervals to challenge the lawfulness of his detention.¹⁰⁰

“Court”

74. The Human Rights Committee found that allowing an appeal from a detention order to the Minister of the Interior, “while providing for some measure of protection and review of the legality of detention, does not satisfy the requirements of article 9, paragraph 4, which envisages that the legality of detention will be determined by a court so as to ensure a higher degree of objectivity and independence in such control”.¹⁰¹

75. To constitute a “court” within the meaning of Article 5(4) of *ECHR*, an authority must exercise proceedings of a “judicial character” and “provide the fundamental guarantees of procedure applied in matters of deprivation of liberty.”¹⁰² It must be

⁹⁴ Communication No. 330/1988, *Berry v. Jamaica*, at para. 11.1

⁹⁵ Communication No. 373/1989, *Stephens v. Jamaica*, at para. 9.7.

⁹⁶ Communication No. 9/1977, *Valcada v. Uruguay*, at para. 12.

⁹⁷ *Eur. Court HR, Case of Singh v. the United Kingdom* (App No. 23389/94), at para. 65.

⁹⁸ *Ibid.*, at para. 68.

⁹⁹ *Ibid.*

¹⁰⁰ *Assenov and Others v. Bulgaria, supra*, note 55, at para. 162.

¹⁰¹ Communication No. 291/1988, *Torres v. Finland*, at para. 7.2.

¹⁰² *Eur. Court HR, Cases of De Wilde, Ooms and Versyp (“Vagrancy”) v. Belgium* (App No. 2832/66; 2835/66; 2899/66), at para. 76.

“independent both of the executive and of the parties to the case.”¹⁰³ It must have the ability to order the defendant’s release if detention is deemed unlawful.¹⁰⁴

76. In *Case Of Firat Can v. Turkey*, the European Court of Human Rights ruled that “complaints concerning the lack of effective remedies by which to challenge the lawfulness of the pre-trial detention should be examined under Article 5 § 4 of the Convention, which provides a *lex specialis* in relation to the more general requirements of Article 13”.¹⁰⁵ The Court held in *Çatal v. Turkey* that, “[i]n the context of the review of a detainee person’s continued detention pursuant to Article 5 § 4 of the Convention, the proceedings must be adversarial and must ensure “equality of arms” between the parties, namely the prosecutor vis-à-vis the detained person.”¹⁰⁶

“Lawfulness”

77. Article 9(4) of *ICCPR* governs the granting of compensation for arrest or detention that is “unlawful” either under domestic law or within the meaning of the Covenant.¹⁰⁷

78. The “lawfulness” of a detention under Article 5(4) of the European Convention must be determined not only in the light of domestic law, but also in accordance with the text of the Convention.¹⁰⁸ The notion of “lawfulness” in Article 5(4) has the same meaning as in Article 5(1).¹⁰⁹

“Without delay” or “Speedily”

79. The Human Rights Committee emphasized, in *Torres v. Finland*, that

as a matter of principle, the adjudication of a case by any court of law should take place as expeditiously as possible. This does not mean, however, that precise deadlines for the handing down of judgements may be set which, if not observed, would necessarily justify the conclusion that a decision was not reached “without delay”. Rather, the question of whether a decision was reached without delay must be assessed on a case by case basis.¹¹⁰

80. Under Article 5(4) of the *ECHR*, the question whether the right to a speedy decision has been respected must be determined in the light of the circumstances of each case.¹¹¹ In *Bezicheri v. Italy*, the European Court of Human Rights held that

¹⁰³ *Eur. Court HR, Case of Neumeister v. Austria* (App No. 1936/63), at para. 24.

¹⁰⁴ *Singh v. UK, supra* note 98, at para. 70.

¹⁰⁵ *Eur. Court HR, Firat Can v. Turkey* (App No 6644/08), at para. 52.

¹⁰⁶ *Eur. Court HR, Çatal v. Turkey*, (App No 26808/08), at para. 32.

¹⁰⁷ Communication No. 1128/2002, *Marques v. Angola*, at para. 6.6.

¹⁰⁸ *Brogan v. UK, supra*, note 61, at para. 65.

¹⁰⁹ *Ibid.*

¹¹⁰ *Torres v. Finland, supra* note 102, at para. 7.3.

¹¹¹ *Eur. Court HR, Case of Alikhonov v. Russia* (App No. 35692/11), at para. 60.

the nature of detention on remand calls for short intervals; there is an assumption in the Convention that detention on remand is to be of strictly limited duration (Article 5 para. 3)...because its *raison d'être* is essentially related to the requirements of an investigation which is to be conducted with expedition.¹¹²

Right to Compensation for Unlawful Deprivation of Liberty

81. Turkey has an obligation to ensure that individuals deprived of their liberty through unlawful arrest or detention are compensated.

A. International Instruments

ICCPR, Article 9(5):

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

CERD, Article 6:

6. States Parties shall assure to everyone within their jurisdiction effective protection and remedies, through the competent national tribunals and other State institutions, against any acts of racial discrimination which violate his human rights and fundamental freedoms contrary to this Convention, as well as the right to seek from such tribunals just and adequate reparation or satisfaction for any damage suffered as a result of such discrimination.

Body of Principles, Rule 35:

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

(2.) Information required to be recorded under these principles shall be available in accordance with procedures provided by domestic law for use in claiming compensation under the present principle.

Basic Principles and Guidelines on the Right to a Remedy and Reparation, paragraph 18:

18. In accordance with domestic law and international law, and taking account of individual circumstances, victims of gross violations of international human rights law and serious violations of international humanitarian law should, as appropriate and proportional to the gravity of the violation and the circumstances of each case, be provided with full and effective reparation, as laid out in principles 19 to 23, which include the following forms: restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition.

¹¹² *Eur. Court HR, Case of Bezicheri v. Italy* (App No. 11400/85), at para. 21.

B. Regional Instruments

***ECHR*, Articles 5(5) and 50:**

5. (5) Everyone who has been the victim of arrest or detention in contravention of the provisions of this article shall have an enforceable right to compensation.

50. If the Court finds that a decision or a measure taken by a legal authority or any other authority of a High Contracting Party, is completely or partially in conflict with the obligations arising from the present convention, and if the internal law of the said Party allows only partial reparation to be made for the consequences of this decision or measure, the decision of the Court shall, if necessary, afford just satisfaction to the injured party.

C. Interpretation

82. The Human Rights Committee, in *CCPR General Comment No. 31*, states, at paragraph 16,

Article 2, paragraph 3, requires that States Parties make reparation to individuals whose Covenant rights have been violated. Without reparation to individuals whose Covenant rights have been violated, the obligation to provide an effective remedy, which is central to the efficacy of article 2, paragraph 3, is not discharged. In addition to the explicit reparation required by articles 9, paragraph 5, and 14, paragraph 6, the Committee considers that the Covenant generally entails appropriate compensation. The Committee notes that, where appropriate, reparation can involve restitution, rehabilitation and measures of satisfaction, such as public apologies, public memorials, guarantees of non-repetition and changes in relevant laws and practices, as well as bringing to justice the perpetrators of human rights violations.¹¹³

83. Under Article 5(4) of the *ECHR*, an individual is entitled to compensation where an arrest and detention were lawful under domestic law, but in breach of Article 5(3).¹¹⁴ An award of compensation under Article 5(5) of *ECHR* may require the victim to show damage resulted from the breach.¹¹⁵

84. In Case of *Sahap Doğan v. Turkey*, the European Court confirmed its earlier findings that changes to the TCCP that provide for the re-examination by a judge of the need for continued detention on remand, both periodically (every thirty days) and spontaneously at the request of the suspect or the accused person, and the possibility of compensation for unlawful detention, did not provide an adequate remedy for challenging the lawfulness of detention and, as a demand for compensation may not be made until the

¹¹³ UN Human Rights Committee (HRC), *CCPR General Comment No. 31: 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. 16, online at: <http://www2.ohchr.org/english/bodies/hrc/comments.htm>.

¹¹⁴ *Brogan v. the UK*, *supra* note 61, at para. 66.

¹¹⁵ *Eur. Court HR, Wassink v. The Netherlands* (App No 12535/86), at para.38.

end of legal proceedings, this remedy is also not available where, as in this case, the domestic proceedings are still pending.¹¹⁶

Prepared by Lois Leslie, B.Soc. Sc. (Hons), LL.B, LL.M for Lawyers Rights Watch Canada (LRWC).

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¹¹⁶ *Eur. Court HR, Sahap Doğan v. Turkey*, (App No 29361/07), at paras. 32-33.