
Pre-trial release and the right to be presumed innocent

**A handbook on international law rights to
pre-trial release**

Lawyers' Rights Watch Canada

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Pre-Trial Release and the Right to be Presumed Innocent: A Handbook on Pre-Trial Release at International Law

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TABLE OF CONTENTS

| | |
|-------------------------------------------------------------------------------------------------------------------------------------|------------|
| I. INTRODUCTION..... | 1 |
| II. THE REALITY OF PRE-TRIAL DETENTION | 2 |
| III. THE INTERNATIONAL STANDARDS..... | 5 |
| A. NON-DISCRIMINATION | 5 |
| Standards..... | 6 |
| Interpretation..... | 7 |
| B. PRESUMPTION OF INNOCENCE | 8 |
| Standards..... | 9 |
| Interpretation..... | 10 |
| C. RIGHT TO LIBERTY AND SECURITY OF THE PERSON..... | 11 |
| Standards..... | 12 |
| Interpretation..... | 16 |
| D. PRESUMPTION IN FAVOUR OF PRE-TRIAL RELEASE..... | 20 |
| Standards..... | 22 |
| Interpretation..... | 26 |
| E. RIGHT TO BE PROMPTLY BROUGHT BEFORE A JUDGE OR OTHER JUDICIAL OFFICER AND TO TRIAL WITHIN A REASONABLE TIME, OR RELEASE | 29 |
| Standards..... | 30 |
| Interpretation..... | 33 |
| F. RIGHT TO BE INFORMED OF REASONS FOR ARREST AND OF ANY CHARGES..... | 37 |
| Standards..... | 37 |
| Interpretation..... | 39 |
| G. RIGHT TO CHALLENGE LAWFULNESS OF DETENTION | 41 |
| Standards..... | 41 |
| Interpretation..... | 45 |
| H. RIGHT TO COMPENSATION FOR UNLAWFUL DEPRIVATION OF LIBERTY | 49 |
| Standards..... | 49 |
| Interpretation..... | 51 |
| APPENDIX A : TREATIES, DECLARATIONS AND INSTRUMENTS | A-1 |
| APPENDIX B : OTHER RESOURCES ON PRE-TRIAL RELEASE | B-1 |

ACRONYMS or ABBREVIATIONS

| | |
|------------------------|-----------------------------------------------------------------------------------|
| ACHR: | American Convention on Human Rights |
| ACHPR: | African Commission on Human and Peoples' Rights |
| AU: | African Union |
| Banjul Charter: | African Charter on Human and Peoples' Rights |
| CEDAW: | Convention on the Elimination of All Forms of Discrimination against Women |
| CERD: | Committee on the Elimination of Racial Discrimination |
| COE: | Council of Europe |
| CRC: | Convention on the Rights of the Child |
| ECHR: | European Convention on Human Rights |
| ECtHR: | European Court of Human Rights |
| HR Committee: | Human Rights Committee |
| ICCPR: | International Covenant on Civil and Political Rights |
| ICERD: | International Convention on the Elimination of All Forms of Racial Discrimination |
| IACHR: | Inter-American Commission on Human Rights |
| IACtHR: | Inter-American Court of Human Rights |
| OAS: | Organization of American States |
| UDHR: | Universal Declaration of Human Rights |
| UN: | United Nations |
| WGAD: | UN Working Group on Arbitrary Detention |

Pre-Trial Release and the Right to be Presumed Innocent: A handbook on international law rights to pre-trial release

I. INTRODUCTION

Every day, millions of people throughout the world charged with criminal offences find themselves in pre-trial detention that violates international human rights law.

At international law pre-trial detention is to be used only when strictly necessary and as a last resort. There is a presumption in favour of pre-trial release, based on:

- the right to be presumed innocent;
- the right to liberty and security of the person;
- the right to a fair trial; and
- the right to full equality before the law.

These fundamental rights are enshrined in the *Universal Declaration of Human Rights*.

The international legal standards concerning pre-trial release are found in an extensive array of international instruments governing pre-trial detention listed in Appendix A at the end of this report, namely:

- the *Universal Declaration of Human Rights* (UDHR);
- treaties which are legally binding on States that have ratified or acceded to them, including treaties originating from the United Nations (UN), the Organization of American States (OAS), the African Union (AU) and the Council of Europe (COE);
- other international instruments originating from the UN, OAS, AU and COE which enunciate or expand on principles contained in international treaties or which reflect customary international law.¹

Many principles, guidelines, standards and recommendations that are not binding *per se* have been adopted by the UN General Assembly or other prominent international organizations. Accordingly, they provide moral authority and practical guidance for State conduct, and there is an expectation that States will respect them.

This handbook sets out the international legal standards, the principles underlying the standards, and interpretations of the standards. In addition to the text of the standards

¹International customary law, or “international custom”, is defined by the Statute of the International Court of Justice as “general practice accepted as law.” online <http://www.icj-cij.org/documents/index.php?p1=4&p2=2&p3=0#CHAPTER_II>

themselves, this handbook discusses comments, recommendations and jurisprudence from international organizations such as the UN treaty bodies, the European Court of Human Rights (ECtHR), the Inter-American Court of Human Rights (IACtHR), the Inter-American Commission on Human Rights (IACHR) and the African Commission on Human and Peoples' Rights (ACHPR).

II. THE REALITY OF PRE-TRIAL DETENTION

According to the Open Society Justice Initiative (OSJI report):²

On any given day, an estimated three million people are behind bars awaiting trial. In the course of a year, approximately 10 million people will pass through pretrial detention. Many will spend months and even years in detention—without being tried or found guilty—languishing under worse conditions than people convicted of crimes and sentenced to prison...

Many pretrial detainees are exposed to torture, extortion, and disease. They are subject to the arbitrary actions of police, corrupt officials, and even other detainees. Throughout their ordeal, most never see a lawyer or legal advisor and often lack information on their basic rights. When they eventually reach trial—without representation and likely beaten down by months of confinement—the odds are stacked against them: persons in pretrial detention are more likely to be found guilty than defendants from similar backgrounds, facing similar charges, who are released awaiting trial.³

In an address to the Twelfth UN Congress on Crime Prevention and Criminal Justice in 2010, the then UN Special Rapporteur on Torture, Mr. Manfred Nowak, remarked that

[i]f more than 50% of all detainees, and in some countries more than 70% are in pre-trial detention..., something is wrong. It usually means that criminal proceedings last far too long, that the detention of criminal suspects is the rule rather than the exception, and that release on bail is misunderstood by judges, prosecutors and the prison staff as an incentive for corruption.⁴

Mr. Nowak reported that most of the inhuman conditions of detention are

² David Berry, *The Socioeconomic Impact of Pretrial Detention. A Global Campaign for Pretrial Justice Report*, Open Society Justice Initiative, New York, 2011 (OSJI report), online <http://www.soros.org/initiatives/justice/articles_publications/publications/socioeconomic-impact-detention-20110201>.

³ *Ibid.*, at p.12.

⁴ Twelfth United Nations Congress on Crime Prevention and Criminal Justice, *Proceedings of a "Workshop on the Survey of United Nations and Other Best Practices in the Treatment of Prisoners in the Criminal Justice System"*, Salvador, Brazil, 12-19 April 2010, at p. 15, online <<http://www.heuni.fi/Etusivu/Publications/HEUNireports/1290609815103>>.

not the result of lack of budgetary resources and poverty, but of punitive policies of criminal justice, corruption, a dysfunctional system of criminal justice, a lack of respect of human beings behind bars and a lack of clearly defined and legally binding rules on the human rights of detainees.⁵

In its Report on the Working Group on Arbitrary Detention,⁶ the UN Working Group on Arbitrary Detention (WGAD) has found that poverty and social marginalization of detainees disproportionately affect the prospects of being released in legal systems where pretrial detention is linked to bail:

Bail courts base their decision whether to release an accused person also on his or her “roots in the community.” People having stable residence, stable employment and financial situation, or being able to make a cash deposit or post a bond as guarantee for appearance at trial are considered as well-rooted. These criteria of course are often difficult to meet for the homeless, drug users, substances abusers, alcoholics, the chronically unemployed and persons suffering from mental disability, who thus find themselves in detention before and pending trial when less socially disadvantaged persons can prepare their defence at liberty. As empirical research in many countries has shown that defendants who are not detained pending trial have significantly better chances to obtain an acquittal than those detained pending trial, the bail system deepens further the disadvantages that the poor and marginalized face in the enjoyment of the right to a fair trial on an equal footing.⁷

The Committee on the Elimination of Racial Discrimination (CERD) noted that persons held awaiting trial include “an excessively high number of non-nationals” and

persons belonging to racial or ethnic groups, in particular non-citizens – including immigrants, refugees, asylum-seekers and stateless persons - Roma/Gypsies, indigenous peoples, displaced populations, persons discriminated against because of their descent, as well as other vulnerable groups which are particularly exposed to exclusion, marginalization and non-integration in society...⁸

Despite legal requirements that pre-trial detainees be treated differently from convicted prisoners, some States classify them as high-risk, subjecting them to tight security and restrictions.⁹ While pre-trial detention affects both male and female detainees, certain aspects, such as limitations on visiting and family contact, may have a disproportionate

⁵ *Ibid.*, at pp.15-16.

⁶ Commission on Human Rights, Report of the Working Group on Arbitrary Detention, 12 December 2005 (E/CN.4/2006/7), online <http://ap.ohchr.org/documents/alldocs.aspx?doc_id=11600>.

⁷ *Ibid.*, at para. 66.

⁸ Committee on the Elimination of Racial Discrimination, General Comment 31 on the Prevention of Racial Discrimination in the Administration and Functioning of the Criminal Justice System (2005), at preamble and para. 26, online <<http://www2.ohchr.org/english/bodies/cerd/comments.htm>>.

⁹ *Ibid.*

impact on female detainees who have caring responsibilities.¹⁰ In a report for the Quaker United Nations Office, Laurel Townhead finds that a lack of detention facilities designed for women means that female pre-trial detainees are more likely to be held with convicted prisoners than their male counterparts.¹¹ The duration of pre-trial detention may have a devastating effect on an individual's family, health, home, job and community ties, while, on the other hand, it may not be long enough to benefit from programmes designed to assist prisoners.¹²

Canvassing the reasons why States make excessive use of pre-trial detention, the Quaker United Nations Office report notes the following:

- a lack of alternative measures, either in law or in practice;
- mandatory denial of pre-trial release for certain crimes and certain groups of individuals;
- pre-trial detention of those charged with offences which do not provide for custodial sentences;
- discriminatory assumptions and overly broad interpretation of risk of absconding;
- overly broad assumptions about the need for detention on grounds of national security or public safety;
- failure to take into account a lack of means to pay financial guarantees;
- overly long pre-trial detention due to slow functioning of the judicial system; and
- detention of individuals “for their own protection.”¹³

According to the OSJI report, however, most pre-trial detainees “pose no threat to society and are not at risk of absconding.”¹⁴ Moreover, pre-trial detention does not reduce crime, while its excessive use is likely to increase criminality by precluding positive social contacts and access to social service options that can reduce crime.¹⁵

These reasons and justifications for pre-trial detention do not measure up to international law standards for pre-trial detention.

¹⁰ See 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, online <<http://www.quono.org/humanrights/women-in-prison/womenPrisonLinks.htm>>.

¹¹ *Ibid.*, at p. 24.

¹² *Ibid.*, at p. 23.

¹³ *Ibid.*, at pp.12-19.

¹⁴ *The Socioeconomic Impact of Pretrial Detention*, *supra* note 2, at p. 40.

¹⁵ *Ibid.*, at p.19.

III. THE INTERNATIONAL STANDARDS

... 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... - *International Covenant on Civil and Political Rights*, s.9(3).

As pre-trial detention involves the detention of individuals who have not been convicted of a crime, it can negatively impact on the presumption of innocence and the right to liberty and security of the person. All of the international standards governing pre-trial detention, therefore, reflect the principle that pre-trial detention should be minimized whenever possible, and should be used only as a last resort, in certain, limited circumstances.

This section provides an overview of the international standards surrounding the right to pre-trial release, focusing on the following principles:

- the right to non-discrimination;
- the presumption of innocence;
- the right to liberty and security of the person, including freedom from arbitrary arrest and detention;
- the presumption in favour of pre-trial release;
- the right to be informed of reasons for arrest and of any charges;
- the right to be promptly brought before a judge and to trial within a reasonable time, or release pending trial;
- the right to prompt review of lawfulness of detention; and
- the right to compensation for unlawful deprivation of liberty.

While these standards are concerned primarily with pre-trial detention and release, also relevant are related 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.

A. Non-discrimination

All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. - *International Covenant on Civil and Political Rights*, s.26

States are obligated to ensure that the international human rights of persons within its territory are enjoyed without distinction of any kind. 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. The right to equality before the courts and tribunals includes equal access and equality of arms, and ensures that the parties to the proceedings in question are treated without any discrimination. An arrest and detention based solely on a prohibited ground of

discrimination is an arbitrary and therefore, unlawful, deprivation of liberty at international law.

Standards

| Non-discrimination | |
|-------------------------------------------------------------------------------------------------------------------|---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| UN Instruments | |
| <i>UNIVERSAL DECLARATION OF HUMAN RIGHTS (UDHR)</i> | |
| 2. | <i>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.</i> |
| <i>INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS (ICCPR)</i> | |
| 2. (1) | <i>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.</i> |
| 26. | <i>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.</i> |
| <i>INTERNATIONAL CONVENTION ON THE ELIMINATION OF ALL FORMS OF RACIAL DISCRIMINATION (ICERD)</i> | |
| 5. (a) | <i>The right to equal treatment before the tribunals and all other organs administering justice;</i> |
| <i>CONVENTION ON THE ELIMINATION OF ALL FORMS OF DISCRIMINATION AGAINST WOMEN (CEDAW)</i> | |
| 15. (1) | <i>States Parties shall accord to women equality with men before the law.</i> |
| <i>UN BODY OF PRINCIPLES FOR THE PROTECTION OF ALL PERSONS UNDER ANY FORM OF DETENTION OR IMPRISONMENT</i> | |
| 5. (1) | <i>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.</i> |
| <i>STANDARD MINIMUM RULES FOR THE TREATMENT OF PRISONERS</i> | |
| 6. (1) | <i>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.</i> |
| Regional Instruments | |
| <i>AMERICAN DECLARATION ON THE RIGHTS AND DUTIES OF MAN</i> | |
| 2. | <i>All persons are equal before the law and have the rights and duties established in this Declaration, without distinction as to race, sex, language, creed or any other factor.</i> |

| AMERICAN CONVENTION ON HUMAN RIGHTS (ACHR) | |
|------------------------------------------------------------------------------------------------------|-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| 1.(1) | <i>The States Parties to this Convention undertake to respect the rights and freedoms recognized herein and to ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms, without any discrimination for reasons of race, color, sex, language, religion, political or other opinion, national or social origin, economic status, birth, or any other social condition.</i> |
| AFRICAN (BANJUL) CHARTER ON HUMAN AND PEOPLES' RIGHTS (Banjul Charter) | |
| 2. | <i>Every individual shall be entitled to the enjoyment of the rights and freedoms recognized and guaranteed in the present Charter without distinction of any kind such as race, ethnic group, color, sex, language, religion, political or any other opinion, national and social origin, fortune, birth or other status.</i> |
| 3. | <i>(1) Every individual shall be equal before the law. (2) Every individual shall be entitled to equal protection of the law.</i> |
| 19. | <i>All peoples shall be equal; they shall enjoy the same respect and shall have the same rights...</i> |
| EUROPEAN CONVENTION ON HUMAN RIGHTS (ECHR) | |
| 14. | <i>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.</i> |
| PRINCIPLES AND GUIDELINES ON THE RIGHT TO A FAIR TRIAL AND LEGAL ASSISTANCE IN AFRICA | |
| | <i>General Principles applicable to all Legal Proceedings: ...The essential elements of a fair hearing include: (a) equality of arms between the parties to a proceedings, whether they be administrative, civil, criminal, or military; (b) equality of all persons before any judicial body without any distinction whatsoever as regards race, colour, ethnic origin, sex, gender, age, religion, creed, language, political or other convictions, national or social origin, means, disability, birth, status or other circumstances; (c) equality of access by women and men to judicial bodies and equality before the law in any legal proceedings;...</i> |
| PROTOCOL TO THE AFRICAN CHARTER ON HUMAN AND PEOPLES' RIGHTS ON THE RIGHTS OF WOMEN IN AFRICA | |
| 8. | <i>Women and men are equal before the law and shall have the right to equal protection and benefit of the law...</i> |

Interpretation

The UN Human Rights Committee (HR Committee), the body responsible for monitoring compliance by States party to the ICCPR, states, in *CCPR General Comment No. 32*, 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.¹⁶

In *CCPR General Comment 18*, the HR 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.¹⁷

The ACHPR has found that arrests and detention carried out by the Rwandan Government “based on grounds of ethnic origin alone, in light of Article 2 in particular, constitute arbitrary deprivation of the liberty of an individual” under the *African Charter on Human and Peoples’ Rights (Banjul Charter)*.¹⁸

B. Presumption of Innocence

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 (2006)2, para. 95. (1)

Every individual charged with a crime has the right to be presumed innocent until proven guilty according to law. This principle requires that pre-trial detainees be treated in accordance with their status as unconvicted persons. Defendants must not be presented in court in a manner indicating that they may be dangerous criminals. Public authorities must refrain from making public statements about an accused which may prejudice the outcome of a fair trial. If detention is necessary, officials may only impose those

¹⁶ *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*, at para. 8, online <<http://www2.ohchr.org/english/bodies/hrc/comments.htm>>.

¹⁷ *CCPR General Comment No. 18: Non-discrimination*, 11 October 1989, Thirty-seventh session, 1989, at para. 1, online <<http://www.unhcr.ch/tbs/doc.nsf/%28Symbol%29/3888b0541f8501c9c12563ed004b8d0e?Opendocument>>.

¹⁸ *Organisation mondiale contre la torture, Association Internationale des juristes démocrates, Commission internationale des juristes, Union interafricaine des droits de l'Homme v. Rwanda (27/89-46/91-49/91-99/93)*, at para. 28.

restrictions required to maintain order and security in the place of detention. Accused persons shall, save in exceptional circumstances, be segregated from convicted persons. The length of pre-trial detention (also referred to as “preventive detention”) or a denial of bail does not affect the presumption of innocence. Pre-trial detainees may not be subject to “punishment”.

Standards

| Right to be Presumed Innocent | |
|--------------------------------------------------------------------------------------|----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| UN Instruments | |
| <i>UNIVERSAL DECLARATION OF HUMAN RIGHTS (UDHR)</i> | |
| 11. (1) | <i>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.</i> |
| <i>INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS (ICCPR)</i> | |
| 10. (2)(a) | <i>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;</i> |
| 14. (2) | <i>Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law.</i> |
| <i>CONVENTION ON THE RIGHTS OF THE CHILD (CRC)</i> | |
| 40. (2)(b)(i) | <i>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;</i> |
| <i>STANDARD MINIMUM RULES FOR THE TREATMENT OF PRISONERS</i> | |
| 84. (2) | <i>Unconvicted prisoners are presumed to be innocent and shall be treated as such.</i> |
| Regional Instruments | |
| <i>AFRICAN CHARTER ON THE RIGHTS AND WELFARE OF THE CHILD</i> | |
| 2. (c)(i) | <i>States Parties to the present Charter shall in particular: ... (c) ensure that every child accused in infringing the penal law: (i) shall be presumed innocent until duly recognized guilty; ...</i> |
| <i>AMERICAN DECLARATION ON THE RIGHTS AND DUTIES OF MAN (ADRDM)</i> | |
| 26. | <i>Every accused person is presumed to be innocent until proved guilty. Every person accused of an offense has the right to be given an impartial and public hearing, and to be tried by courts previously established in accordance with pre-existing laws, and not to receive cruel, infamous or unusual punishment.</i> |
| <i>AMERICAN CONVENTION ON HUMAN RIGHTS (ACHR)</i> | |
| 8. (2) | <i>Every person accused of a criminal offense has the right to be presumed innocent so long as his guilt has not been proven according to law.</i> |
| <i>AFRICAN (BANJUL) CHARTER ON HUMAN AND PEOPLES' RIGHTS (Banjul Charter)</i> | |
| 7. (b) | <i>...the right to be presumed innocent until proved guilty by a competent court or tribunal;</i> |

| EUROPEAN CONVENTION ON HUMAN RIGHTS (ECHR) | |
|----------------------------------------------------------------------------------------------|----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| 6. (2) | <i>Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.</i> |
| PRINCIPLES AND GUIDELINES ON THE RIGHT TO A FAIR TRIAL AND LEGAL ASSISTANCE IN AFRICA | |
| | <p><i>Provisions Applicable to Proceedings Relating to Criminal Charges:</i></p> <p><i>...Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law...</i></p> <p><i>Children and the Right to a Fair Trial:</i></p> <p><i>...Every child accused of having committed a criminal offence shall have the following additional guarantees: ...to be presumed innocent until proven guilty according to the law;</i></p> |
| COUNCIL OF EUROPE, RECOMMENDATION (2006)2 | |
| 95. (1) | <i>The regime for untried prisoners may not be influenced by the possibility that they may be convicted of a criminal offence in the future.</i> |
| COUNCIL OF EUROPE, RECOMMENDATION (2008)11 | |
| 108. | <i>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.</i> |

Interpretation

The HR Committee, in *CCPR General Comment No. 32*, comments on the *ICCPR* 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. All public authorities have the duty to refrain from prejudging the outcome of a trial, e.g. by abstaining from making public statements affirming the guilt of the accused. Defendants should normally not be shackled or kept in cages during trials or otherwise presented to the court in a manner indicating that they may be dangerous criminals. The media should avoid news coverage undermining the presumption of innocence. Furthermore, the length of pre-trial detention should never be taken as an indication of guilt and its degree. The denial of bail or findings of liability in civil proceedings do not affect the presumption of innocence.¹⁹

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

¹⁹ *CCPR General Comment No. 32, supra note 16, at para. 30,*

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...²⁰

In *Gridin v. Russia*, the HR Committee found public statements made by high ranking law enforcement officials portraying the author as guilty, which were given wide media coverage, to be a violation of the presumption of innocence.²¹

The IACtHR held, in the *Suarez Rosero* case, that the principle of the presumption of innocence, set out in Article 8(2) of the *ACHR*

establishes the obligation of the State not to restrict the liberty of a detained person beyond the limits strictly necessary to ensure that he will not impede the efficient development of an investigation and that he will not evade justice; (detention is, therefore, a precautionary rather than a punitive measure...preventive detention should not be the normal practice in relation to persons who are to stand trial...²²

C. Right to Liberty and Security of the Person

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 include elements of inappropriateness, injustice, lack of predictability and due process of law...this means that remand in custody pursuant to lawful arrest must not only be lawful but reasonable in all the circumstances... Remand in custody must further be necessary in all the circumstances. – HR Committee in *Albert Womah Mukong v. Cameroon*, *Communication No. 458/1991*, at para. 9.8

All States are obliged to respect the right of all persons to liberty and security of the person and their freedom from arbitrary arrest, detention or exile. As principles of customary international law, these obligations pertain to States, whether or not they have ratified or otherwise adhered to a particular human rights treaty.

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.

²⁰CCPR General Comment 21: *Article 10 (Humane treatment of persons deprived of liberty)*, 10 April 1992, para. 9, online <<http://www.unhchr.ch/tbs/doc.nsf/%28Symbol%29/3327552b9511fb98c12563ed004cbe59?Opendocument>>.

²¹HR Committee: *Communication No. 770/1997, Dimitry L. Gridin v. Russian Federation*, at para 8.3.

²²IACtHR, *Case of Suárez-Rosero v. Ecuador*, Judgment of November 12, 1997, at para. 77.

“Arbitrariness” has been defined to include an element of *inappropriateness, injustice, lack of predictability* and *lack of due process of law*. A remand in custody, therefore, must not only be lawful but reasonable and necessary in all of the circumstances, for example, to prevent flight, interference with evidence or the recurrence of crime. The *ICCPR* does not specify the circumstances under which an arrest is considered reasonable.

Under the *ECHR*, the grounds on which a deprivation of liberty can be lawfully justified are specifically enumerated in an exhaustive list subject to strict interpretation. Of relevance are provisions allowing for the lawful arrest or detention of a person

APPENDIX B for non-compliance with the lawful order of a court or in order to secure the fulfilment of any obligation prescribed by law (5(1)(b)); and

APPENDIX B 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(1)(c));

Any deprivation of liberty under Article 5 of the *ECHR* must also be consistent with the purpose of that Article.

The *Principles and Guidelines on The Right to a Fair Trial and Legal Assistance in Africa*, para. M(1)(b), state that a person may only be arrested and detained “pursuant to a warrant, on reasonable suspicion or for probable cause.”

Standards

| Right to Liberty and Security of the Person | |
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| UN Instruments | |
| <i>UNIVERSAL DECLARATION OF HUMAN RIGHTS (UDHR)</i> | |
| 3. | <i>Everyone has the right to life, liberty and security of person.</i> |
| 9. | <i>No one shall be subjected to arbitrary arrest, detention or exile.</i> |
| <i>INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS (ICCPR)</i> | |
| 9. (1) | <i>Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.</i> |
| <i>CONVENTION ON THE RIGHTS OF THE CHILD (CRC)</i> | |
| 37. (b) | <i>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...</i> |
| <i>INTERNATIONAL CONVENTION ON THE ELIMINATION OF ALL FORMS OF RACIAL DISCRIMINATION (ICERD)</i> | |
| 5. (b) | <i>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;</i> |
| <i>UN BODY OF PRINCIPLES FOR THE PROTECTION OF ALL PERSONS UNDER ANY FORM OF</i> | |

| DETENTION OR IMPRISONMENT | |
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| 9. | <i>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.</i> |
| 12. | <i>(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.</i> |
| 13. | <i>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.</i> |
| 36. (2) | <i>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...</i> |
| UNITED NATIONS STANDARD MINIMUM RULES FOR NON-CUSTODIAL MEASURES (THE TOKYO RULES) | |
| Rule 3 | <i>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.</i> |
| UN RULES FOR THE PROTECTION OF JUVENILES DEPRIVED OF THEIR LIBERTY (HAVANA RULES) | |
| 68. | <i>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.</i> |
| 70. | <i>No juvenile should be disciplinarily sanctioned except in strict accordance with the terms of the law and regulations in force....</i> |

| Regional Instruments | |
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| AMERICAN DECLARATION ON THE RIGHTS AND DUTIES OF MAN | |
| 1. | <i>Every human being has the right to life, liberty and the security of his person.</i> |
| 25. | <i>No person may be deprived of his liberty except in the cases and according to the procedures established by pre-existing law...</i> |
| AMERICAN CONVENTION ON HUMAN RIGHTS (ACHR) | |
| 7. | <p><i>(1) Every person has the right to personal liberty and security.</i></p> <p><i>(2) No one shall be deprived of his physical liberty except for the reasons and under the conditions established beforehand by the constitution of the State Party concerned or by a law established pursuant thereto.</i></p> <p><i>(3) No one shall be subject to arbitrary arrest or imprisonment...</i></p> |
| AFRICAN (BANJUL) CHARTER ON HUMAN AND PEOPLES' RIGHTS (Banjul Charter) | |
| 6. | <i>Every individual shall have the right to liberty and to the security of his person. No one may be deprived of his freedom except for reasons and conditions previously laid down by law. In particular, no one may be arbitrarily arrested or detained.</i> |
| EUROPEAN CONVENTION ON HUMAN RIGHTS (ECHR) | |
| 5. (1) | <p><i>Everyone has the right to liberty and security of person.</i></p> <p><i>No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:</i></p> <p><i>(a) the lawful detention of a person after conviction by a competent court;</i></p> <p><i>(b) the lawful arrest or detention of a person for non-compliance with the lawful order of a court or in order to secure the fulfilment of any obligation prescribed by law;</i></p> <p><i>(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;</i></p> <p><i>(d) the detention of a minor by lawful order for the purpose of educational supervision or his lawful detention for the purpose of bringing him before the competent legal authority;</i></p> <p><i>(e) the lawful detention of persons for the prevention of the spreading of infectious diseases, of persons of unsound mind, alcoholics or drug addicts, or vagrants;</i></p> <p><i>(f) the lawful arrest or detention of a person to prevent his effecting an unauthorized entry into the country or of a person against whom action is being taken with a view to deportation or extradition.</i></p> |
| PROTOCOL TO THE AFRICAN CHARTER ON HUMAN AND PEOPLES' RIGHTS ON THE RIGHTS OF WOMEN IN AFRICA | |
| 4. (1) | <i>Every woman shall be entitled to respect for her life and the integrity and security of her person. All forms of exploitation, cruel, inhuman or degrading punishment and treatment shall be prohibited.</i> |
| PRINCIPLES AND BEST PRACTICES ON THE PROTECTION OF PERSONS DEPRIVED OF LIBERTY IN THE AMERICAS | |
| 3. (1) | <i>Every person shall have the right to personal liberty and to be protected against any illegal or arbitrary deprivation of liberty. The law shall prohibit, in all circumstances,</i> |

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| | <i>incommunicado detention of persons and secret deprivation of liberty since they constitute cruel and inhuman treatment. Persons shall only be deprived of liberty in officially recognized places of deprivation of liberty.</i> |
| PRINCIPLES AND GUIDELINES ON THE RIGHT TO A FAIR TRIAL AND LEGAL ASSISTANCE IN AFRICA | |
| M. (1) | <p><i>(Right to liberty and security)</i></p> <p><i>(a) States shall ensure that the right of everyone on its territory and under its jurisdiction to liberty and security of person is respected.</i></p> <p><i>(b) States must ensure that no one shall be subject to arbitrary arrest or detention, and that arrest, detention or imprisonment shall only be carried out strictly in accordance with the provisions of the law and by competent officials or persons authorized for that purpose, pursuant to a warrant, on reasonable suspicion or for probable cause.</i></p> <p><i>(c) Each State shall establish rules under its national law indicating those officials authorized to order deprivation of liberty, establishing the conditions under which such orders may be given, and stipulating penalties for officials who, without legal justification, refuse to provide information on any detention.</i></p> <p><i>(d) Each State shall likewise ensure strict supervision, including a clear chain of command, of all law enforcement officials responsible for apprehensions, arrests, detentions, custody, transfers and imprisonment, and of other officials authorized by law to use force and firearms...</i></p> |
| GUIDELINES AND MEASURES FOR THE PROHIBITION AND PREVENTION OF TORTURE, CRUEL, INHUMAN OR DEGRADING TREATMENT OR PUNISHMENT IN AFRICA (THE ROBBEN ISLAND GUIDELINES) | |
| 20. | <i>All persons who are deprived of their liberty by public order or authorities should have that detention controlled by properly and legally constructed regulations. Such regulations should provide a number of basic safeguards, all of which shall apply from the moment when they are first deprived of their liberty...</i> |
| 21. | <i>[States should] Establish regulations for the treatment of all persons deprived of their liberty guided by the UN Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment...</i> |
| COUNCIL OF EUROPE, RECOMMENDATION (2006)13 | |
| 8. (1) | <i>...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.</i> |
| COUNCIL OF EUROPE, RECOMMENDATION (2008)11 | |
| 3. | <i>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.</i> |

Interpretation

Purpose and scope of prohibition of arbitrary arrest and detention

The HR Committee, in *CCPR General Comment No. 8*, states that Article 9(1) of the *ICCPR* “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.”²³

The HR 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.²⁴

The rights of children not to be arbitrarily detained are addressed by the UN Committee on the Rights of the Child (CRC), in *CRC General Comment No. 10 (2007): Children’s rights in juvenile justice*, at paragraph 79:

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.²⁵

Where preventive detention is used for reasons of public security or public order, i.e., “where the person concerned constitutes a clear and serious threat to society which cannot be contained in any other manner,” the guarantees enshrined in Article 9 fully apply in such instances.²⁶ In *CCPR General Comment No. 8*, the HR Committee states that:

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

²³ *CCPR General Comment No. 8: Right to liberty and security of persons (Art. 9)*, 30 June 1982, at para. 1, online <<http://www.unhchr.ch/tbs/doc.nsf/%28Symbol%29/f4253f9572cd4700c12563ed00483bec?Opendocument>>.

²⁴ HR Committee: Communication No. 449/1991, *Barbarin Mojica v. Dominican Republic*, at para. 5.4; Communication No. 314/1988, *Bwalya v. Zambia*, at para. 6.4.

²⁵ *CRC General Comment No. 10 (2007): Children’s rights in juvenile justice*, 25 April 2007, CRC/C/GC/10, para. 79, online <<http://www2.ohchr.org/english/bodies/crc/comments.htm>>.

²⁶ HR Committee: Communication No. 66/1980, *David Alberto Cámpora Schweizer v. Uruguay*, at para. 18.1

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.²⁷

Pre-trial detention in accordance with the law

A deprivation of liberty must be carried out in accordance with the law, and, with respect to Article 5 of the *ECHR*, for the purposes enumerated in that Article. Applicable laws must be sufficiently precise to enable an individual to reasonably understand the consequences of a course of action.

The HR Committee has held that the principle of legality in Article 9(1) of the *ICCPR* requires that the grounds for arrest and detention must be clearly established by domestic legislation and made in accordance with that law.²⁸ Such laws must accord with applicable international human rights law.

Article 7 of the *ACHR* was considered by the IACtHR in *Gangaran Panday Case v. Suriname*:

This provision contains specific guarantees against illegal or arbitrary detentions or arrests, as described in clauses 2 and 3, respectively. Pursuant to the first of these provisions, no person may be deprived of his or her personal freedom except for reasons, cases or circumstances expressly defined by law (material aspect) and, furthermore, subject to strict adherence to the procedures objectively set forth in that law (formal aspect). The second provision addresses the issue that no one may be subjected to arrest or imprisonment for reasons and by methods which, although classified as legal, could be deemed to be incompatible with the respect for the fundamental rights of the individual because, among other things, they are unreasonable, unforeseeable or lacking in proportionality.²⁹

The ECtHR has held that “lawful” and “in accordance with a procedure prescribed by law” in Article 5(1) of the *ECHR*

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,

²⁷ *CCPR General Comment No. 8*, *supra* note 23, at para. 4.

²⁸ HR Committee: 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.

²⁹ *I-A Court of HR, Gangaram Panday Case v. Suriname*, judgment of January 21, 1994, in OAS doc. OAS/Ser.L/V/III.31, doc, *Annual Report of the Inter-American Court of Human Rights 1994*, p.32, at para. 47.

the consequences which a given action may entail...³⁰

For the detention of an individual to be compliant with the “lawful arrest” requirement in Article 5(1) of the *ECHR*, 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 must be recorded accurately.³¹

Pre-trial detention must be reasonable and necessary in all the circumstances

In addition to being carried out in accordance with the law, arrest and detention must not be arbitrary. This requires that an arrest be reasonable in all of the circumstances and that pre-trial detention be necessary in all the circumstances. The “reasonableness” of pre-trial detention will be assessed in the light of all of the circumstances of the particular case, such as the gravity of the offences, the risk of absconding and the risk of influencing witnesses, as well as the conduct of the domestic authorities.

Pre-trial detention has been found to be arbitrary, *inter alia*, where no charges have been laid, the duration of detention is indefinite or becomes excessive, detention is applied automatically or there is no possibility of bail.

The “reasonableness” of the suspicion on which an arrest must be made is relevant to a determination of arbitrariness. The ECtHR has interpreted the reasonable suspicion as 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.

Under the *ECHR*, pre-trial detention can only be imposed when it is reasonably considered necessary to prevent an accused person from committing an offence or fleeing after having done so.

The HR Committee, interpreting the *ICCPR*, 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 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 [footnote omitted]. Remand in custody must further be necessary in all the circumstances, for example, to prevent flight, interference with evidence or the recurrence of crime.³²

³⁰ ECtHR, *Steel and Others v. the United Kingdom* (App. No. 67/1997/851/1058), judgment of 23 September 1998, Reports 1998-VII, p. 2735, at para. 54.

³¹ ECtHR, *Case of Cakici v. Turkey* (App. No. 23657/94), judgment of 8 July 1999, at para. 105.

³² HR Committee: 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*

Pre-trial detention may become a violation of the right to liberty and the presumption of innocence where, for example, the duration is excessive, or is set according to the length of potential sentence or it is applied automatically.³³ Cases in which 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 ICCPR Article 9(1).³⁴ Detention should not be of a punitive character.³⁵

The HR Committee held that the abduction of a former national by a State from the territory of another State constitutes an arbitrary arrest in violation of Article 9(1) of the ICCPR.³⁶

Chair of the WGAD, 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.”³⁷

The ACHPR has interpreted indefinite detention as arbitrary and a violation of Article 6 of the *Banjul Charter*,³⁸ as it has the detention of persons without charge and without the possibility of bail.³⁹

The requirement that the State actor carrying out an arrest has a "reasonable suspicion" that an offence has been committed 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.⁴⁰

The ECtHR 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.⁴¹

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.

³³ HR Committee (2006) Concluding Observations: Italy (CCPR/C/ITA/CO/5), at para. 14.

³⁴ HR Committee: Communication No. 90/1981, *Luyeye Magana ex-Philibert v. Zaire*, at para. 8.

³⁵ HR Committee: Communication No. *De Morais v. Angola*, *supra*, note 32, at para. 6.1.

³⁶ HR Committee: Communication No. 52/1979, *Delia Saldias de Lopez v. Uruguay*, at para. 13.

³⁷ “Pre-Trial Detention of Women and its Impact on their Children”, *supra*, note 10, 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.

³⁸ *Free Legal Assistance Group, Lawyers' Committee for Human Rights, Union Interafricaine des Droits de l'Homme, Les Témoins de Jehovah v. DRC* (25/89-47/90-56/91-100/93), at para. 42.

³⁹ African Commission on Human and Peoples' Rights, Communication No. 102/93, *Constitutional Rights Project v. Nigeria*, at para. 55.

⁴⁰ ECtHR, *Fox, Campbell and Hartley v. The United Kingdom* (App no. 12244/86, 12245/86, 12383/86), Series A, No. 182, p.19, at para. 32.

⁴¹ ECtHR, *Case of Cahit Demirel v. Turkey* (App No. 18623/03), at para. 23.

The IACtHR found that the second provision of Article 7 of the *ACHR*

addresses the issue that no one may be subjected to arrest or imprisonment for reasons and by methods which, although classified as legal, could be deemed to be incompatible with the respect for fundamental rights of the individual because, among other things, they are unreasonable, unforeseeable or lacking in proportionality.⁴²

A violation of Articles 7(1), (2) and (3) of the *ACHR* were found by the IACtHR in the *Cesti Hurtado* case, as a result of the detention, prosecution and sentencing of the petitioner by the Peruvian military in defiance of a legitimate order of the Public Law Chamber.⁴³

In *Case of Acosta-Calderón v. Ecuador*, the IACtHR found that

preventive detention is the most severe measure that can be applied to the persona (*sic*) accused of a crime, reason for which its application must have an exceptional nature, since it is limited by the principles of legality, the presumption of innocence, need, and proportionality, all of which are strictly necessary in a democratic society [footnote omitted].

The Tribunal also considers that preventive detention is a precautionary measure, not a punitive one [footnote omitted]. The arbitrary extension of a preventive detention turns it into a punishment when it is inflicted without having proven the criminal responsibility of the person to whom this measure is applied.⁴⁴

The IACHR has held that failing to set a time-limit for the release of a detainee without charges or for announcing the nature of the accusations violates the detainee's rights.⁴⁵

D. Presumption in Favour of Pre-Trial Release

Shifting the burden of proof to the detained person in such matters is tantamount to overturning the rule of Article 5 of the Convention, a provision which makes detention an exceptional departure from the right to liberty and one that is only permissible in exhaustively enumerated and

⁴² *Gangaram Pandy v. Suriname*, *supra* note 29, at para. 47.

⁴³ *IACtHR, Case of Cesti-Hurtado v. Peru*, Judgment of September 29, 1999, at para. 143.

⁴⁴ *IACtHR, Case of Acosta-Calderón v. Ecuador, Judgment of June 24, 2005*, para. 74-75.

⁴⁵ *IACHR, Report on the Situation of Human Rights in Paraguay* (OEA/Ser.LV/II.44, doc. 38 rev.1), p. 53, as cited in

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), at p. 17, online <<http://www.humanrightseducation.info/images/stories/pdf/HRandPreTrialDetention.pdf>>

strictly defined cases. - European Court of Human Rights in the *Case of Ilijkov v. Bulgaria (Application no. 33977/96)*, at para. 85.

Consistent with the presumption of innocence and the presumption in favour of liberty, the international standards provide that pre-trial detention should be the exception and not the rule, and should be used as a means of last resort only, and for the minimum necessary period. Release may be conditioned by guarantees to appear for trial.

The burden is on the State to show why an accused cannot be released. Under the *ICCPR*, pretrial detention should be ordered only if there are reasonable grounds to believe that the accused has been involved in the commission of the alleged offence, and there is a danger of flight, commission of further serious offences, or that the course of justice will be seriously interfered with if they are freed. Under Article 5(1) of the *ECHR*, an individual may only be detained following the first appearance before a judicial officer when it is reasonably necessary to prevent further offences or flight. Under para. M(1)(e) of the *Principles And Guidelines on The Right to a Fair Trial and Legal Assistance in Africa* persons arrested on a criminal charge must not be kept in custody pending trial unless there is sufficient evidence that makes it necessary to prevent such person from fleeing, interfering with witnesses or posing a clear and serious risk to others.

The necessity for detention and the imposition of non-custodial measures must be kept under judicial review. This requires that a detainee be brought before a court at regular intervals throughout a detention or the imposition of non-custodial measures so that the court can review the continuing need for detention or such measures.

States should take various measures to minimize pre-trial detention. Prosecutors shall not initiate or continue prosecution, or shall make every effort to stay proceedings, when an impartial investigation shows the charge to be unfounded.⁴⁶ Where appropriate and compatible with the legal system, and in accordance with established criteria, 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.⁴⁷

A wide range of alternatives to pre-trial detention, prescribed by law, should be employed as early as possible. The COE has said that “the widest possible use should be made of alternatives to pretrial detention.”⁴⁸ Principle 3(4) of the *Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas* requires, whenever

⁴⁶ See *Tokyo Rules*, Rule 5.1 *infra*; also, *UN Guidelines on the Role of Prosecutors*, Adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, 27 August to 7 September 1990, at paras 14 and 18, online <<http://www.unrol.org/files/Guidelines%20on%20the%20Role%20of%20Prosecutors%20.pdf>>

⁴⁷ *UN Guidelines on the Role of Prosecutors*, *ibid.*, at para. 18.

⁴⁸ *Recommendation No. R (99) 22 of the Committee of Ministers to Member States Concerning Prison Overcrowding and Prison Population Inflation*, Adopted by the Committee of Ministers on 30 September 1999, at par. III(12), online <<http://legislationline.org/topics/organisation/4/topic/13>>

detention is a possibility, that States establish by law a series of alternative or substitute measures.

States are urged to provide the necessary and appropriate resources to ensure the availability and effectiveness of alternative or substitute measures for deprivation of liberty.⁴⁹

Standards

| Right To Release Pending Trial | |
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| <i>UN Instruments</i> | |
| <i>INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS (ICCPR)</i> | |
| 9. (3) | <i>... 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...</i> |
| <i>UN BODY OF PRINCIPLES FOR THE PROTECTION OF ALL PERSONS UNDER ANY FORM OF DETENTION OR IMPRISONMENT</i> | |
| 39. | <i>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.</i> |
| <i>UN STANDARD MINIMUM RULES FOR NON-CUSTODIAL MEASURES (THE TOKYO RULES)</i> | |
| 2. (3) | <i>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.</i> |
| 3. | <p><i>3.1. The introduction, definition and application of non-custodial measures shall be prescribed by law.</i></p> <p>...</p> <p><i>3.4. Non-custodial measures imposing an obligation on the offender, applied before or instead of formal proceedings or trial, shall require the offender's consent.</i></p> <p><i>3.5. 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.</i></p> |

⁴⁹ See *Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas*, Principle 3(4), *infra*; see also, *Recommendation Rec(2000)22 of the Committee of Minister to member states on Improving the Implementation of the European Rules on Community Sanctions and Measures*, adopted by the Committee of Ministers on 29 November 2000, at para. 9, online: <<http://legislationline.org/topics/organisation/4/topic/13>>

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| 5. (1) | <i>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.</i> |
| 6. | <p><i>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.</i></p> <p><i>6.2. 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.</i></p> <p><i>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.</i></p> |
| UN STANDARD MINIMUM RULES FOR THE ADMINISTRATION OF JUVENILE JUSTICE (THE BEIJING RULES) | |
| 13. | <p><i>(1) Detention pending trial shall be used only as a measure of last resort and for the shortest possible period of time.</i></p> <p><i>(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.</i></p> |
| 19. | <i>(1) The placement of a juvenile in an institution shall always be a disposition of last resort and for the minimum necessary period.</i> |
| UN RULES FOR THE PROTECTION OF JUVENILES DEPRIVED OF THEIR LIBERTY (HAVANA RULES) | |
| 1. | <i>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;</i> |
| 2. | <i>...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.</i> |
| UN RULES FOR THE TREATMENT OF WOMEN PRISONERS AND NON-CUSTODIAL MEASURES FOR WOMEN OFFENDERS (THE BANGKOK RULES) | |
| 58. | <i>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.</i> |

| Regional Instruments | |
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| <i>AMERICAN CONVENTION ON HUMAN RIGHTS (ACHR)</i> | |
| 7. (5) | <i>Any person detained shall ...be entitled to trial within a reasonable time or to be released without prejudice to the continuation of the proceedings. His release may be subject to guarantees to assure his appearance for trial.</i> |
| <i>EUROPEAN CONVENTION ON HUMAN RIGHTS (ECHR)</i> | |
| 5. (1)(c) | <i>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;</i> |
| 5. (3) | <i>...Release may be conditioned by guarantees to appear for trial.</i> |
| <i>PRINCIPLES AND BEST PRACTICES ON THE PROTECTION OF PERSONS DEPRIVED OF LIBERTY IN THE AMERICAS</i> | |
| 3. | <i>(1) ...As a general rule, the deprivation of liberty of persons shall be applied for the minimum necessary period. Deprivation of liberty of children shall be applied as a measure of last resort and for the minimum necessary period, and shall be limited to strictly exceptional cases. In imposing penalties laid down by general law on members of indigenous peoples preference shall be given to methods of punishment other than confinement in prison, in conformity with their customs or customary laws, where these are compatible with the legal system in force. (2) Exceptional use of preventive deprivation of liberty The law shall ensure that personal liberty is the general rule in judicial and administrative procedures, and that preventive deprivation of liberty is applied as an exception, in accordance with international human rights instruments. In the context of criminal proceedings, there shall be sufficient evidentiary elements that associate the accused with the facts of the case, in order to justify an order of preventive deprivation of liberty. The foregoing is a demand or a condition sine qua non for imposing any precautionary measure; nevertheless, after a certain lapse of time it no longer suffices Preventive deprivation of liberty is a precautionary measure, not a punitive one, which shall additionally comply with the principles of legality, the presumption of innocence, need, and proportionality, to the extent strictly necessary in a democratic society. It shall only be applied within the strictly necessary limits to ensure that the person will not impede the efficient development of the investigations nor will evade justice, provided that the competent authority examines the facts and demonstrates that the aforesaid requirements have been met in the concrete case. ... (4) Alternative or substitute measures for deprivation of liberty The Member States of the Organization of American States shall establish by law a series of alternative or substitute measures for deprivation of liberty, duly taking into account the international human rights standards on the topic.</i> |

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| | <i>When applying alternative or substitute measures for deprivation of liberty, Member States shall promote the participation of society and the family in such a way as to complement the intervention by the State, and shall also provide the necessary and appropriate resources to ensure their availability and effectiveness.</i> |
| PRINCIPLES AND GUIDELINES ON THE RIGHT TO A FAIR TRIAL AND LEGAL ASSISTANCE IN AFRICA | |
| M.(1)(e) | <i>(Right to liberty and security) Unless there is sufficient evidence that deems it necessary to prevent a person arrested on a criminal charge from fleeing, interfering with witnesses or posing a clear and serious risk to others, States must ensure that they are not kept in custody pending their trial. However, release may be subject to certain conditions or guarantees, including the payment of bail.</i> |
| COUNCIL OF EUROPE, RECOMMENDATION (2006)13 | |
| 3. | <i>(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.</i> |
| 4. | <i>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.</i> |
| 5. | <i>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.</i> |
| 6. | <i>Remand in custody shall generally be available only in respect of persons suspected of committing offences that are imprisonable.</i> |
| 7. | <i>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.</i> |
| COUNCIL OF EUROPE, RECOMMENDATION CM/REC(2008)11 | |
| 10. | <i>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.</i> |

Interpretation

Pre-trial detention only as a last resort

The HR Committee, interpreting the *ICCPR*, states in *CCPR General Comment No. 8*, that “Pre-trial detention should be an exception and as short as possible.”⁵⁰

The Eighth UN Congress on the Prevention of Crime and the Treatment of Offenders, expressing serious concern about delays in the criminal justice process and the high proportion of pre-trial detainees among the prison population, among other things, recommended that Member States use pre-trial detention only if circumstances make it strictly necessary and as a last resort in criminal proceedings.⁵¹

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.⁵²

The burden is on the state to justify pre-trial detention

States must demonstrate that the detention of individuals pending trial is absolutely necessary. The HR Committee has stated, in relation to the *ICCPR*, that “bail should be granted, except in situations where the likelihood exists that the accused would abscond or destroy evidence, influence witnesses or flee from the jurisdiction of the state party.”⁵³ The mere assumption by the 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 *ICCPR*.⁵⁴

The burden is on the State to show why the defendant cannot be released. The ECtHR ruled, in *Case Of Ilijkov V. Bulgaria*:

Shifting the burden of proof to the detained person in such matters is tantamount to overturning the rule of Article 5 of the Convention, a provision which makes detention an exceptional departure from the right to liberty and one that is only permissible in exhaustively enumerated and strictly defined cases.⁵⁵

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

⁵⁰ *CCPR General Comment No. 8*, *supra* note 23, at para. 3.

⁵¹ 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, at p.158.

⁵² *Nart v. Turkey*, 20817/04, 6 May 2008, at para. 31. See also *Guñeç v. Turkey*, no. 70337/01, 20 January 2009.

⁵³ HR Committee: Communication No. 526/1993, *Hill v. Spain*, at para. 12.3.

⁵⁴ HR Committee: Communication No. 1178/2003, *Aleksander Smantser v. Belarus*, at para. 10.3.

⁵⁵ *Case Of Ilijkov V. Bulgaria* (Application no. 33977/96), at para. 85.

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 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.”⁵⁶

Suspected involvement in serious offences

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.⁵⁷ When release pending trial is refused on the basis that the defendant may commit further offences prior to trial, the domestic court must be satisfied that the risk is substantiated. A reference to a person's antecedents cannot suffice to justify refusing release.⁵⁸

Danger of absconding

The absence of a fixed residence does not give rise to a danger of flight.⁵⁹ 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.”⁶⁰ In *Case of Grishin v. Russia*, the ECtHR 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.”⁶¹

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’.”⁶²

The HR 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.”⁶³

⁵⁶ ECtHR, *Case of Grishin v. Russia* (App No. 14807/08), at para. 139.

⁵⁷ ECtHR, *Case of Van Der Tang v. Spain* (App No 19382/92), at para. 63. See also *Case Of Ilijkov V. Bulgaria* (Application no. 33977/96), at para. 81.

⁵⁸ ECtHR, *Case of Muller v. France* (App No. 21802/93), at para. 44.

⁵⁹ ECtHR, *Case of Sulaoja v. Estonia* (App No. 55939/00), at para. 64.

⁶⁰ ECtHR, *Case of Tomasi v France* (App No 12850/87), at para. 98.

⁶¹ ECtHR, *Case of Grishin v. Russia* (App No. 14807/08), at para 143.

⁶² *Cahit Demirel v. Turkey*, *supra* note 41, at paras. 24-25.

⁶³ *Hill v. Spain*, *supra* note 53, at para. 12.3.

Pressure on witnesses and risk of collusion

Although a risk of collusion between co-accused may be genuine at the outset of the detention, it may gradually diminish, or even disappear altogether.⁶⁴

The ECtHR ruled that

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...⁶⁵

The ECtHR has found that certain crimes prejudicing public order may justify pre-trial detention.⁶⁶ However, the circumstances must be exceptional, and

this ground can be regarded as relevant and sufficient only provided that it is based on facts capable of showing that the accused's release would actually prejudice public order. In addition, detention will continue to be legitimate only if public order remains actually threatened...⁶⁷

However, the UN Office of the High Commissioner for Human Rights has challenged the notion of "public order" as a justification for pre-trial detention in a democratic society governed by the rule of law.⁶⁸ In *Cámpora Schweizer v. Uruguay*, the author of an individual communication to the HR Committee was held in accordance with the "prompt security measures" under Uruguayan law. While the HR Committee indicated it was not in a position to pronounce itself on the general compatibility of the regime of "prompt security measures" under Uruguayan law with the *ICCPR*, it emphasized that "although administrative detention may not be objectionable in circumstances where the person concerned constitutes a clear and serious threat to society which cannot be contained in any other manner...the guarantees enshrined in the following paragraphs of Article 9 fully apply in such instances".⁶⁹

In some States, insults to authorities are offences for which those convicted are subject to imprisonment. States sometimes claim that such charges warrant pre-trial detention to

⁶⁴ *Tomasi v France*, *supra* note 60, at paras. 92-95.

⁶⁵ *Grishin v. Russia*, *supra* note 61, at para. 148.

⁶⁶ *Tomasi v. France*, *supra*, note 60, at para. 91.

⁶⁷ *Ibid.*

⁶⁸ Office of the UN High Commissioner for Human Rights in association with the International Bar Association (2003), *Human Rights and the Administration of Justice: A Manual on Human Rights for Judges, Prosecutors and Lawyers* (United Nations), p.194.

⁶⁹ HR Committee: Communication No. 66/1980, *Schweizer v. Uruguay*, at para. 18.1.

prevent a breach of public order. WGAD has considered charges for insulting authorities to be violations of the right to freedom of expression, and imprisonment on conviction for such charges is considered arbitrary.⁷⁰ Pre-trial detention on charges that themselves violate international human rights law is not permissible at international law.

Duty to consider alternatives

When deciding whether a person should be released or detained, authorities have an obligation under Article 5(3) of the *ECHR* to consider alternative measures of ensuring his or her appearance at the trial.⁷¹ Where the risk of absconding is legitimately found to exist, authorities are under a duty to consider alternatives to detention which will ensure that the defendant appears at trial.⁷²

When fixing a financial surety as a condition of release pending trial, authorities “must take as much care in fixing appropriate bail as in deciding whether or not the accused’s continued detention is indispensable... Furthermore, the amount set for bail must be duly justified in the decision fixing bail ...and must take into account the accused’s means.”⁷³

E. Right To Be Promptly Brought Before a Judge or Other Judicial Officer and to Trial within a Reasonable Time, or Release

Individuals arrested 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. This safeguard is contained within each of the major international and regional human rights instruments. The right is automatic and does not depend upon the request of the detainee.

The HR Committee has indicated that the delay between the arrest of an accused and the time he or she is brought before a judicial authority should not exceed a few days and ideally should be within 48 hours. The judicial 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 a judicial 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.

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

⁷⁰ WGAD: Opinions adopted by the Working Group on Arbitrary Detention at its sixty-fourth session, 27-31 August 2012, No. 35/2012 (Thailand), at para. 24.

⁷¹ *ECtHR, Case of Yevgeniy Kuzmin v. Russia* (Application no. 6479/05), at para. 34.

⁷² *ECtHR, Case Of Khodorkovskiy v. Russia* (App No. 5829/04), at para. 186.

⁷³ *ECtHR, Case of Mangouras v. Spain* (App No. 12050/04), at paras. 79-80.

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.

Where an individual is detained, that person is entitled to be tried within a reasonable time, or to release pending trial. What constitutes “reasonable time” is a matter of assessment for each particular case, but detention must not continue beyond the period for which the State party can provide appropriate justification, as discussed in the previous section. The relevant period of detention to be assessed is the date of arrest or commencement of detention until the date of final judgment.

Standards

| Right To Be Promptly Brought Before a Judge or Other Judicial Officer and to Trial Within a Reasonable Time, or Release | |
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| UN Instruments | |
| <i>INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS (ICCPR)</i> | |
| 9. (3) | <i>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...</i> |
| <i>UN BODY OF PRINCIPLES FOR THE PROTECTION OF ALL PERSONS UNDER ANY FORM OF DETENTION OR IMPRISONMENT</i> | |
| 11. | <i>(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.</i> ... <i>(3) A judicial or other authority shall be empowered to review as appropriate the continuance of detention.</i> |
| 37. | <i>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</i> |
| 38. | <i>A person detained on a criminal charge shall be entitled to trial within a reasonable time or to release pending trial.</i> |
| <i>UN STANDARD MINIMUM RULES FOR NON-CUSTODIAL MEASURES (THE TOKYO RULES)</i> | |
| 6.3 | <i>The offender shall have the right to appeal to a judicial or other competent independent authority in cases where pre-trial detention is employed.</i> |
| <i>UN STANDARD MINIMUM RULES FOR THE ADMINISTRATION OF JUVENILE JUSTICE (THE BEIJING RULES)</i> | |
| 7.1 | <i>Basic procedural safeguards such as...the right to appeal to a higher authority shall be guaranteed at all stages of proceedings.</i> |

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| UN RULES FOR THE PROTECTION OF JUVENILES DEPRIVED OF THEIR LIBERTY (HAVANA RULES) | |
| 70. | <i>...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...</i> |
| Regional Instruments | |
| AMERICAN DECLARATION ON THE RIGHTS AND DUTIES OF MAN | |
| 25. | <i>...Every individual who has been deprived of his liberty has the right to have the legality of his detention ascertained without delay by a court, and the right to be tried without undue delay or, otherwise, to be released...</i> |
| AMERICAN CONVENTION ON HUMAN RIGHTS (ACHR) | |
| 2. (h) | <i>...During the proceedings, every person is entitled, with full equality, to the following minimum guarantees:...</i> <i>(h) the right to appeal the judgment to a higher court.</i> |
| 7. (5) | <i>Any person detained shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to be released without prejudice to the continuation of the proceedings. His release may be subject to guarantees to assure his appearance for trial.</i> |
| AFRICAN CHARTER ON THE RIGHTS AND WELFARE OF THE CHILD | |
| 2.(c)(iv) | <i>States Parties to the present Charter shall in particular:</i> <i>... (c) ensure that every child accused in infringing the penal law:</i> <i>... (iv) shall have the matter determined as speedily as possible by an impartial tribunal...</i> |
| AFRICAN (BANJUL) CHARTER ON HUMAN AND PEOPLES' RIGHTS (Banjul Charter) | |
| 7. (1) | <i>Every individual shall have the right to have his cause heard. This comprises:</i> <i>(a) the right to an appeal to competent national organs against acts of violating his fundamental rights as recognized and guaranteed by conventions, laws, regulations and customs in force;... (d) the right to be tried within a reasonable time by an impartial court or tribunal.</i> |
| EUROPEAN CONVENTION ON HUMAN RIGHTS (ECHR) | |
| 5. (3) | <i>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...</i> |
| PRINCIPLES AND BEST PRACTICES ON THE PROTECTION OF PERSONS DEPRIVED OF LIBERTY IN THE AMERICAS | |
| 5. | <i>Every person deprived of liberty shall, at all times and in all circumstances, have the right to the protection of and regular access to competent, independent, and impartial judges and tribunals, previously established by law.</i> <i>...They shall have the right to a hearing and a trial, with due guarantees and within a reasonable time, by a judge, authority or official who is legally authorized to exercise judicial functions, or to be released without prejudice to the continuation of the proceedings; to appeal the judgment to a higher judge or court...</i> |

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| 6. | <p><i>Competent, independent, and impartial judges and tribunals shall be in charge of the periodic control of legality of acts of the public administration that affect, or could affect the rights, guarantees, or benefits to which persons deprived of liberty are entitled, as well as the periodic control of conditions of deprivation of liberty and supervision of the execution of, or compliance with, punishments.</i></p> <p><i>Member States of the Organization of American States shall ensure the necessary resources to permit the establishment and effectiveness of judicial bodies of control and supervision of punishments, and shall provide the necessary resources for them to function adequately.</i></p> |
| <p>PRINCIPLES AND GUIDELINES ON THE RIGHT TO A FAIR TRIAL AND LEGAL ASSISTANCE IN AFRICA</p> | |
| | <p><i>General Principles Applicable To All Legal Proceedings:</i></p> <p><i>...The essential elements of a fair hearing include: ...</i></p> <p><i>(i) an entitlement to a determination of their rights and obligations without undue delay and with adequate notice of and reasons for the decisions; ...</i></p> |
| | <p><i>Provisions Applicable to Arrest and Detention:</i></p> <p><i>...States shall enact legislation, where it does not exist, to ensure the right to habeas corpus, amparo or similar procedures.</i></p> |
| <p>GUIDELINES AND MEASURES FOR THE PROHIBITION AND PREVENTION OF TORTURE, CRUEL, INHUMAN OR DEGRADING TREATMENT OR PUNISHMENT IN AFRICA (THE ROBBEN ISLAND GUIDELINES)</p> | |
| 27. | <p><i>[States should] Ensure that all persons deprived of their liberty are brought promptly before a judicial authority, having the right to defend themselves or to be assisted by legal counsel, preferably of their own choice.</i></p> |
| <p>COUNCIL OF EUROPE, RECOMMENDATION (2006)13</p> | |
| 14. | <p><i>(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.</i></p> <p><i>(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.</i></p> |
| 15. | <p><i>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.</i></p> |
| 16. | <p><i>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.</i></p> |
| 18. | <p><i>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.</i></p> |

Interpretation

The HR Committee has stated that the purpose of the first sentence of Article 9(3) of the *ICCPR* 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.”⁷⁴

With respect to Article 5(3) of the *ECHR*, the ECtHR ruled that “[s]uch automatic expedited judicial scrutiny provides an important measure of protection against arbitrary behaviour, incommunicado detention and ill-treatment.”⁷⁵

A hearing must be held promptly following arrest

In *CCPR General Comment No. 8*, the HR Committee states that “delays must not exceed a few days.”⁷⁶ The Committee ruled that the term “promptly” in *ICCPR* Article 9 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”⁷⁷ and ideally should be made available within 48 hours.⁷⁸

The ACHPR found that a Nigerian Decree which authorized the detention of people without charge for a 3-month period and allowed the government arbitrarily to hold people critical of its policies for a period of 3 months without having to submit and explanations and without the possibility to challenge the arrest and detention before a court violated Article 6 of the *Banjul Charter*.⁷⁹

An assessment of whether the requirement for “promptness” in Article 5(3) of the *ECHR* has been met 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”.⁸⁰ No violation of Article 5(3) can arise if the arrested person is released “promptly” before any judicial control would have been feasible.⁸¹

According to the ECtHR

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

⁷⁴ HR Committee: Communication No. 521/1992, *Vladimir Kulomin v. Hungary*, at para. 11.2.

⁷⁵ ECtHR, *Medvedyev and Others v. France* (App No. 3394/03), 29 March 2010, at para. 118.

⁷⁶ *CCPR General Comment No. 8*, *supra* note 23, at para. 2.

⁷⁷ HR Committee: Communication No. 373/1989, *Stephens v. Jamaica*, at para. 9.6.

⁷⁸ HR Committee, Concluding Observations: Zimbabwe, CCPR/C/79/Add.89 (1998), at para. 17.

⁷⁹ ACHPR, *International Pen and Others v. Nigeria, African Commission on Human and Peoples' Rights, Comm. Nos. 137/94, 139/94, 154/96 and 161/97 (1998)*, at paras. 83-84.

⁸⁰ ECtHR, *Case of Brogan and Others v. the United Kingdom* (App No. 11209/84; 11234/84; 11266/84; 11386/85), 29 November 1988, at para. 58.

⁸¹ *Ibid.*

of Article 5... (“speedily”/“á bref délai”)...

Whereas promptness is to be assessed in each case according to its special features...the significance to be attached to those features can never be 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.⁸²

Consequently, the ECtHR held that a period of four days and six hours spent in police custody fell 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.”⁸³

In *Case of Acosta-Calderón v. Ecuador*, the IACtHR explained that “prompt judicial control”

seeks to avoid arbitrary or illegal arrests, taking into account that, in a Constitutional State, a judge must guarantee the rights of the person detained, authorize the adoption of precautionary or coercive measures, when these are strictly necessary and, in general, ensure that the accused receive a treatment consequent with the presumption of innocence...

The simple awareness of a judge that a person is detained does not satisfy this guarantee, since the detainee must appear personally and give his statement before the competent judge or authority.⁸⁴

The IACtHR held, in *Castillo-Páez Case v. Peru*, that Article 7(5) of the *ACHR* was violated since the victim had not been “brought before a competent court within 24 hours or otherwise if distance was a factor, nor within fifteen days on suspicion of terrorism, pursuant to Article 7, paragraph 5, of the Convention, and Article 2, paragraph 20(c), of the Constitution of Peru.”⁸⁵

The duty is automatic and does not depend upon the request of the detainee

Under the *ICCPR*, the duty to bring a detainee promptly before a judicial authority applies regardless of whether a detainee requests it.⁸⁶

Similarly, the ECtHR has ruled that the review must be automatic and must not depend on the application of the detained person.⁸⁷

⁸² *Ibid.*, at para. 59.

⁸³ *Ibid.*, at para. 62.

⁸⁴ *IAtHR, Case of Acosta-Calderón v. Ecuador, Judgment of June 24, 2005*, at paras. 76-78.

⁸⁵ *IACtHR, Castillo-Páez Case v. Peru, judgment of November 3, 1997*, at para. 57.

⁸⁶ HR Committee, Concluding Observations: Republic of Korea, CCPR/C/79/Add.114, 1 November 1999, at para. 13.

⁸⁷ *ECtHR, Case of McKay v. the United Kingdom (App. No. 543/03), judgment 3 October 2006*, at para. 34.

Scope of review of pre-trial detention

In *Case of McKay v. the United Kingdom*, the ECtHR identified three strands running through the Court's case law on ECHR 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...⁸⁸
[emphasis added]

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...⁸⁹

The “officer” must be independent, objective and impartial, with the authority to order the detainee’s release

In *Kulomin v. Hungary*, the HR Committee considered the meaning of “officer” under ICCPR Article 9(3), finding 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.”⁹⁰ In that case, the Committee ruled that a public prosecutor who extended an 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 [ICCPR] article 9(3).”⁹¹

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.⁹² In *Case of Shishkov v. Bulgaria*, neither investigators before whom accused persons were brought, nor prosecutors who approved detention orders, could be considered to be an “officer authorised by law to exercise judicial power” within the meaning of ECHR Article 5(3).⁹³

⁸⁸ *Ibid.*, at para. 30.

⁸⁹ ECtHR, *Case of X.Y. v. Hungary* (Application no. 43888/08), at para. 50.

⁹⁰ *Kulomin v. Hungary*, *supra* note 74, at para. 11.3.

⁹¹ *Ibid.*

⁹² ECtHR, *Case of Assenov and Others v. Bulgaria* (App. No. 90/1997/874/1086), at para. 146.

⁹³ ECtHR, *Case of Shishkov v. Bulgaria* (App. No. 38822/97), final judgment 09/04/2003, at para. 53.

Right to trial within a reasonable time, or to release

Detainees must be granted provisional release once continuing detention ceases to be reasonable. What constitutes “reasonable time” in which to be brought to trial must be assessed in each particular case. However, detention should not continue beyond the period for which the State party can provide appropriate justification. (See previous section for legal justifications for pre-trial detention).

Interpreting the *ICCPR*, the HR Committee stated:

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.⁹⁴

The ECtHR 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.” Instead:

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.⁹⁵

The ECtHR held in *Wemhoff v. Germany* that “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.”⁹⁶

Detention should not continue beyond the period for which the State party can provide appropriate justification.⁹⁷ It falls first to the national judicial authorities to ensure that the pre-trial detention of an accused person 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

⁹⁴ HR Committee: Communication No. 336/1988, *Fillastre and Bizouarn v. Bolivia*, at para. 6.5.

⁹⁵ ECtHR, *Case of Neumeister v. Austria* (App No. 1936/63), at para. 4.

⁹⁶ ECtHR, *Wemhoff v. Germany*, (App No. 2122/64), at para. 5, 9.

⁹⁷ HR Committee: Communication No. 1172/2003, *Salim Abbassi v. Algeria*, at para. 8.4.

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...⁹⁸

The ACHPR found a violation of Articles 7(1)(d) and 26 (independence of the courts) of the *Banjul Charter* where victims had been detained for weeks and months respectively without any charges being brought against them.⁹⁹

F. Right To Be Informed of Reasons for Arrest and of Any Charges

Individuals must be promptly informed of the reasons for an arrest, and of any charges, in a language that they understand and in sufficient detail to enable them to take proceedings to have the lawfulness of their detention decided speedily.

The *UN Body Of Principles for the Protection of all Persons under any Form of Detention or Imprisonment*, Principle 12(1) requires that the following information be duly recorded:

- The reasons for the arrest;
- 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;
- The identity of the law enforcement officials concerned; and
- Precise information concerning the place of custody.

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

Standards

| Right To Be Informed of Reasons for Arrest and of Any Charges | |
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| UN Instruments | |
| <i>INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS (ICCPR)</i> | |
| 9. (2) | <i>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.</i> |

⁹⁸ *Assenov and Others v. Bulgaria*, *supra*, note 92, at para. 154.

⁹⁹ *Huri-Laws v. Nigeria*, African Commission on Human and Peoples' Rights, Comm. No. 225/98 (2000), at para. 46.

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| 14. (3) | <i>In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality:</i> <i>(a) To be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him;</i> |
| UN BODY OF PRINCIPLES FOR THE PROTECTION OF ALL PERSONS UNDER ANY FORM OF DETENTION OR IMPRISONMENT | |
| 10. | <i>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.</i> |
| 12. | <i>(1) There shall be duly recorded:</i> <i>(a) The reasons for the arrest;</i> <i>(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;</i> <i>(c) The identity of the law enforcement officials concerned;</i> <i>(d) Precise information concerning the place of custody.</i> <i>(2) Such records shall be communicated to the detained person, or his counsel, if any, in the form prescribed by law.</i> |
| UN STANDARD MINIMUM RULES FOR NON-CUSTODIAL MEASURES (THE TOKYO RULES) | |
| 7.1 | <i>Basic procedural safeguards such as...the right to be notified of the charges...shall be guaranteed at all stages of proceedings.</i> |
| Regional Instruments | |
| AFRICAN CHARTER ON THE RIGHTS AND WELFARE OF THE CHILD | |
| 2.(c)(ii) | <i>States Parties to the present Charter shall in particular:</i> <i>... (c) ensure that every child accused in infringing the penal law:</i> <i>... (ii) shall be informed promptly in a language that he understands and in detail of the charge against him, and shall be entitled to the assistance of an interpreter if he or she cannot understand the language used;...</i> |
| AMERICAN CONVENTION ON HUMAN RIGHTS (ACHR) | |
| 7. (4) | <i>Anyone who is detained shall be informed of the reasons for his detention and shall be promptly notified of the charge or charges against him.</i> |
| EUROPEAN CONVENTION ON HUMAN RIGHTS (ECHR) | |
| 5. (2) | <i>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.</i> |
| PRINCIPLES AND BEST PRACTICES ON THE PROTECTION OF PERSONS DEPRIVED OF LIBERTY IN THE AMERICAS | |
| 5. | <i>...Persons deprived of liberty shall have the right to be promptly informed in a language they understand of the reasons for their deprivation of liberty and of the charges against them, as well as to be informed of their rights and guarantees...</i> |
| PRINCIPLES AND GUIDELINES ON THE RIGHT TO A FAIR TRIAL AND LEGAL ASSISTANCE IN AFRICA | |
| M.(1)(a) | <i>(Rights upon arrest)</i> <i>Anyone who is arrested shall be informed, at the time of arrest, of the reasons for his or her</i> |

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| | <i>arrest and shall be promptly informed, in a language he or she understands, of any charges against him or her.</i> |
| GUIDELINES AND MEASURES FOR THE PROHIBITION AND PREVENTION OF TORTURE, CRUEL, INHUMAN OR DEGRADING TREATMENT OR PUNISHMENT IN AFRICA (THE ROBBER ISLAND GUIDELINES) | |
| 25. | <i>[States should] Ensure that all detained persons are informed immediately of the reasons for their detention.</i> |
| 26. | <i>[States should] Ensure that all persons arrested are promptly informed of any charges against them.</i> |

Interpretation

Interpreting the *ICCPR*, in *CCPR General Comment No. 32*, the HR Committee states:

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. Notice of the reasons for an arrest is separately guaranteed in article 9, paragraph 2 of the Covenant. 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, or the individual is publicly named as such...[original citations omitted]¹⁰⁰

Detainees must receive “prompt” information regarding the criminal charge made against them to enable them, in turn, “to request a prompt decision on the lawfulness of his or her detention by a competent judicial authority.”¹⁰¹ In *Morrison v. Jamaica*, the HR Committee stated that a general refutation by the State was not adequate to disprove a detainee’s claim that he had not been informed of charges against him for three or four weeks after his arrest.¹⁰² Nor does the HR Committee consider it sufficient under Article 9(2) simply to inform the person arrested and detained that the deprivation of liberty has been carried out on the orders of the President of the country concerned.¹⁰³

Arresting and detaining a person for a “presumed connection with subversive activities” without providing an explanation as to “the scope and meaning of ‘subversive activities’, which constitute a criminal offence under the relevant legislation”, is not sufficient justification for the purposes of the *ICCPR*, including Article 9(2).¹⁰⁴

¹⁰⁰ *CCPR General Comment No. 32*, *supra* note 16, at para. 31.

¹⁰¹ HR Committee: Communication No. 248/1987, *Campbell v. Jamaica*, at para. 6.3.

¹⁰² HR Committee: Communication No. 635/1995, *Morrison v. Jamaica*, at para. 21.2.

¹⁰³ HR Committee: Communication No. 414/1990, *Essono Mika Miha v. Equatorial Guinea*, at para. 6.5.

¹⁰⁴ HR Committee: Communication No. 33/1978, *Carballal v. Uruguay*, at paras. 12-13.

The ECtHR commented on Article 5(2) of the *ECHR* in *Fox, Campbell and Hartley v. The United Kingdom*, where it said the provision

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.¹⁰⁵

While the ECtHR found, in *Fox, Campbell and Hartley*, that an arrest under a particular law on suspicion of being a terrorist is, taken on its own, an insufficient legal basis for the purposes of Article 5(2), it may be sufficient if the reasons an individual is suspected of terrorism are brought out in sufficient detail during interrogation by the police.¹⁰⁶

Article 7(4) of the *ACHR* “sets forth a mechanism to avoid unlawful or arbitrary conduct from the very act of deprivation of liberty on, and to ensure defense of the detainee. Both the detainee and those representing him or with legal custody over him have the right to be informed of the motives of and reasons for the detention and about the rights of the detainee.”¹⁰⁷

While the *Banjul Charter* does not contain a provision equivalent to *ICCPR* Article 9(2), the ACHPR has held that such a right is implicit in the right to a fair trial.¹⁰⁸ In Communication No. 224/98, *Huri-Laws v. Nigeria*, the Commission held that the failure and/or negligence of the security agents of a state party to “scrupulously” comply with the requirements to submit reasons for arrest and to inform the persons arrested promptly of any charges against them is a violation of the right to fair trial as guaranteed under the *Banjul Charter*.¹⁰⁹ The ACHPR explained in Comm. No. 48/90, 50/91, 52/91, 89/93 (1999), *Amnesty International and Others v. Sudan*, that the *Banjul Charter* Article 6

must be interpreted in such a way as to permit arrests only in the exercise of powers normally granted to the security forces in a democratic society. In these cases, the wording of this decree allows for individuals to be arrested for vague reasons, and upon suspicion, not proven acts, which conditions are not in conformity with the spirit of the African Charter.¹¹⁰

¹⁰⁵ *Fox, Campbell and Hartley v. The United Kingdom*, *supra*, note 40, at para. 40.

¹⁰⁶ *Ibid.*, at para. 41.

¹⁰⁷ *I-A Court HR, Case of Tibi v. Ecuador, Judgment of September 07, 2004*, at para. 109.

¹⁰⁸ HR Committee: Communication No. 224/98, *Media Rights Agenda v. Nigeria*, at para. 43.

¹⁰⁹ ACHPR, Comm. No. 225/98 (2000), *Huri-Laws v. Nigeria*, at paras. 43-44.

¹¹⁰ ACHPR, Comm. No. 48/90, 50/91, 52/91, 89/93 (1999), *Amnesty International and Others v. Sudan*, at para. 59.

G. Right To Challenge Lawfulness of Detention

[T]he absence of an effective remedy to violations of the rights recognized by the Convention is itself a violation of the Convention by the State Party in which the remedy is lacking. In that sense, it should be emphasized that, for such a remedy to exist, it is not sufficient that it be provided for by the Constitution or by law or that it be formally recognized, but rather it must be truly effective in establishing whether there has been a violation of human rights and in providing redress. - IACtHR, *Case of Castillo Petruzzi et al. v. Peru*, Judgment of May 30, 1999, at para. 185.

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. “Lawfulness” includes compliance with the *ICCPR* and the *ECHR*. This judicial remedy must be “effectively available” to the detainee. A person detained on remand must be able to take proceedings at reasonable intervals to challenge the lawfulness of his detention.

The legality of the detention must be determined by a court, which is independent and impartial, with the authority to review both the procedural and substantive grounds for the deprivation of liberty and to make a binding order for release, in the event of a determination that the detention is unlawful. The absence of an effective remedy to violations of the rights recognized under international human rights law is itself a violation of those laws.

Under the *Principles And Best Practices On The Protection Of Persons Deprived Of Liberty In The Americas*, Principle 7, persons deprived of their liberty shall have the right to petition and the right to a response before judicial, administrative, or other authorities, including national and international human rights bodies.

The *Principles And Guidelines On The Right To A Fair Trial And Legal Assistance In Africa*, Principle M(5)(a), requires States to enact legislation, where it does not exist, to ensure the right to *habeas corpus*, *amparo* or a similar procedure.

Standards

| Right To Prompt Review of Lawfulness of Detention | |
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| UN Instruments | |
| <i>UNIVERSAL DECLARATION OF HUMAN RIGHTS (UDHR)</i> | |
| 8. | <i>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.</i> |
| <i>INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS (ICCPR)</i> | |
| 2. (3) | <i>Each State Party to the present Covenant undertakes:</i> <i>(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</i> |

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| | <p><i>acting in an official capacity;</i></p> <p><i>(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;</i></p> <p><i>(c) To ensure that the competent authorities shall enforce such remedies when granted.</i></p> |
| 9. (4) | <p><i>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.</i></p> |
| <p>OPTIONAL PROTOCOL TO THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS (OP-ICCPR)</p> | |
| 2. | <p><i>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.</i></p> |
| <p>INTERNATIONAL CONVENTION ON THE ELIMINATION OF ALL FORMS OF RACIAL DISCRIMINATION (ICERD)</p> | |
| 6. | <p><i>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.</i></p> |
| <p>UN BODY OF PRINCIPLES FOR THE PROTECTION OF ALL PERSONS UNDER ANY FORM OF DETENTION OR IMPRISONMENT</p> | |
| 7. | <p><i>(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.</i></p> <p><i>(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.</i></p> <p><i>(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.</i></p> |
| 32. | <p><i>(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.</i></p> <p><i>(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.</i></p> |
| <p>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</p> | |
| 11. | <p><i>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</i></p> |

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| | <p><i>under international law:</i></p> <p><i>(a) Equal and effective access to justice;</i></p> <p><i>(b) Adequate, effective and prompt reparation for harm suffered;</i></p> <p><i>(c) Access to relevant information concerning violations and reparation mechanisms.</i></p> |
| 12. | <p><i>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...</i></p> |
| 14. | <p><i>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.</i></p> |
| Regional Instruments | |
| AMERICAN DECLARATION ON THE RIGHTS AND DUTIES OF MAN | |
| 18. | <p><i>Every person may resort to the courts to ensure respect for his legal rights. There should likewise be available to him a simple, brief procedure whereby the courts will protect him from acts of authority that, to his prejudice, violate any fundamental constitutional rights.</i></p> |
| 25. | <p><i>...Every individual who has been deprived of his liberty has the right to have the legality of his detention ascertained without delay by a court, and the right to be tried without undue delay or, otherwise, to be released...</i></p> |
| AMERICAN CONVENTION ON HUMAN RIGHTS (ACHR) | |
| 7. (6) | <p><i>Anyone who is deprived of his liberty shall be entitled to recourse to a competent court, in order that the court may decide without delay on the lawfulness of his arrest or detention and order his release if the arrest or detention is unlawful. In States Parties whose laws provide that anyone who believes himself to be threatened with deprivation of his liberty is entitled to recourse to a competent court in order that it may decide on the lawfulness of such threat, this remedy may not be restricted or abolished. The interested party or another person in his behalf is entitled to seek these remedies.</i></p> |
| 25. | <p><i>(1) Everyone has the right to simple and prompt recourse, or any other effective recourse, to a competent court or tribunal for protection against acts that violate his fundamental rights recognized by the constitution or laws of the state concerned or by this Convention, even though such violation may have been committed by persons acting in the course of their official duties.</i></p> <p><i>(2) The States Parties undertake:</i></p> <p><i>(a) to ensure that any person claiming such remedy shall have his rights determined by the competent authority provided for by the legal system of the state;</i></p> <p><i>(b) to develop the possibilities of judicial remedy; and</i></p> <p><i>(c) to ensure that the competent authorities shall enforce such remedies when granted.</i></p> |
| EUROPEAN CONVENTION ON HUMAN RIGHTS (ECHR) | |
| 5. (4) | <p><i>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.</i></p> |

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| 13. | <i>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.</i> |
| PROTOCOL TO THE AFRICAN CHARTER ON HUMAN AND PEOPLES' RIGHTS ON THE RIGHTS OF WOMEN IN AFRICA | |
| 25. | <i>States Parties shall undertake to:</i> <i>a) provide for appropriate remedies to any woman whose rights or freedoms, as herein recognised, have been violated;</i> <i>b) ensure that such remedies are determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by law.</i> |
| AFRICAN (BANJUL) CHARTER ON HUMAN AND PEOPLES' RIGHTS (Banjul Charter) | |
| 7. (1) | <i>Every individual shall have the right to have his cause heard. This comprises: (a) the right to an appeal to competent national organs against acts of violating his fundamental rights as recognized and guaranteed by conventions, laws, regulations and customs in force; ...</i> |
| COUNCIL OF EUROPE, RECOMMENDATION (2006)13 | |
| 18. | <i>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</i> |
| 19. | <i>(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.</i> <i>(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.</i> |
| PRINCIPLES AND BEST PRACTICES ON THE PROTECTION OF PERSONS DEPRIVED OF LIBERTY IN THE AMERICAS | |
| 5. | <i>...All persons deprived of liberty shall have the right, exercised by themselves or by others, to present a simple, prompt, and effective recourse before the competent, independent, and impartial authorities, against acts or omissions that violate or threaten to violate their human rights. In particular, persons deprived of liberty shall have the right to lodge complaints or claims about acts of torture, prison violence, corporal punishment, cruel, inhuman, or degrading treatment or punishment, as well as concerning prison or internment conditions, the lack of appropriate medical or psychological care, and of adequate food.</i> |
| 7. | <i>Persons deprived of liberty shall have the right of individual and collective petition and the right to a response before judicial, administrative, or other authorities. This right may be exercised by third parties or organizations, in accordance with the law.</i> <i>This right comprises, amongst others, the right to lodge petitions, claims, or complaints before the competent authorities, and to receive a prompt response within a reasonable time. It also comprises the right to opportunely request and receive information concerning their procedural status and the remaining time of deprivation of liberty, if applicable.</i> <i>Persons deprived of liberty shall also have the right to lodge communications, petitions or complaints with the national human rights institutions; with the Inter-American Commission on Human Rights; and with the other competent international bodies, in conformity with the requirements established by domestic law and international law.</i> |

| PRINCIPLES AND GUIDELINES ON THE RIGHT TO A FAIR TRIAL AND LEGAL ASSISTANCE IN AFRICA | |
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| C.(a) | <i>Everyone has the right to an effective remedy by competent national tribunals for acts violating the rights granted by the constitution, by law or by the Charter, notwithstanding that the acts were committed by persons in an official capacity.</i> |
| M. | <p><i>(4) Right of arrested or detained person to take proceedings before a judicial body:</i></p> <p><i>Anyone who is deprived of his or her liberty by arrest or detention shall be entitled to take proceedings before a judicial body, in order that that judicial body may decide without delay on the lawfulness of his or her detention and order release if the detention is not lawful.</i></p> <p><i>(5) Right to habeas corpus:</i></p> <p><i>(a) States shall enact legislation, where it does not exist, to ensure the right to habeas corpus, amparo or similar procedures.</i></p> |
| GUIDELINES AND MEASURES FOR THE PROHIBITION AND PREVENTION OF TORTURE, CRUEL, INHUMAN OR DEGRADING TREATMENT OR PUNISHMENT IN AFRICA (THE ROBBER ISLAND GUIDELINES) | |
| 32. | <i>[States should] Ensure that all persons deprived of their liberty can challenge the lawfulness of their detention.</i> |

Interpretation

In *CRC General Comment No. 10 (2007)*, the CRC states:

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.¹¹¹

The right to challenge the lawfulness of one's deprivation of liberty must be effectively available. The HR Committee found a violation of *ICCPR* Article 9(4) when a person was held incommunicado and effectively barred from challenging his arrest and detention.¹¹²

Similarly, where a lack of access to legal representation throughout his detention prevented an individual from, in principle, applying for a writ of habeas corpus, the HR Committee held that his detention was a violation of Article 9(4) of the *ICCPR*.¹¹³ In Communication No. 9/1977, *Valcada v. Uruguay*, Valcada was arrested on "grounds of a grave and imminent danger to security and public order." Because the remedy of habeas corpus was inapplicable in principle, the HR Committee determined that he was denied

¹¹¹ *CRC General Comment No. 10 (2007)*, supra note 25, at para. 84.

¹¹² HR Committee: Communication No. 84/1981, *Guillermo Ignacio Dermit Barbato et al. v. Uruguay*, at para. 10.

¹¹³ HR Committee: Communication No. 330/1988, *Berry v. Jamaica*, at para. 11.1

an effective remedy to challenge his arrest and detention.¹¹⁴ However, in a case where there was no evidence that either the author of a communication to the HR Committee 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”.¹¹⁵

In *Case of Castillo Petruzzi et al. v. Peru*, the IACtHR found a violation of both Article 7(5) and Article 25 of the *ACHR* when the State’s enforcement of its domestic laws under a state of emergency denied the victims the possibility of recourse to judicial guarantees.¹¹⁶ The IACtHR held:

Of the essential judicial guarantees not subject to derogation or suspension, habeas corpus is the proper remedy in “ensuring that a person’s life and physical integrity are respected, in preventing his disappearance or the keeping of his whereabouts secret and in protecting him against torture or other cruel, inhumane, or degrading punishment or treatment.”¹¹⁷

The review must be conducted by an independent, impartial and objective court with authority to order the detainee’s release, if unlawful

The HR Committee found that a right to appeal against 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 [ICCPR] 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.”¹¹⁸

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.”¹¹⁹ It must be “independent both of the executive and of the parties to the case.”¹²⁰ It must have the ability to order the defendant’s release if detention is deemed unlawful.¹²¹

Scope of review

A review under Article 5(4) of the *ECHR* must be wide enough to bear on those conditions which are essential to the “lawful” detention of a person according to 5(1).¹²²

¹¹⁴ HR Committee: Communication No. 9/1977, *Valcada v. Uruguay*, at para. 12.

¹¹⁵ HR Committee: Communication No. 373/1989, *Stephens v. Jamaica*, at para. 9.7.

¹¹⁶ *I-A Court HR, Case of Castillo Petruzzi et al. v. Peru*, Judgment of May 30, 1999, at para. 188.

¹¹⁷ *I-A Court HR, Case of Castillo Petruzzi et al. v. Peru*, Judgment of May 30, 1999, at para. 187.

¹¹⁸ HR Committee: Communication No. 291/1988, *Torres v. Finland*, at para. 7.2.

¹¹⁹ *ECtHR, Cases of De Wilde, Ooms and Versyp ("Vagrancy") v. Belgium* (Application no. 2832/66; 2835/66; 2899/66), at para. 76.

¹²⁰ *ECtHR, Case of Neumeister v. Austria* (Application no 1936/63), at para. 24.

¹²¹ *ECtHR, Case of Singh v. the United Kingdom* (Application no. 23389/94), at para. 70.

¹²² *Ibid*, at para. 65.

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,” *ECHR* 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.”¹²³ Arrested or detained persons are entitled to a remedy that ensures the competent court may 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.”¹²⁴

Equality of arms

The concept of “equality of arms” denotes that a fair trial necessarily includes respect for the essential balance that must exist between the arms of the prosecution and the defence and respect for the principle of adversary proceedings.¹²⁵ The HR Committee held that the requirement for equality of arms was not met when “the accused is denied the opportunity to personally attend the proceedings, or where he is unable to properly instruct his legal representative. In particular, the principle of equality of arms is not respected where the accused is not served a properly motivated indictment.”¹²⁶

The ECtHR found that, to ensure equality of arms, it was necessary to give the applicant the opportunity to appear at the same time as the prosecutor so that he could reply to his arguments.¹²⁷ Similarly, in *Case of Hussain v. the United Kingdom*¹²⁸, the ECtHR found that “where a substantial term of imprisonment may be at stake and where characteristics pertaining to his personality and level of maturity are of importance in deciding on his dangerousness, [*ECHR*] Article 5 para. 4 (art. 5-4) requires an oral hearing in the context of an adversarial procedure involving legal representation and the possibility of calling and questioning witnesses.”¹²⁹

The lawfulness of detention is determined under domestic law and international law

Article 9(4) of the *ICCPR* governs the granting of compensation for arrest or detention that is “unlawful” either under domestic law or within the meaning of the Covenant.¹³⁰

The “lawfulness” of a detention under Article 5(4) of the *ECHR* must be determined in the light not only of domestic law, but also the text of the Convention.¹³¹ The notion of “lawfulness” in Article 5(4) has the same meaning as in Article 5(1).¹³²

¹²³ *Ibid.*, at para. 68.

¹²⁴ *ECtHR*, *Case Of Petar Vasilev V. Bulgaria* (Application no. 62544/00), at para. 33.

¹²⁵ *Campbell v. Jamaica*, *supra* note 101, at para. 6.5

¹²⁶ HR Committee: Communication No. 289/1988, *Dieter Wolf v. Panama*, at para. 6.6.

¹²⁷ *ECtHR*, *Case of Kampanis v. Greece* (App No. 17977/91), at para. 58.

¹²⁸ *ECtHR*, *Case of Hussain v. the United Kingdom* (Application no. 21928/93).

¹²⁹ *Ibid.*, at para. 60.

¹³⁰ HR Committee: Communication No. 1128/2002, *Marques v. Angola*, at para. 6.6.

¹³¹ *Brogan v. UK*, *supra*, note 80, at para. 65.

The court must rule speedily on the legality of detention

The HR Committee emphasized, in *Torres v. Finland*, that, to ensure compliance with the ICCPR,

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.¹³³

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.¹³⁴ In the *Case of Bezicheri v. Italy*¹³⁵, the ECtHR held that an interval of five and a half months from the time the applicant lodged his application until the investigating judge dismissed it did not comply with term "speedily" under Article 5(4).¹³⁶ The government's arguments that "the investigating judge suffered from an excessive workload at the material time" was not relevant since "the Convention requires the Contracting States to organise their legal systems so as to enable the courts to comply with its various requirements."¹³⁷

Right to take proceedings at reasonable intervals

In the *Case of Assenov and Others V. Bulgaria*, the ECtHR ruled that *ECHR* Article 5(4) requires that a person on remand must be able to take proceedings at reasonable intervals to challenge the lawfulness of his detention.¹³⁸ The court observed that "[i]n view of the assumption under the Convention that such detention is to be of strictly limited duration...periodic review at short intervals is called for."¹³⁹ In that case, Article 5(4) was violated when the person was held in pre-trial detention for two years, but was only entitled to apply to have the legality of the continued detention examined once under Bulgarian law, and then without an oral hearing.¹⁴⁰ In *Case of Bezicheri v. Italy* (Application no. 11400/85), an application brought one month after the dismissal of the first application was not considered "unreasonable":

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

¹³² *Ibid.*

¹³³ *Torres v. Finland*, *supra* note 118, at para. 7.3.

¹³⁴ ECtHR, *Case of Alikhonov v. Russia* (Application no. 35692/11), at para. 60.

¹³⁵ ECtHR, *Case of Bezicheri v. Italy*, (Application no. 11400/85).

¹³⁶ *Ibid.*, at paras. 22-26.

¹³⁷ *Ibid.*

¹³⁸ *Case of Assenov and Others V. Bulgaria*, *supra* note 92, at para. 162.

¹³⁹ *Ibid.*

¹⁴⁰ *Ibid.*, at para. 165.

(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.¹⁴¹

H. Right To Compensation for Unlawful Deprivation of Liberty

Individuals deprived of their liberty through unlawful arrest or detention have an enforceable right to compensation.

Standards

| Right To Compensation for Unlawful Deprivation of Liberty | |
|------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| UN Instruments | |
| <i>INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS (ICCPR)</i> | |
| 9. (5) | <i>Anyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation.</i> |
| <i>INTERNATIONAL CONVENTION ON THE ELIMINATION OF ALL FORMS OF RACIAL DISCRIMINATION (ICERD)</i> | |
| 6. | <i>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.</i> |
| <i>UN BODY OF PRINCIPLES FOR THE PROTECTION OF ALL PERSONS UNDER ANY FORM OF DETENTION OR IMPRISONMENT</i> | |
| 35. | <i>(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.</i> <i>(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.</i> |
| <i>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</i> | |
| Para. 18. | <i>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.</i> |

¹⁴¹ ECtHR, *Case of Bezicheri v. Italy* (Application no. 11400/85), at para. 21.

Regional Instruments

| AMERICAN CONVENTION ON HUMAN RIGHTS (ACHR) | |
|----------------------------------------------------------------------------------------------|---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| 7. (6) | <i>Anyone who is deprived of his liberty shall be entitled to recourse to a competent court, in order that the court may decide without delay on the lawfulness of his arrest or detention and order his release if the arrest or detention is unlawful. In States Parties whose laws provide that anyone who believes himself to be threatened with deprivation of his liberty is entitled to recourse to a competent court in order that it may decide on the lawfulness of such threat, this remedy may not be restricted or abolished. The interested party or another person in his behalf is entitled to seek these remedies.</i> |
| 10. | <i>Every person has the right to be compensated in accordance with the law in the event he has been sentenced by a final judgment through a miscarriage of justice.</i> |
| 25. | <i>(1) Everyone has the right to simple and prompt recourse, or any other effective recourse, to a competent court or tribunal for protection against acts that violate his fundamental rights recognized by the constitution or laws of the state concerned or by this Convention, even though such violation may have been committed by persons acting in the course of their official duties. (2) The States Parties undertake: (a) to ensure that any person claiming such remedy shall have his rights determined by the competent authority provided for by the legal system of the state; (b) to develop the possibilities of judicial remedy; and (c) to ensure that the competent authorities shall enforce such remedies when granted.</i> |
| 63. (1) | <i>If the Court finds that there has been a violation of a right or freedom protected by this Convention, the Court shall rule that the injured party be ensured the enjoyment of his right or freedom that was violated. It shall also rule, if appropriate, that the consequences of the measure or situation that constituted the breach of such right or freedom be remedied and that fair compensation be paid to the injured party.</i> |
| EUROPEAN CONVENTION ON HUMAN RIGHTS (ECHR) | |
| 5. (5) | <i>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.</i> |
| 50. | <i>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.</i> |
| PRINCIPLES AND GUIDELINES ON THE RIGHT TO A FAIR TRIAL AND LEGAL ASSISTANCE IN AFRICA | |
| M.(1)(h) | <i>States shall ensure, including by the enactment of legal provisions and adoption of procedures, that anyone who has been the victim of unlawful arrest or detention is enabled to claim compensation.</i> |

Interpretation

The HR Committee, in *CCPR General Comment No. 31*, states that *ICCPR*

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.¹⁴²

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).¹⁴³ To be entitled to an award of compensation under Article 5(5) of the *ECHR*, the victim may be required to show damage resulting from the breach.¹⁴⁴

¹⁴² HR Committee, *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 <<http://www2.ohchr.org/english/bodies/hrc/comments.htm>>

¹⁴³ *Brogan and Others v. the United Kingdom*, *supra* note 80, at para. 67.

¹⁴⁴ *ECtHR, Wassink v. The Netherlands* (App No 12535/86) (1990), at para. 38.

APPENDIX A: Treaties, Declarations and Instruments

The international law and principles setting out the standards for pre-trial release are found in the following international instruments:

United Nations (UN) Treaties, Declarations and Instruments

The UDHR

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

UN Treaties

- International Covenant on Civil and Political Rights (ICCPR), 16 Dec. 1966, U.N. Doc. A/6316, 999 U.N.T.S. 171, entered into force 23 March 1976, online <<http://www.ohchr.org/EN/ProfessionalInterest/Pages/CCPR.aspx>>
- International Convention on the Elimination of All Forms of Racial Discrimination (CERD), adopted 21 December 1965, entered into force 4 January 1969, 660 U.N.T.S. 195, online <<http://www.ohchr.org/EN/ProfessionalInterest/Pages/CERD.aspx>>;
- Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), adopted 18 December 1979, entered into force 3 September 1981, UN Doc. A/34/46, at 193 (1979), online <<http://www.ohchr.org/EN/ProfessionalInterest/Pages/CEDAW.aspx>>
- Convention on the Rights of the Child (CRC), adopted 20 Nov. 1989, entered into force 2 Sept. 1990, UN Doc. A/44/49, at 166 (1989), online <<http://www.ohchr.org/EN/ProfessionalInterest/Pages/CRC.aspx>>.

Other UN Instruments

- Standard Minimum Rules for the Treatment of Prisoners (Standard Minimum Rules) 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 <<http://www.unhcr.org/refworld/docid/3ae6b36e8.html>>;
- United Nations Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment (Body of Principles), G.A. Res. 43/173, U.N. Doc. A/RES/43/173 (Dec. 9, 1988), online <<http://www.un.org/documents/ga/res/43/a43r173.htm>>;
- United Nations Standard Minimum Rules for Non-custodial Measures (Tokyo Rules), G.A. Res. 45/110, U.N. Doc. A/RES/45/110 (Dec. 14, 1990), online <<http://www.un.org/documents/ga/res/45/a45r110.htm>>;

- 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 < <http://www.un.org/documents/ga/res/40/a40r033.htm>>;
- 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 <http://www.un.org/en/ecosoc/docs/2010/res_2010-16.pdf>;
- 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 < <http://www.un.org/documents/ga/res/45/a45r113.htm>>;
- 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”), adopted and proclaimed by General Assembly resolution 60/147 of 16 December 2005, online <<http://www.ohchr.org/EN/ProfessionalInterest/Pages/RemedyAndReparation.aspx>>.

African Union (AU) Treaties and Other Instruments:

AU Treaties

- African (Banjul) Charter on Human and Peoples' Rights (“Banjul Charter”), June 27, 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), entered into force 21 October 1986, online <<http://www.achpr.org/instruments/achpr/>>, binding on all African States except South Sudan which has not yet signed, ratified or succeeded to any human rights treaties [as of August 21, 2012], but has expressed an intention to do so. In July 2012, South Sudan acceded to the Geneva Conventions and their Additional Protocols;
- African Charter on the Rights and Welfare of the Child, July 11, 1990, OAU Doc. CAB/LEG/24.9/49, entered into force Nov. 29, 1999, online <<http://www.achpr.org/instruments/child/>>;
- Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, 11 July 2003, entered into force 25 November 2005, online <<http://www.achpr.org/instruments/women-protocol/>>.

African Union instruments

- Guidelines and Measures for the Prohibition and Prevention of Torture, Cruel, Inhuman or Degrading Treatment or Punishment in Africa (“The Robben Island Guidelines”), African Commission on Human and Peoples’ Rights, October, 2002, online < <http://www.achpr.org/sessions/32nd/resolutions/61>>
- Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, African Commission on Human and Peoples’ Rights, OAU Doc. DOC/OS(XXX) 247, 12 Int'l Hum. Rts. Rep. 1180 (2005), online <<http://www.achpr.org/instruments/fair-trial/>>.

OAS Treaties, Declaration and Other Instruments:

OAS Treaties

- American Convention on Human Rights (ACHR), Nov. 22, 1969, O.A.S. Treaty Series No. 36, 1144 U.N.T.S. 123, online <<http://www.cidh.oas.org/basicos/english/basic3.american%20convention.htm>>, binding on all States in the Americas except for Canada and the US;
- American Declaration of the Rights and Duties of Man (“American Declaration”), April 1948, online <<http://www1.umn.edu/humanrts/oasinstr/zoas2dec.htm>>.

Other OAS instruments

- *Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas*, Inter-American Commission on Human Rights, approved by the Commission during its 131st regular period of sessions, held from March 3-14, 2008, online <[http://www.cidh.org/basicos/english/Basic21.a.Principles and Best Practices PDL.htm](http://www.cidh.org/basicos/english/Basic21.a.Principles%20and%20Best%20Practices.PDL.htm)>.

Council of Europe (COE) Treaties and Other Instruments:

COE Treaties

- European Convention on Human Rights (ECHR), Nov. 4, 1950, 213 U.N.T.S. 222, entered into force 3 September 1953, online <<http://conventions.coe.int/treaty/Commun/QueVoulezVous.asp?NT=005&CM=7&DF=24/07/2012&CL=ENG>>, binding on all member States in the Council of Europe, and ratification is required for entry into the European Union.

Other COE instruments

- Recommendation Rec (2006)2 of the Committee of Ministers to member states on the European Prison Rules (“Council of Europe, Recommendation (2006)2”), adopted by the Committee of Ministers on 11 January 2006, online <http://www.coe.int/t/DGHL/STANDARDSETTING/PRISONS/Recommendations_en.asp>;
- 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”), adopted by the Committee of Ministers on 27 September 2006, online <http://www.coe.int/t/DGHL/STANDARDSETTING/PRISONS/Recommendations_en.asp>;
- 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”), adopted by the Committee of Ministers on 5 November 2008, online <http://www.coe.int/t/DGHL/STANDARDSETTING/PRISONS/Recommendations_en.asp>

APPENDIX B: Other Resources on Pre-trial Release

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”, online <
<http://www1.umn.edu/humanrts/monitoring/hradmin.html>>.

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), online
<<http://www.humanrightseducation.info/images/stories/pdf/HRandPreTrialDetention.pdf>>
>

American Bar Association Rule of Law Initiative, *Handbook of International Standards on Pretrial Detention Procedure* (2010), online <
<http://www.cejamericas.org/manualsaj/%5BABA%5DHandbookofInternationalStandards onPretrialDetentionProcedure2010.pdf>>.