



**HANDBOOK OF  
INTERNATIONAL STANDARDS  
ON  
PRETRIAL DETENTION PROCEDURE**

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ISBN: 978-1-61632-841-2 (paperback)

ISBN: 978-1-61632-842-9 (PDF)

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## TABLE OF CONTENTS

<b>INTRODUCTION.....</b>	<b>1</b>
<b>1. IMPOSITION OF PRETRIAL DETENTION .....</b>	<b>3</b>
1.1. PRETRIAL DETENTION AS A LAST RESORT .....	3
1.2. ARREST AND DETENTION PRIOR TO JUDICIAL REVIEW .....	6
1.3. JUDICIAL SUPERVISION OF PRETRIAL DETENTION.....	9
<b>2. CHALLENGING PRETRIAL DETENTION.....</b>	<b>12</b>
<b>3. CONSIDERATIONS DURING DETENTION .....</b>	<b>15</b>
3.1. PROCEDURAL FAIRNESS .....	15
3.2. RESOURCES AND INDEPENDENCE.....	18
3.3. SPECIAL GROUPS .....	20
3.4. PRACTICES DURING DETENTION .....	24
<b>TABLE OF AUTHORITIES .....</b>	<b>29</b>





## INTRODUCTION

In many countries, overreliance on detention is a major problem both at pretrial and dispositional stages of criminal proceedings. International standards strongly encourage the imposition of non-custodial measures during investigation and trial and at sentencing, and hold that deprivation of liberty should be imposed only when non-custodial measures would not suffice. The overuse of detention is often a symptom of a dysfunctional criminal justice system that may lack protection for the rights of criminal defendants and the institutional capacity to impose, implement, and monitor non-custodial measures and sanctions. It is also often a cause of human rights violations and societal problems associated with an overtaxed detention system, such as overcrowding; mistreatment of detainees; inhumane detention conditions; failure to rehabilitate offenders leading to increased recidivism; and the imposition of the social stigma associated with having been imprisoned on an ever-increasing part of the population. Overuse of pretrial detention and incarceration at sentencing are equally problematic and both must be addressed in order to create effective and lasting criminal justice system reform.

Drawing on the American Bar Association Rule of Law Initiative's (ABA ROLI's) 20 years of experience providing technical legal assistance to promote the rule of law in more than 70 countries worldwide, ABA ROLI has developed the *Handbook of International Standards on Pretrial Detention Procedure* to serve as a reference for members of the legal community interested in ensuring their country's compliance with international norms and best practices for pretrial detention. This handbook compiles standards and best practices on pretrial detention from all over the globe in a convenient format, with the goal of providing a framework for legislative and procedural reforms. A second handbook focuses on international standards on sentencing procedure.<sup>1</sup> These handbooks will find their greatest utility in countries where ABA ROLI's *Detention Procedure Assessment Tool* (DPAT) has been implemented in order to analyze all aspects of the country's detention regime and identify the areas in which the country is out of compliance with internationally-accepted norms and best practices for detention; the handbooks will serve as an invaluable tool for the local legal community to design and implement reforms targeting the problem areas identified in the DPAT. However, the handbooks can also be used on their own by anyone interested in learning about the international standards relevant to detention procedure.

In implementing criminal law reform programs, ABA ROLI was struck that, while many academics, governmental institutions, and non-governmental organizations had heavily documented and evaluated issues of prisoners' rights, including issues such as overcrowding, mistreatment, detention conditions, rehabilitation, and social stigma, no organization or study had sought to directly address the legislative and structural causes of these problems. ABA ROLI, in developing the DPAT and the handbooks on international standards, thus aimed to evaluate the procedural and legislative framework that contributes to the overuse of detention and incarceration, as well as the actual practices of criminal justice sector actors charged with implementing detention procedure and legislation. It is ABA ROLI's belief that, by promoting the rule of law through transparent and effective procedural reforms, a country is likely to improve the human rights situation in its detention facilities. This handbook, therefore, focuses narrowly on the procedures and practices regarding deprivation of liberty and alternatives thereto, from the moment of apprehension of a suspect until the end of his trial.

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<sup>1</sup> AMERICAN BAR ASSOCIATION RULE OF LAW INITIATIVE, *HANDBOOK OF INTERNATIONAL STANDARDS ON SENTENCING PROCEDURE* (2010).



This handbook relies on many international and regional legal instruments pertaining to criminal procedure, prisoners' and detainees' rights, juvenile justice, sentencing, and alternatives to detention. These include major international human rights treaties as well as regional conventions from the European, Inter-American, and African human rights systems; guidelines, rules, declarations, and best practices developed by the United Nations, regional intergovernmental bodies, bar associations, and civil society organizations; jurisprudence from international, regional, and domestic judicial or quasi-judicial bodies; and books and manuals by academic or civil society experts. The table of authorities at the end of the handbook provides the list of original sources of law as well as resources for further reading on detention procedure. The handbook considers the roles played by all actors and institutions involved in criminal detention, including police, investigators, prosecutors, judges, defense advocates, court personnel, corrections staff, parole board members, defendants, detainees, prisoners, victims, witnesses, and, when applicable, others. It covers both detention arising from lawful processes, such as the court-supervised arrest of a criminal suspect by a state actor, and unlawful processes, such as forced disappearance or apprehension of a suspect without judicial supervision.

### *Acknowledgments*

This handbook was compiled by Anita H. Kocsis, ABA ROLI Research Fellow, and edited by Jessie Tannenbaum, ABA ROLI Senior Legal Analyst. ABA ROLI Senior Criminal Law Advisor Mary Greer, Legal Analyst Jim Wormington, Director of Research and Assessments Simon Conté, Program Manager Irina Parshikova, Program Officer Kristi Kontak, Program Associate Cameron Platt, Armenia Country Director Gregg Halstead, Armenia Criminal Law Program Attorney Rima Poghosyan, and Armenia Senior Criminal Law Program Attorney Hasmik Hakobyan provided strong support for the development and publication of the handbook.

## 1. Imposition of Pretrial Detention

The following considerations apply throughout the decision to deprive an individual of liberty, from the moment of initial apprehension until the end of trial, including detention imposed or overseen by a judicial body as well as deprivation of liberty outside of or prior to judicial supervision.

### 1.1. Pretrial Detention as a Last Resort

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.<sup>2</sup>

#### *Pretrial Detention as a Last Resort*

All of the standards discussed in this section are based on the principle that detention during the adjudicative process should be minimized whenever possible. By its nature, pretrial detention involves the detention of individuals who have not yet been convicted of criminal conduct. As the UN Human Rights Committee (HRC) noted, pretrial detention can therefore negatively impact the presumption of innocence,<sup>3</sup> and should be used only as a “last resort.”<sup>4</sup>

There are a number of measures states should take to minimize pretrial detention. First, law enforcement agencies and prosecutors should not initiate or continue prosecutions where the charges are unfounded or unnecessary (based on the protection of society, prevention of crime or the promotion of respect for the law and the rights of victims.)<sup>5</sup> A set of established criteria should be developed to guide police and prosecutors when deciding whether to initiate or continue proceedings.<sup>6</sup>

Second, where charges are well founded, prosecutors and judges should be authorized to dispose of cases through non-judicial means, and should make every effort to do so. When appropriate, states should create and utilize diversion programs allowing the accused to avoid a criminal trial, provided he fulfill certain obligations, such as making restitution to victims or completing community service hours.<sup>7</sup> Diversion schemes, along with the minimization of pretrial detention, lessen the stigma surrounding indictment and conviction, and mitigate the adverse effects of imprisonment.<sup>8</sup> Note, however, that whenever a diversion scheme requires the fulfillment of conditions by the accused, the accused’s consent must first be obtained.<sup>9</sup>

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<sup>2</sup> *Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders*, Havana, 27 August – 7 September 1990, chapter 1, section C, paragraph 2(b).

<sup>3</sup> Human Rights Committee, Concluding Observations: Argentina, CCPR/CO/70/ARG (2000), para. 10.

<sup>4</sup> United Nations Minimum Rules of Non-Custodial Measures, Principle 6.1.

<sup>5</sup> United Nations Guidelines on the Role of Prosecutors, para’s. 14 and 18; United Nations Minimum Rules for Non-Custodial Measures, para. 5.1.

<sup>6</sup> *Id.*

<sup>7</sup> United Nations Guidelines on the Role of Prosecutors, para. 18. Council of Europe, Recommendation (87)18 Concerning the Simplification of Criminal Justice, Section I.

<sup>8</sup> *Id.*

<sup>9</sup> Council of Europe, Recommendation (87)18 Concerning the Simplification of Criminal Justice, para. I(a)(7).



In addition to diversion schemes, states should, whenever appropriate, make use of alternative dispute resolution practices, so as to streamline the criminal justice system and minimize pretrial detention. For example, in regions with strong non-formal justice systems, states should employ traditional, customary or community-based alternatives to the formal criminal process, provided those mechanisms satisfy due process requirements.<sup>10</sup> The circumstances, structure, organization, and procedures of diversion schemes and alternative dispute resolution mechanisms should be enshrined in law.

### *Detention only if Necessary*

States should only detain individuals pending trial where it is absolutely necessary. International and regional human rights instruments are explicit as to the limited circumstances under which pretrial detention is permissible. The HRC has stated 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.”<sup>11</sup> In criminal proceedings, following the first appearance before a judicial officer, ECHR Article 5(1) only permits detention when it is reasonably necessary to prevent further offenses or flight. Drawing from Article 5(1), the Council of Europe has said that a person may only be remanded in custody if: “there are substantial reasons for believing that, if released, he 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.”<sup>12</sup> Similarly, the African Commission on Human and People’s Rights stated that, “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.”<sup>13</sup> The Inter-American Commission on Human Rights uses the term “preventive detention” to describe pretrial detention, and has stated: “Preventive detention...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.” The significant overlap between international and regional human rights instruments suggests that pretrial detention can only be justified when used to prevent the accused from absconding, committing a serious offense, or interfering with the administration of justice.

Whatever the justification for pretrial detention, it is only necessary if the alternatives discussed above will not effectively address the risks posed by the accused. Courts should, therefore, only detain an individual during the adjudication process if, having considered the widest possible range of alternatives, they conclude that detention remains necessary to address the risk identified.<sup>14</sup> In making this determination, courts should consider any risk that release of the

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<sup>10</sup> Lilongwe Declaration on Accessing Legal Aid in the Criminal Justice System in Africa, para. 5. 1; Kampala Declaration on Prison Conditions in Africa, para’s. 1,2 and 3.

<sup>11</sup> Hill v. Spain, Communication No. 526/1993, para. 12.3.

<sup>12</sup> Council of Europe, Recommendation (2006)13 on the Use of Remand in Custody, the Conditions in which it takes place and the Provision of Safeguards against Abuse, para. 6.

<sup>13</sup> African Commission on Human and People’s Rights, Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, para. M(1)(e).

<sup>14</sup> For example, the ABA Criminal Justice Standards on Pretrial Release state that: “When no conditions of release are sufficient to accomplish the aims of pretrial release, the accused may be detained through specific procedures,” Standard 10-1.2.





accused poses to the victim of the crime with which he is charged.<sup>15</sup> The burden of establishing any risk posed by the accused should lie with the prosecuting authority or investigating judge.<sup>16</sup>

### *Alternatives to Detention*

Even if a person will be tried within the formal justice system, the least restrictive, legal alternatives to detention should be made available during the adjudicative process. The United Nations Minimum Rules of Non-Custodial Measures state that “alternatives to pretrial detention shall be employed at as early a stage as possible.”<sup>17</sup> The Council of Europe has said that “the widest possible use should be made of alternatives to pretrial detention.”<sup>18</sup> The Inter-American Commission on Human Rights requires, whenever detention is a possibility, that states establish by law a series of alternative or substitute measures.<sup>19</sup> The alternatives available should include, at a minimum, a sufficient breadth of alternatives such that release options appropriate for the risks and special needs of the accused can be developed.<sup>20</sup> Available alternatives to pretrial detention could include:

- (i) undertakings:
  - a. to appear before a judicial authority as and when required;
  - b. not to interfere with the course of justice;
  - c. not to engage in particular conduct, including that involved in a particular profession or employment.
  
- (ii) requirements:
  - a. to report on a periodic basis to a judicial authority, the police or other authority;
  - b. to accept supervision by an agency appointed by the judicial authority;
  - c. to submit to electronic monitoring;
  - d. to participate in drug treatment or diversion programs;
  - e. to reside at a specified address, with or without conditions as to the hours to be spent there;
  - f. not to leave or enter specified places or districts without authorization;
  - g. not to meet specified persons without authorization;
  - h. to surrender passports or other identification papers;
  - i. to provide or secure financial or other guarantees as to conduct pending trial.<sup>21</sup>

Such alternatives to pretrial detention must be realistic and not overly restrictive. States must ensure that a fully functioning and sufficiently funded system exists to manage and implement alternatives to pretrial detention.<sup>22</sup> This requires an effective system for the supervision and

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<sup>15</sup> See section 3.3.

<sup>16</sup> Council of Europe, Recommendation (2006)13 on the Use of Remand in Custody, the Conditions in which it takes place and the Provision of Safeguards against Abuse, para. 8(2); ABA Criminal Justice Standards on Pretrial Release, Standard 10-5.10(f).

<sup>17</sup> Para. 6.1.

<sup>18</sup> Council of Europe, Recommendation (99)22 Concerning Prison Overcrowding and Prison Population Inflation, para. III(12).

<sup>19</sup> Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas, Principle III, para. 4.

<sup>20</sup> ABA Criminal Justice Standards on Pretrial Release, Standard 10-1.2.

<sup>21</sup> This list is derived from: Council of Europe, Recommendation (2006)13 on the Use of Remand in Custody, the Conditions in which it takes place and the Provision of Safeguards against Abuse, para. 2(1); ABA Criminal Justice Standards on Pretrial Release, Standard 10-1.2.

<sup>22</sup> ABA Criminal Justice Standards on Pretrial Release, Standard 10-1.10, The Role of the Pretrial Services Agency.



monitoring of released individuals, which is a common condition of release. Mechanisms should exist to verify that individuals are complying with the conditions of their release and report violations of conditions and arrests in connection with other offenses.

In order to ensure that alternatives to pretrial detention are given proper consideration by judicial authorities, states may wish to create a government agency responsible for collecting information concerning individuals against whom pretrial detention is sought. This information, which should include a risk assessment and recommendations for possible alternatives to detention, should be used to inform the decision on pretrial detention taken by the judicial authority.<sup>23</sup>

## 1.2. Arrest and Detention Prior to Judicial Review

Detention should generally be based upon an arrest warrant issued by a detached and neutral judicial officer. A warrantless arrest is justified only in extraordinary circumstances, where obtaining an arrest warrant is not practicable (such as the existence of flight risk, or a threat to public safety).

Under the ICCPR, any detention must be reasonable and necessary.<sup>24</sup> The definition of “reasonable and necessary” differs depending on the stage of the proceedings, and the ICCPR does not specify the circumstances under which an arrest is considered reasonable.

Under the ECHR, an arrest will only be reasonable if: (1) there is a reasonable suspicion that a person has committed an offence; (2) A person is attempting an unauthorized entry into a country or has been ordered extradited or deported to another country; or (3) A person has failed to comply with a lawful court order or fulfill any obligation prescribed by law.<sup>25 26</sup> Unsurprisingly, officials attempt to justify the vast majority of arrests on the first ground. Perhaps for this reason, the African Commission on Human Rights has stated that a person can only be arrested on “reasonable suspicion or for probable cause.”<sup>27</sup> Although explicit legal standards may vary, in general, an arrest must be justified by sufficient facts or information to justify the objective and prudent belief that a subject committed an offense.

It is implicit in the requirement that any detention be “necessary” that the arresting officer consider if reasonable alternatives to arrest and pretrial detention exist. For example, the ABA Criminal Justice Standards on Pretrial Release require that authorities consider whether a citation or judicial summons would be an effective method of bringing the accused before a tribunal in cases of “minor<sup>28</sup> offenses.”<sup>29</sup> According to the ABA Standards, a citation or summons, in lieu of detention, should be mandatory for such “minor offenses” unless the accused fails to cooperate or is likely to abscond or commit further offenses.<sup>30</sup> In the United Kingdom, police have the power,

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<sup>23</sup> *Id.*

<sup>24</sup> UN Human Rights Committee, Communication No. 458/1991, *A. W. Mukong v. Cameroon* (Views adopted on 21 July 1994), in UN doc. GAOR, A/49/40, (vol. II), p. 181, para. 9.8.

<sup>25</sup> ECHR Article 5(1).

<sup>26</sup> The European Court of Human Rights has held that this denotes “an obligation, of a specific and concrete nature, ... already incumbent on the person concerned”, *Ciulla v. Italy*, judgment of 22 February 1989, Series A, No. 148, p. 16, para. 36. “*Ciulla v Italy* ECHR 11152/84, 22 January 1989”.

<sup>27</sup> African Commission on Human and Peoples’ Rights, Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, M(1)(b).

<sup>28</sup> The standards state that: “In determining whether an offense is minor, consideration should be given to whether the alleged crime involved the use or threatened use of force or violence, possession of a weapon, or violation of a court order protecting the safety of persons or property”, Standards 10-1.3.

<sup>29</sup> Standards 10-1.3; 10-2.1-2; 10-3.1-2.

<sup>30</sup> *Id.*



for offenses of all seriousness, to release a person after they have been charged and require them to appear in court on a future date.<sup>31</sup> For imprisonable offenses, this power must be exercised unless the officer has reasonable grounds to believe that the accused will abscond, commit further offenses, or interfere with the administration of justice.<sup>32</sup>

Although due process rights apply at all stages of criminal proceedings, ordinary rules of evidence may not apply at detention hearings, depending on local law.

#### *Notifications at the time of initial arrest, and notification regarding the nature of the charges*

Anyone arrested shall be informed of the reason immediately, and shall promptly be informed of any charges against him.<sup>33</sup> The ECHR defines “promptly” as “at or soon after time of arrest (a few hours).”<sup>34</sup> Under the ICCPR, “promptly” has been interpreted to require notification by the time of initial interrogation, and not longer than 72 hours after arrest. The ICCPR also requires that the individual be able to discern “the substance of the complaint against him.” Knowledge of specific legal charges is sufficient; the accused need not be shown a written arrest warrant, nor given a full explanation.<sup>35</sup>

The UN Principles require that the following information 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; and (d) precise information concerning the place of custody. Such records shall be communicated to the detained person, or his counsel, in the form prescribed by law, in a language he understands.<sup>36</sup>

In addition to the requirements set forth above, most standards, including those emanating from the African and Inter-American Commissions, add that all information about the rights of an accused be communicated in “a language he or she understands.”<sup>37</sup>

#### *Notification regarding right to counsel*

UN Principles require that the accused have the assistance of legal counsel. He shall be informed of this right by the competent authority promptly upon arrest, and shall be provided with reasonable facilities for exercising this right. If a person does not have counsel of his own choice, he shall be entitled to have counsel assigned to him by a judicial or other authority in all cases where the interests of justice so require, and without payment by him if he does not have sufficient means to pay.<sup>38</sup> The ICCPR notes that failure to provide legal aid at the time of arrest

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<sup>31</sup> Police and Criminal Evidence Act 1984, s. 38.

<sup>32</sup> *Id.*, s. 38(1).

<sup>33</sup> United Nations Body of Principles for the Protection of All Persons under Any Form of Detention Principle 10.

<sup>34</sup> ECHR: Article 5(2) (further detail at p. 341, Practitioner’s Guide).

<sup>35</sup> ICCPR Art. 9(4).

<sup>36</sup> United Nations Body of Principles for the Protection of All Persons under Any Form of Detention Principle 12. 1.

<sup>37</sup> African Commission on Human and Peoples’ Rights, Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa. Inter-American Commission on Human Rights, Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas, Principle V. Guidelines and Measures for the Prohibition and Prevention of Torture, Cruel, Inhuman or Degrading Treatment or Punishment in Africa (The Robben Island Guidelines) Sections 25 and 26.

<sup>38</sup> United Nations Body of Principles for the Protection of All Persons under Any Form of Detention, Principle 17. Lilongwe Declaration on Accessing Legal Aid in the Criminal Justice System in Africa Section 3.

violates Article 14(3)(d).<sup>39</sup> Under the ECHR, however, there is no requirement of assistance at the first moment of arrest.<sup>40</sup> The Inter-American Commission sets forth specific safeguards:

[the accused]... shall have the right to communicate privately with their counsel, without interference or censorship, without delays or unjustified time limits, from the time of their capture or arrest and necessarily before their first declaration before the competent authority.<sup>41</sup>

#### *Notification regarding right against self incrimination*

The right to remain silent under police questioning and the privilege against self-incrimination are recognized international standards, indispensable to achieving fair procedure under Article 6 of the ECHR. By protecting the accused from improper compulsion by the authorities, these immunities contribute to the preservation of justice.<sup>42</sup> The African Commission mandates that, unless a person has waived this right in writing, he shall not be obliged to answer any questions or participate in any interrogation without his lawyer present.<sup>43</sup>

#### *Notification regarding right for doctor's exam*

The African Commission mandates that anyone who is arrested or detained shall be informed upon arrest, in a language he understands, of the right... to be examined by a doctor of his or her choice, and the facilities available to exercise this right.<sup>44</sup>

#### *Notification regarding right to communicate with family members/consular representatives/others*

Promptly after arrest and after each transfer from one place of detention or imprisonment to another, a detained or imprisoned person shall be entitled to notify or to require the competent authority to notify members of his family (or other appropriate persons of his choice) of his arrest, detention, imprisonment, or transfer, as well as the place where he is being kept in custody. Any notification referred to in the present principle shall be made or permitted without delay.<sup>45</sup> The competent authority may, however, delay a notification for a reasonable period where exceptional needs of an investigation so require.<sup>46</sup>

The Council of Europe also mandates familial notification, unless this would result in a serious risk to the administration of justice or national security.<sup>47</sup> The African Commission adds that

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<sup>39</sup> ICCPR Article 14(3)(d), p. 28 KAM.

<sup>40</sup> ECHR Article 6(3)(c), (p. 158).

<sup>41</sup> Inter-American Commission on Human Rights, Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas, Principle V.

<sup>42</sup> ECt.HR Murray v. UK - 18731/91 [1996] ECHR 3 (8 February 1996) Para 45.

<sup>43</sup> African Commission on Human and Peoples' Rights, Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa Section M (f).

<sup>44</sup> African Commission on Human and Peoples' Rights, Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa Section M (b).

<sup>45</sup> United Nations Body of Principles for the Protection of All Persons under Any Form of Detention, Article 16. Guidelines and Measures for the Prohibition and Prevention of Torture, Cruel, Inhuman or Degrading Treatment or Punishment in Africa (The Robben Island Guidelines) Section 20. Inter-American Commission on Human Rights, Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas Principle V.

<sup>46</sup> United Nations Body of Principles for the Protection of All Persons under Any Form of Detention, Article 16. Guidelines and Measures for the Prohibition and Prevention of Torture, Cruel, Inhuman or Degrading Treatment or Punishment in Africa (The Robben Island Guidelines) Section 20.

<sup>47</sup> Council of Europe, Recommendation (2006)13 on the Use of Remand in Custody, the Conditions in which it takes Place and the Provision of Safeguards against Abuse Section 32. [1].



anyone who is arrested or detained shall be given reasonable facilities to receive visits from family and friends, subject to restriction and supervision only as necessary in the interests of the administration of justice and institutional security.<sup>48</sup>

If a detained or imprisoned person is a foreign national, he shall be promptly informed of his right to communicate with a consular post or diplomatic mission of the State of which he is a national (or which is otherwise entitled to receive such communication, in accordance with international law or the representative of the competent international organization, if he is a refugee or is otherwise under the protection of an intergovernmental organization).<sup>49</sup> The Council of Europe requires that this occur in sufficient time to obtain advice and assistance.<sup>50</sup> The Council of Europe also adds that this right should, wherever possible, be extended to persons holding the nationality both of the country where their remand in custody is being sought, and the other country in which they hold citizenship.<sup>51</sup>

Persons deprived of liberty in an Organization of American States Member State of which they are not a national, shall be informed, without delay, and before they make any statement to the competent authorities, of their right to consular or diplomatic assistance, and to request that consular or diplomatic authorities be notified of their deprivation of liberty immediately. Furthermore, they shall have the right to communicate with their diplomatic and consular authorities freely and in private.<sup>52</sup>

If a detained or imprisoned person is a juvenile or is incapable of understanding his entitlement, the competent authority shall on its own initiative undertake the notification referred to in the present principle. Special attention shall be given to notifying parents or guardians.<sup>53</sup>

### **1.3. Judicial Supervision of Pretrial Detention**

#### *Prompt Review by a Judicial Authority*

The primary mechanism for oversight of pretrial detention is the right of anyone arrested or detained to be brought promptly before a judicial authority. This review provides a fundamental safeguard against abuses of power and arbitrary arrest, allowing a court to determine whether initial detention was justified, and whether or not the accused shall be remanded in custody pending trial.<sup>54</sup> It also prevents and uncovers violations of the detainee's fundamental rights, and allows the detainee to be released if the arrest or detention violates his rights.<sup>55</sup> This safeguard is contained within each of the major international and regional human rights instruments; the HRC has noted that under ICCPR Article 9, "in criminal cases any person arrested or detained has to be

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<sup>48</sup> African Commission on Human and Peoples' Rights, Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa Section M (g).

<sup>49</sup> United Nations Body of Principles for the Protection of All Persons under Any Form of Detention, Article 16. Vienna Convention on Consular Relations, 1963 Article 36, African Commission on Human and Peoples' Rights, Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa Section M (d).

<sup>50</sup> Council of Europe, Recommendation (2006)13 on the Use of Remand in Custody, the Conditions in which it takes Place and the Provision of Safeguards against Abuse Section 27. [1].

<sup>51</sup> Council of Europe, Recommendation (2006)13 on the Use of Remand in Custody, the Conditions in which it takes Place and the Provision of Safeguards against Abuse Section 27 [2].

<sup>52</sup> Inter-American Commission on Human Rights, Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas Principle V.

<sup>53</sup> United Nations Body of Principles for the Protection of All Persons under Any Form of Detention, Article 16.

<sup>54</sup> Council of Europe, Recommendation (2006)13 on the Use of Remand in Custody, the Conditions in which it takes place and the Provision of Safeguards against Abuse, para. 14.

<sup>55</sup> African Commission on Human and Peoples' Rights, Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, para. M(3)(b).



brought ‘promptly’ before a judge or other officer authorized by law to exercise judicial power.”<sup>56</sup> The ECHR,<sup>57</sup> African Charter on Human and People’s Rights<sup>58</sup> and American Convention on Human Rights<sup>59</sup> contain similar guarantees. The duty to bring a detainee promptly before a judicial authority applies regardless of whether the detainee requests it,<sup>60</sup> and applies to administrative detention as well as pretrial detention.<sup>61</sup>

The definition of “promptly” is not articulated under any of the human rights instruments, although some guidance is provided. The HRC has indicated that detention prior to judicial review “must not exceed a few days,”<sup>62</sup> and ideally should be made available with 48 hours.<sup>63</sup> The European Court of Human Rights has held that the degree of flexibility attaching to the notion is limited. While individual circumstances can be taken into account in determining promptness, the essence of the right should not be impaired.<sup>64</sup> Four days may be acceptable in exceptional circumstances, (e.g., terrorist investigations), but longer than four days is unacceptable, as it would impair the essence of the right.<sup>65</sup> Even in case of an emergency threatening the life of a nation, which can permit states to derogate from certain obligations under the ECHR,<sup>66</sup> there should not be an interval greater than seven days between detention and appearance before a judicial authority unless it is absolutely impossible to hold a hearing.<sup>67</sup> The ABA Criminal Justice Standards on Pretrial Release state that a detainee should in no instance be held by police longer than 24 hours without appearing before a judicial officer.<sup>68</sup>

In order to ensure that a detainee’s rights are properly protected, the judicial authority that reviews detention must have certain characteristics. It 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.<sup>69</sup> An officer who combines the functions of investigation and prosecution is likely to lack the required level of independence and impartiality.<sup>70</sup>

In Europe, pretrial detention hearings must have a judicial character and provide guarantees appropriate to the kind of deprivation of liberty in question, although it is not always necessary that the accused receive the same rights as those required by Article 6 of the European

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<sup>56</sup> Human Rights Committee, General Comment 8, para. 2.

<sup>57</sup> Article 5(3).

<sup>58</sup> African Commission on Human and Peoples’ Rights, Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, para. M(3)(a).

<sup>59</sup> Inter-American Commission on Human Rights, Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas, Principle V.

<sup>60</sup> Human Rights Committee, Concluding Observations: Republic of Korea, CCPR/C/79/Add.122 (2000) para. 13.

<sup>61</sup> *Van der Sluijs and others v Netherlands*, May 22, 1984, Series A, No. 78, para. 46.

<sup>62</sup> General Comment 8, para. 2. In several cases, the Human Rights Committee has found that a period of 7 or 9 days is not acceptable under Article 9(2). See *Grant v. Jamaica*, Communication No. 597/1994, para. 8.1; see also *Morrison v. Jamaica*, Communication No. 663/1995, para. 8.2; see also *Kurbanov v. Tajikistan*, Communication No. 1096/2002, para. 7.2.

<sup>63</sup> Human Rights Committee, Concluding Observations: Zimbabwe, CCPR/C/79/Add.89 (1998) para. 17; Concluding Observations: Czech Republic, CCPR/CO/72/CZE (2001) para. 17.

<sup>64</sup> Reid, *A Practitioner’s Guide to the European Convention of Human Rights*, (Sweet and Maxwell, 1998) at 305 (citing *Brogan v UK*, November 29, 1988, Series A, No. 145-B.)

<sup>65</sup> *Id.*

<sup>66</sup> Article 15.

<sup>67</sup> Council of Europe, Recommendation (2006)13 on the Use of Remand in Custody, the Conditions in which it takes place and the Provision of Safeguards against Abuse, para. 15.

<sup>68</sup> Standard 10-4.1.

<sup>69</sup> Nowak, Manfred, *U.N. Covenant on Civil and Political Rights: CCPR Commentary* 160 (N.P. Engel, 1993) at 176-77 (citing *Schiesser*, Judgment of 4 December 1979, Series A 34, 30).

<sup>70</sup> Human Rights Committee, *Kulomin v. Hungary*, Communication No. 521/1992, para. 11.2-3. ECt.HR, *Huber v Switzerland*, October 23, 1990 Series A, No, 188.



Convention for criminal or civil litigation.<sup>71</sup> Proceedings conducted under Article 5 § 4 of the Convention should meet, to the largest extent possible, the basic requirements of a fair trial, be adversarial, and ensure equality of arms between the parties.<sup>72</sup>

### *Records of Detention*

Other safeguards complement judicial review of pretrial detention. First, a comprehensive record should be made of the pretrial detention process. The law enforcement agency responsible for the arrest and detention should record: the reason for the arrest; the time of arrest and taking of the arrested person to custody; details of the first appearance before a judicial authority, including the time of it and the name of the judicial officer involved; the identity of the law enforcement officers involved and precise information concerning the place of custody.<sup>73</sup> An official up-to-date register of all detainees, including the names of their legal representatives, shall be maintained in every place of detention, and should include the information specified above, as well as information concerning the places of detention of an individual, including information on transfers between detention facilities.<sup>74</sup> This information shall be made available to the detainee, his legal representative, and any judicial or other competent and independent national authority seeking to trace the whereabouts of a detained person.<sup>75</sup>

### *Oversight of Law Enforcement Agencies*

A final safeguard requires proper oversight of the detention practices of law enforcement agencies. The African Commission on Human and Peoples' Rights, in its Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, requires states to ensure strict supervision, including a clear chain of command, of all law enforcement officials responsible for apprehensions, arrests, detentions, custody, transfers, and imprisonment.<sup>76</sup> States should stipulate penalties for officials who arbitrarily arrest or detain any person or who, without legal justification, refuse to provide information on any detention.<sup>77</sup>

### *Right to Trial within Reasonable Time*

Timeliness can also effect the decision to release or detain a person before trial. Under ICCPR Article 9(3), ECHR Article 7(3), and ACHR Article 7(5) an individual detained prior to trial is entitled to trial within a reasonable time, or release pending trial. Therefore, in considering whether to release an individual, a judicial authority must determine both whether continued detention remains necessary and is legally justified, and whether the length of detention is such that the detainee has been denied his right to be tried within a reasonable time. The relevant period of detention is the date of arrest/commencement of detention until the date of final judgment.<sup>78</sup> In considering what is reasonable, the authority must “examine all the circumstances

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<sup>71</sup> See, e.g. *Assenov and Others v. Bulgaria*, 28 October 1998, § 162, *Reports* 1998-VIII; *Wloch v. Poland*, no. 27785/95, § 125, ECHR 2000-XI; *Megyeri v. Germany*, 12 May 1992, § 22, Series A no. 237-A.

<sup>72</sup> See, e.g., *Nikolova v. Bulgaria* [GC], no. 31195/96, § 58, ECHR 1999-II, and *Schiesser v. Switzerland*, 4 December 1979, §§ 30-31, Series A no. 34, *Ramishvili & Kokbreidze v Georgia*, ECHR 1704/06, 27 January 2009

<sup>73</sup> United Nations Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, Principle 12(1); African Commission on Human and Peoples' Rights, Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, para. M(6)(a).

<sup>74</sup> *Id.*. Inter-American Commission on Human Rights, Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas, Principle IX.

<sup>75</sup> *Id.*.

<sup>76</sup> Para. M(1).

<sup>77</sup> *Id.*.

<sup>78</sup> B v Austria, March 28, 1990, Series A, No. 175, para. 39.



arguing for or against the existence of a genuine public interest justifying, with a due regard to the presumption of innocence, a departure from the rule of respect for individual liberty”.<sup>79</sup> In other words, the judicial officer must ask whether the justification put forward for detaining the accused can justify the time the accused has spent in detention prior to the adjudication. The diligence of the prosecuting or investigating authority in bringing the case to trial, the complexity of the case, and the conduct of the accused are all highly relevant factors,<sup>80</sup> as is the proportionality of the detention period to the penalty that may be imposed for the offense.<sup>81</sup>

### *Reasons for Decisions*

To preserve the right to a fair trial, courts give reasons for their decisions in a timely manner.<sup>82</sup> Decisions imposing pretrial detention on an individual, or refusing a request for release, are no exception.<sup>83</sup> The Council of Europe has said that “every ruling by a judicial authority to remand someone in custody, to continue such remand or to impose alternative measures shall be reasoned and the person affected shall be provided with a copy of the reasons.”<sup>84</sup> The ABA Criminal Justice Standards impose a similar requirement.<sup>85</sup> The reasons should indicate with sufficient clarity the grounds on which the decision was based in order to provide for the possibility of appellate review.<sup>86</sup> For pretrial detention hearings and appeals from those hearings, this requires an explanation of why detention is necessary in lieu of the available alternatives.<sup>87</sup>

Different standards of proof may apply in making determinations involved in deciding whether to impose pretrial detention. In the United States, courts apply a preponderance of the evidence standard. The ordinary rules of evidence may not apply at detention hearings, depending upon the laws of a particular state.

## **2. Challenging Pretrial Detention**

An individual deprived of liberty prior to conviction should have at least three avenues available to challenge his detention: ordinary appeals of the imposition of detention, extraordinary remedies challenging the lawfulness of detention, and the guaranteed periodic review of detention.

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<sup>79</sup> Reid, *A Practitioner’s Guide to the European Convention of Human Rights*, (Sweet and Maxwell, 1998) at 308.

<sup>80</sup> Under the ECHR, the prosecution must display “special diligence” in bringing a case to trial throughout the period of detention, or the detainee is entitled to be released. Reid, *A Practitioner’s Guide to the European Convention of Human Rights*, (Sweet and Maxwell, 1998) at 309. The Inter-American Commission on Human Rights, *Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas* state that: “Three criteria shall be taken into consideration when determining if a judicial proceeding complied with the reasonable time requirement: the complexity of the case; the conduct of the applicant; and the conduct of the relevant authorities”.

<sup>81</sup> Council of Europe, *Recommendation (2006)13 on the Use of Remand in Custody, the Conditions in which it takes place and the Provision of Safeguards against Abuse*, para. 22(2).

<sup>82</sup> ECHR Article 6(1) has been interpreted as requiring courts to give reasons for their decisions, Reid, *A Practitioner’s Guide to the European Convention of Human Rights*, (Sweet and Maxwell, 1998) at 126. The African Commission on Human and Peoples’ Rights, *Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa* describe this right as “an essential element” of a fair hearing, para. A(2)(i).

<sup>83</sup> Inter-American Commission on Human Rights, *Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas* state that: “orders of deprivation of liberty shall be duly reasoned”, Principle IV.

<sup>84</sup> Council of Europe, *Recommendation (2006)13 on the Use of Remand in Custody, the Conditions in which it takes place and the Provision of Safeguards against Abuse*, para. 21.

<sup>85</sup> ABA Criminal Justice Standards on Pretrial Detention, Standard 10-5.10.

<sup>86</sup> Reid, *A Practitioner’s Guide to the European Convention of Human Rights*, (Sweet and Maxwell, 1998) at 128.

<sup>87</sup> ABA Criminal Justice Standards on Pretrial Release, Standard 10-5.10.





### *Appealing the Imposition of Pretrial Detention*

Whenever a decision to detain an individual during the adjudicative process is made by a first instance judicial authority, the detainee should have the right, contained in law, to appeal the decision to a higher judicial or other competent authority.<sup>88</sup> The right to appeal also applies when conditional release has been revoked, or when a previous period of detention has been extended.<sup>89</sup>

Appellate procedures should share the same fair trial and due process requirements as first instance decisions,<sup>90</sup> although given that appeal processes take different forms in different legal systems, the manner in which the interests of the parties are protected will depend on the structure and functioning of the appellate body.<sup>91</sup>

There are few examples of desirable standards of review for the appeal process. The HRC has held, when discussing the ICCPR Article 14(5) right to appeal convictions, that an appeal process that only considers errors of law and does not call for a hearing “falls short of the requirements...for a full evaluation of the evidence and the conduct of the trial.”<sup>92</sup> The ABA Criminal Justice Standards on Pretrial Release state that if the detention decision is made by a judicial officer other than a trial court judge, it should be reviewed *de novo*, whereas decisions of trial court judges should be reviewed under an abuse of discretion standard.<sup>93</sup>

### *Right to Review of the Legality of Pretrial Detention*

ICCPR Article 9(4) entitles all persons who have been arrested or detained to have their confinement reviewed in court without delay, a provision which stems from the Anglo-American right to *habeas corpus*. If the court does not find the confinement lawful, it must order the immediate release of the detainee. The UN Human Rights Committee, in the case of *A. v. Australia*, defined lawfulness as not only including compliance with domestic law, but also compliance with the ICCPR.<sup>94</sup> The Human Rights Committee has also defined “court” as a body with judicial character that has the ability to order the detainee’s release, stipulating that an administrative body’s decisions on detention must be reviewed by a judicial body in order to comply with the requirements of Article 9(4),<sup>95</sup> and that this requirement equally applies to military justice systems.<sup>96</sup> The UN Body of Principles for the Protection of All Persons under any Form of Detention or Imprisonment reiterates that a person shall not be kept in detention without having an effective opportunity to be heard promptly by a judicial or other authority. Judicial or other authorities must be empowered to review the continuance of detention, and the detained person must be entitled under domestic law to challenge the lawfulness of his detention before a judicial or other authority at any time.<sup>97</sup>

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<sup>88</sup> United Nations Minimum Rules of Non-Custodial Measures, para. 6.3.

<sup>89</sup> Council of Europe, Recommendation (2006)13 on the Use of Remand in Custody, the Conditions in which it takes place and the Provision of Safeguards against Abuse, para. 18.

<sup>90</sup> ECt.HR *Delcourt v Belgium*, January 17, 1970, Series A, No. 11, para’s. 25-26. See also Human Rights Committee General Comment 13, para. 17, although this concerns appeals from conviction and sentence.

<sup>91</sup> Reid, *A Practitioner’s Guide to the European Convention of Human Rights*, (Sweet and Maxwell, 1998) at 72.

<sup>92</sup> *Domukovsky, et. al. v. Georgia*, Communication Nos. 623/1995, 624/1995, 626/1995, and 627/1995 (29 May 1998) para. 18.11, CCPR/C/62/D/623/1995, CCPR/C/62/D/624/1995, CCPR/C/62/D/627/1995, and CCPR/C/62/D/628/1995.

<sup>93</sup> Standard 10-5.10.

<sup>94</sup> NOWAK, MANFRED, U.N COVENANT ON CIVIL AND POLITICAL RIGHTS: CCPR COMMENTARY 2<sup>ND</sup> EDITION 236 (N.P. Engel, 2005).

<sup>95</sup> *A. v. Australia*, Communication No. 560/1993 ¶ 9.5.

<sup>96</sup> *Vuolanne v. Finland*, Communication No. 265/1987 ¶ 9.6.

<sup>97</sup> United Nations Body of Principles for the Protection of All Persons under any Form of Detention or Imprisonment, Principles 11, 32.

The European human rights system is similar to the ICCPR requirements.<sup>98</sup> The Council of Europe has added the stipulation that prisoners who have appeared before a court but are remanded into custody have a separate right to a speedy challenge regarding the lawfulness of that detention.<sup>99</sup> Additionally, the European system requires that the proceeding be adversarial, giving the detained person an opportunity to present his case effectively, although it is not necessarily required that the detainee be present.<sup>100</sup>

The Inter-American Commission on Human Rights' Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas states that persons deprived of 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.<sup>101</sup>

The African Commission on Human Rights' Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa echoes the requirements of the ICCPR, and goes a step further, requiring states to enact legislation, where it does not exist, to ensure the right to *habeas corpus*, *amparo* or a similar procedure.<sup>102</sup> Moreover, anyone interested in the well-being, safety, or security of a person deprived of liberty has the right to a prompt and effective judicial remedy to determine the whereabouts or state of health of that person, as well as the identity of the officer or agency carrying out the deprivation of liberty.<sup>103</sup> Judicial bodies must at all times hear and act upon petitions for *habeas corpus* (and its equivalents), and no circumstances whatsoever can justify the denial of the right to *habeas corpus*, *amparo*, or similar procedures.<sup>104</sup>

The Human Rights Committee has not clarified the meaning of the phrase “without delay,” although it has found delays of 5 weeks and of 3 months to be in violation of the ICCPR Article 9(4). According to the UN Body of Principles for the Protection of All Persons under any Form of Detention, the detainee may raise a challenge to the lawfulness of his detention at any time.<sup>105</sup> The European Convention on Human Rights requires that the lawfulness of detention be decided “speedily,” and the European Court of Human Rights evaluates speediness depending on the nature and circumstances of the detention, rather a bright-line rule.<sup>106</sup>

The right to legal representation may be required, depending on the nature of the proceedings and the capabilities of the applicant. The European Court has required legal representation in cases involving juveniles, mental health patients, and substantive questions of law.<sup>107</sup> The UN Body of Principles for the Protection of All Persons under any Form of Detention requires that the detained person have the right to a defense and counsel at this stage.<sup>108</sup>

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<sup>98</sup> European Convention on Human Rights Art. 5(4).

<sup>99</sup> Council of Europe Recommendation (2006)13 on the Use of Remand in Custody, the Conditions in which it takes Place and the Provision of Safeguards against Abuse, Art. 19.

<sup>100</sup> Reid 358

<sup>101</sup> Principle VII.

<sup>102</sup> Principles M(4), (5)(a).

<sup>103</sup> Principle M(5)(b).

<sup>104</sup> Principle M(5)(e).

<sup>105</sup> United Nations Body of Principles for the Protection of All Persons under any Form of Detention, Principles 11, 32.

<sup>106</sup> Practitioner's Guide 359.

<sup>107</sup> Reid 358

<sup>108</sup> United Nations Body of Principles for the Protection of All Persons under any Form of Detention, Principle 11.



## *Automatic Review of Detention*

Whenever a judicial authority decides to detain an individual during the adjudicative process, the United Nations Body of Principles for the Protection of All Persons under Any Form of Detention requires that the authority maintain a continuous review of the individual's detention.<sup>109</sup> This review should be automatic and should not require any action by the detainee. The detainee should be released if detention is no longer necessary under one of the permissible grounds identified in section 1.1., or if the length of detention is such that the detainee has been denied the right to be tried within a reasonable time.

The ABA Criminal Justice Standards on Pretrial Release require decisions to detain an individual to be reviewed *de novo* at intervals "in most cases not exceeding 90 days."<sup>110</sup> The Council of Europe is more demanding, stating that the "interval between reviews shall normally be no longer than a month, unless the person concerned has the right to submit and have examined, at any time, an application for release."<sup>111</sup>

### **3. Considerations During Detention**

The following considerations apply at all stages at which an individual is deprived of liberty, beginning at the moment of initial apprehension by a state actor. These considerations affect both the rights afforded to a detainee or suspect, as well as the structure of the criminal justice system as a whole.

#### **3.1. Procedural Fairness**

There are three due process rights that impact detention procedure at all stages of the criminal justice process: review by a competent tribunal, the right to counsel, and the right to effective participation.

##### *Review by a Competent Tribunal*

All detainees are entitled to equal treatment before courts and tribunals. Anyone facing criminal charges is entitled to a fair and public hearing by a competent, independent, and impartial tribunal established by law. Proceedings should generally be open to the public and press, but may be closed for reasons of public order, national security (in a democratic society), substantial and compelling privacy concerns, or to the extent strictly necessary, as determined by the court, in special circumstances where publicity may prejudice the interests of justice. Judgments in criminal cases must be made public except to protect the interests of juveniles,<sup>112</sup> and defendants have the right to be tried without undue delay.<sup>113</sup> Additionally, persons convicted of a crime have the right to have the conviction reviewed by a higher court established by law.<sup>114</sup> No person may be retried or re-punished based on charges of which they have already been finally convicted or acquitted.<sup>115</sup>

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<sup>109</sup> Principle 39.

<sup>110</sup> Standard 10-5.10.

<sup>111</sup> Council of Europe, Recommendation (2006)13 on the Use of Remand in Custody, the Conditions in which it takes place and the Provision of Safeguards against Abuse, para. 17(2).

<sup>112</sup> ICCPR art. 14(1).

<sup>113</sup> Art. 14(c).

<sup>114</sup> *Id.* art. 14(5).

<sup>115</sup> *Id.* art. 14(7).

### *Right to Counsel*

All international and regional human rights instruments stipulate that persons accused of crimes have the right to consult with and be represented by legal counsel. This right applies during all stages of the criminal process, from the moment of detention,<sup>116</sup> through trial, sentence, and appeal.<sup>117</sup>

The right to counsel encompasses three guarantees: (1) the right to defend one's self; (2) the right to be informed of the right to counsel; and (3) the right to choose one's counsel or, where the interests of justice or indigent status of the accused so require, to elect to have legal counsel appointed and paid for by the state.<sup>118</sup> Whenever a state does appoint counsel free of charge for a detainee, the appointed lawyer must be able to provide "effective" legal assistance, and as such, must be "of experience and competence commensurate with the nature of the offence."<sup>119</sup>

Implicit within the right to obtain legal counsel, whether free or otherwise, is the guarantee of adequate time and facilities for confidential consultation with that counsel. The right to communicate confidentially with counsel should not be suspended or restricted "save in exceptional circumstances, specified in law or lawful regulations, and only when considered indispensable by a judicial or other authority in order to maintain security and good order."<sup>120</sup>

### *Right to Effective Participation*

It is an essential element of due process that a detained person and/or his legal counsel are able to effectively participate in proceedings, beginning with pretrial detention. Several discrete rights guarantee effective participation.

First, a detainee has the right to be present at all court appearances including his trial.<sup>121</sup> Second, a detainee has the right to an interpreter, provided free of charge, at all stages of legal proceedings, including initial interviews during the investigatory stages.<sup>122</sup> This right does not, however, constitute a right to express oneself in the language of one's choice if one is sufficiently proficient in the language customarily used within the nation's legal system.

Third, effective participation requires that the detainee be given adequate opportunity to prepare his case. Implicit in this right is the requirement that the accused have access to the documentation relevant to the proceedings, as well as adequate time to review that documentation.<sup>123</sup> The previously mentioned right to an interpreter does not necessarily extend to translation of all court documents, according to the *travaux préparatoires* of the ICCPR. The

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<sup>116</sup> See section 1.2. The right to counsel attaches "for the determination of any criminal charge against [the detainee]."

<sup>117</sup> United Nations Basic Principles on the Role of Lawyers, Right to Counsel, para. 1. African Commission on Human and Peoples' Rights, Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, para. N(2)(c). Inter-American Commission on Human Rights, Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas, Principle V, Due Process of Law.

<sup>118</sup> ICCPR Article 14(3)(d), see Lawyers Committee for Human Rights, *What is a Fair Trial?* (1995), at 3 and Nowak, Manfred, *U.N. Covenant on Civil and Political Rights: CCPR Commentary* 160 (N.P. Engel, 1993) at 258. Both the ICCPR Article 14(3)(d) and the ECHR Article 6(3)(c) require legal assistance free of charge where the "interests of justice" so require.

<sup>119</sup> United Nations Basic Principles on the Role of Lawyers, Principle 6.

<sup>120</sup> United Nations Body of Principles for the Protection of All Persons under Any Form of Detention, Principle 18(3).

<sup>121</sup> ICCPR art. 14(d).

<sup>122</sup> United Nations Body of Principles for the Protection of All Persons under Any Form of Detention, Principle 14.

<sup>123</sup> *Id.*, para. N3(e)(iv). In the context of pre-detention, see Council of Europe, Recommendation (2006)13 on the Use of Remand in Custody, the Conditions in which it takes place and the Provision of Safeguards against Abuse, para. 26.



European Court of Human Rights, however, has interpreted the analogous ECHR provision, Article 6(3)(e), to require the translation of written materials,<sup>124</sup> and the African Commission on Human and Peoples' Rights has done the same for the African Charter on Human and People's Rights.<sup>125</sup>

Fourth, the detainee, or his legal representative, must be given an adequate opportunity to present arguments and evidence and to challenge or respond to opposing arguments or evidence.<sup>126</sup> This includes but is not limited to the ability to call witnesses to present relevant testimony at court proceedings, and to confront and cross-examine witnesses called by the opposition, including at both pretrial detention and sentencing hearings.<sup>127</sup> Finally, there must be "equality of arms" between the parties, such that both the prosecution and defense are treated equally and have access to equal resources.<sup>128</sup> The defense must have reasonable opportunity to present their case under conditions which do not place them at a substantial disadvantage against the prosecution.<sup>129</sup>

Finally, nations may claim that they cannot respect due process rights due to states of emergency or threats to public order. The ICCPR allows this only when public emergency is officially proclaimed and threatens the life of the nation, and only to the extent required by the exigencies of the situation.<sup>130</sup>

### *Arbitrariness*

Under ICCPR Article 9(1), a decision to detain an individual should not be arbitrary. According to the *travaux préparatoires* of the ICCPR, the prohibition against "arbitrary" detentions is broad. The term "arbitrary" captures "elements of inappropriateness, injustice, lack of predictability."<sup>131</sup>

Prominent international and regional human rights standards require that the circumstances and procedures under which a person can be lawfully detained be enshrined in domestic law.<sup>132</sup> States must establish national laws indicating which officials are authorized to impose detention, and establishing the conditions under which such actions may be given.<sup>133</sup> Such laws should generally be issued by the legislature; administrative laws or regulations will not suffice.<sup>134</sup> These laws also must be sufficiently accessible and precise to allow a citizen to regulate his conduct with knowledge of the consequences his actions will entail.<sup>135</sup> <sup>136</sup> Legislatures should not, therefore, enact laws that allow individuals to be detained for vague reasons.<sup>137</sup>

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<sup>124</sup> Nowak, Manfred, U.N. Covenant on Civil and Political Rights: CCPR Commentary 160 (N.P. Engel, 1993) at 263.

<sup>125</sup> African Commission on Human and Peoples' Rights, Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, para. A(4).

<sup>126</sup> African Commission on Human and Peoples' Rights, Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, para. A(2)(b). ABA Criminal Justice Standards on Sentencing, Standard 18-5.17(a).

<sup>127</sup> *Id.*, Standard 18-5.17(a)(iv). Council of Europe, Recommendation (2006)13 on the Use of Remand in Custody, the Conditions in which it takes place and the Provision of Safeguards against Abuse, para. 28.

<sup>128</sup> Nowak, Manfred, U.N. Covenant on Civil and Political Rights: CCPR Commentary 160 (N.P. Engel, 1993) at 258. The ECHR and the ACHR contain similar concepts.

<sup>129</sup> ECHR, *Dombo Deheer B.V. v Netherlands*, October 27, 1993, Series A, No. 274-A, para. 33.

<sup>130</sup> ICCPR art. 4.

<sup>131</sup> *Van Alphen v Netherlands*, Communication No. 305/1988, para. 5.8.

<sup>132</sup> ICCPR, Article 9; ECHR, Article 5; African Charter on Human and People's Rights, Article 6; American Convention on Human Rights, Article 7.

<sup>133</sup> African Commission on Human and Peoples' Rights, Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, para. M(1)(c).

<sup>134</sup> Bossuyt, Marc, Guide to the "Travaux Préparatoires" of the International Covenant on Civil and Political Rights, A/C.3/SR.863, §36 (Martinus Nijhoff Publishers, 1987).

<sup>135</sup> Dinstein, Yoram, Right to Life, Physical Integrity, and Liberty, in Louis Henkin, the International Bill of Rights: CCPR Commentary 130 (Columbia University Press, 1981). ECt.HR, *Amuur v France*, June 10 1996.

At the pretrial stage, it is particularly important to ensure that detention decisions are not arbitrary. Consequently, these determinations should be made according to established criteria, which provide structure and predictability to a decision maker's exercise of discretion.<sup>138</sup> In the United States, pretrial detention is determined based on whether there are conditions of release that will reasonably ensure the appearance of the accused in court, as well as the safety of any individual and the community at large. The criteria taken into account include (1) the nature and circumstances of the offense, (2) the weight of the evidence against the accused, (3) the history and characteristics of the accused, and (4) the nature and seriousness of the danger that would be posed by the accused's release.<sup>139</sup> Similarly, the United Nations Minimum Rules for Non-Custodial Measures state that "selection of a non-custodial measure shall be based on an assessment of established criteria."<sup>140</sup>

International and regional human rights instruments offer significant guidance as to the specific criteria that should be used to decide whether a person should be subject to pretrial detention. The applicable standards are discussed above.<sup>141</sup>

Of course, the existence of laws regulating the circumstances in which lawful detention occurs and the procedures under which it is authorized does not, in and of itself, guarantee that arbitrary detentions will not take place. Where, despite the presence of these laws, a person is detained on grounds not provided for in law, or without proper procedure, an arbitrary arrest and detention and unlawful deprivation of liberty will result.<sup>142</sup>

### **3.2. Resources and Independence**

The need for adequate financial, institutional, personnel, and other resources affects all aspects of pretrial detention and sentencing. The success or failure of each element of a pretrial detention or sentencing regime depends, in part, on whether there are sufficient resources to maintain it.

When applying alternative or substitute measures for deprivation of liberty, states shall also provide the necessary and appropriate resources to ensure their availability and effectiveness.<sup>143</sup> A state's efforts to implement a policy favoring pretrial release and selective use of pretrial detention is inextricably tied to explicit recognition of the need to safely supervise defendants in the community pending adjudication of their cases. To be effective, these policies require sufficient resources, especially informational and supervisory.<sup>144</sup>

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<sup>136</sup> See *Silver v United Kingdom* (1983) 2 E.H.R.R. 347, para. 87-89, discussing the "in accordance with law" requirement in the context of Article 8(1).

<sup>137</sup> African Commission on Human and Peoples' Rights, Communication 48/90, Amnesty International, Sudan, para. 59. Detention based on general terms, such as "national security," may violate international human rights laws, Human Rights Committee, Concluding Observations: Sudan, CCPR/C/79/Add.85 (1998) para. 13.

<sup>138</sup> Council of Europe, Recommendation (2006)13 on the Use of Remand in Custody, the Conditions in which it takes place and the Provision of Safeguards against Abuse, para. 8(1).

<sup>139</sup> Bail Reform Act of 1984, Pub. L. No. 98-473, § 203(a) et seq., 98 Stat. 1976 (1984) (codified at 18 U.S.C. § 3141 et seq.).

<sup>140</sup> Rule 2.

<sup>141</sup> See section 1.1.

<sup>142</sup> Human Rights Committee, Communication No. 90/1981, L. Magana ex-Philibert v. Zaire (Views adopted on 21 July 1983), in UN doc. GAOR, A/38/40, p. 200, paras. 7.2 and 8.

<sup>143</sup> Inter-American Commission on Human Rights, Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas, Section 4.

<sup>144</sup> ABA Criminal Justice Standards on Pretrial Release, Standard 10-1.9.



Adequate services for the implementation of community sanctions and measures should be established, given sufficient resources, and developed as necessary to secure the confidence of judicial authorities in the usefulness of community sanctions and measures, ensuring community safety, and effecting an improvement in the personal and social situations of offenders.<sup>145</sup> In the event that the legislature fails to provide adequate funds, the agency performing the intermediate function should ensure that the number of sentences imposed does not exceed the system's capacity to properly and legally execute those sentences.<sup>146</sup>

In addition to the provision of sufficient resources for the efficient operation of the criminal justice system, all actors within the criminal justice system must be able to operate independently and free from undue influence.

### *Tribunals and Judges*

International and regional human rights standards require that tribunals adjudicating matters relating to pretrial detention and sentencing are “independent and impartial.”<sup>147</sup> The United Nations Basic Principles on the Independence of the Judiciary elaborate on the contents of this requirement. Tribunals must be free from outside influence, such that their decisions are based only on the facts and laws applicable to the case.<sup>148</sup> Judges should not engage in corrupt practices, and must be protected from outside pressures, including “restrictions, improper influences, inducements, pressures, threats, or interferences, direct or indirect, from any quarter or for any reason.”<sup>149</sup> Judges should also be immune from liability in civil or criminal proceedings for improper acts or omissions in the exercise of their judicial functions, so long as they act in good faith.<sup>150</sup> Their decisions may, however, be subject to appellate review by higher courts, and sentences may be commuted by the executive, provided the procedures for doing so are enshrined in law.<sup>151</sup>

### *Prosecutors and Lawyers*

Like judges, prosecutors should both refrain from corrupt practices and be able to perform their duties free from outside influences. The United Nations Guidelines on the Role of Prosecutors require states to ensure that “prosecutors are able to perform their professional functions without intimidation, hindrance, harassment, improper interference, or unjustified exposure to civil, penal, or other liability.”<sup>152</sup> Similar obligations and protections apply to lawyers, including defense counsel. Lawyers should, particularly, “not suffer, or be threatened with, prosecution or administrative, economic or other sanctions for any action taken in accordance with recognized professional duties, standards and ethics.”<sup>153</sup>

### *Police*

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<sup>145</sup> Council of Europe, Recommendation (2000)22 on Improving the Implementation of the European Rules on Community Sanctions and Measures.

<sup>146</sup> ABA Criminal Justice Standards on Sentencing, Standard 18-2.3, Costs of criminal sanctions; resources needed (e).

<sup>147</sup> ICCPR, Article 14; ECHR, Article 6(1); American Convention on Human Rights, Article 8; African Charter on Human and People's Rights, Article 7.

<sup>148</sup> United Nations Basic Principles on the Independence of the Judiciary, Principle 2.

<sup>149</sup> *Id.*

<sup>150</sup> In relation to civil proceedings, *Id.*, Principle 15.

<sup>151</sup> *Id.*, Principle 4.

<sup>152</sup> United Nations Guidelines on the Role of Prosecutors, Principle 4.

<sup>153</sup> United Nations Basic Principles on the Role of Lawyers, Principle 16.



States should, where possible, ensure law enforcement officials are protected from outside influence. States should, particularly, take steps to prevent law enforcement officials from committing acts of corruption.<sup>154</sup> The Commentary to the United Nations Code of Conduct for Law Enforcement Officials urges states to adopt an expansive definition of corruption that encompasses the “commission or omission of an act in the performance of or in connection with one’s duties in response to gifts, promises or incentives demanded or accepted or the wrong receipt of these once the act has been committed or omitted.”<sup>155</sup>

### 3.3. Special Groups

Within the criminal justice process, there are two groups which must receive special consideration: victims and juveniles.

#### *Victims*

Victims should be kept well informed during the criminal process, including at the pretrial phase. The United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power states, “victims should be informed of their role and the scope, timing and progress of the proceedings and of the disposition of the case, especially where serious crimes are involved and where they have requested such information.”<sup>156</sup> The information provided to the victim should include the date and place of all hearings,<sup>157</sup> as well as details of any sentence imposed on the offender.<sup>158</sup> It should also include information about victims’ rights to participate in any part of the proceedings. Victims should, however, be given the opportunity to indicate that they do not wish to receive this information.<sup>159</sup> The responsibility for ensuring victims are kept sufficiently well-informed lies with all actors in the criminal justice system, but particularly with prosecutors<sup>160</sup> and judicial officers.

The importance of providing information to the victim becomes particularly acute when a decision is made resulting in the release from detention of the accused. A number of international standards emphasize the importance of informing victims that an accused or an offender is to be released. For example, the United Nations Model Strategies and Practical Measures on the Elimination of Violence against Women in the Field of Crime Prevention and Criminal Justice require that, “a woman subjected to violence is notified of any release of the offender from detention or imprisonment where the safety of the victim in such disclosure outweighs invasion of the offender’s privacy.”<sup>161</sup> The United Nations Guidelines on Justice in Matters involving Child Victims and Witnesses of Crime require that child victims, their parents or guardians, and their legal representatives should “be promptly and adequately informed, to the extent feasible and appropriate, of...the custodial status of the accused and any pending changes to that status.”<sup>162</sup> The ABA Criminal Justice Standards on Pretrial Release state that, where an accused is to be released, “the judicial officer should direct the appropriate office or agency to provide victims

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<sup>154</sup> United Nations Code of Conduct for Law Enforcement Officials, Article 7.

<sup>155</sup> Commentary to Article 7, para. (b).

<sup>156</sup> Para. 6.

<sup>157</sup> Council of Europe, Recommendation (85)11E on the Position of the Victim in the Framework of Criminal Law and Procedure, para. 9.

<sup>158</sup> Council of Europe, Recommendation (2006)8 on Assistance to Crime Victims, para. 6.5.

<sup>159</sup> *Id.*

<sup>160</sup> United Nations, Guidelines on the Role of Prosecutors, para. 13.

<sup>161</sup> Para. 9(b).

<sup>162</sup> Para. 20(a).





with notice of any crime charged, any conditions imposed on the defendant...and methods of seeking enforcement of release conditions”.<sup>163</sup>

The United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power notes that states should allow “the views and concerns of victims to be presented and considered at appropriate stages of the proceedings where their personal interests are affected, without prejudice to the accused and consistent with the relevant national criminal justice system.”<sup>164</sup>

At the pretrial stage, the effect of release on victims should be taken into account. Any risk that the accused might commit further offenses is an important consideration to be weighed by the judicial authority when determining whether an accused should be released during the adjudicative process.<sup>165</sup> Concerns raised by the victim in this regard would be accounted for in the tribunal’s decision at the pretrial stage, however, international standards do not require that the views of victims be heard prior to a detention decision.

### *Juvenile Victims*

The United Nations Guidelines on Justice in Matters involving Child Victims and Witnesses of Crime state that “age should not be a barrier to a child’s right to participate fully in the justice process.”<sup>166</sup> Juvenile victims have the same rights to information and to input into the pretrial detention and sentencing processes as adults, and ensuring that those rights are protected involves consideration of the special needs of juvenile victims.<sup>167</sup> The United Nations Guidelines state that all interactions with juvenile victims “should be conducted in a child-sensitive manner in a suitable environment that accommodates the special needs of the child, according to his or her abilities, age, intellectual maturity, and evolving capacity. They should also take place in a language that the child uses and understands.”<sup>168</sup>

### *Juvenile Defendants*

While some standards specify that an individual under of 18 is to be recognized under the law as a juvenile,<sup>169</sup> others simply state that if a person comes within the jurisdiction of a juvenile court, he shall be treated as a juvenile.<sup>170</sup> In addition, the Council of Europe has created an additional category of “young adult offenders,” who are afforded unique due process protections.<sup>171</sup> Regardless of the specific definition selected, a clear legislative standard should be in place.

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<sup>163</sup> Standard 10-6.1.

<sup>164</sup> Para. 6(b).

<sup>165</sup> See section 1.1.

<sup>166</sup> Para. 18.

<sup>167</sup> Para’s. 19 and 20 of the United Nations Guidelines on Justice in Matters involving Child Victims and Witnesses of Crime discuss the right of juveniles to be properly informed during the criminal justice process. Para. 21 concerns the right of juveniles “to express their views and concerns related to their involvement in the justice process.”

<sup>168</sup> Para. 14.

<sup>169</sup> UN Human Rights Committee, citing ICCPR Article 6(5). United Nations Rules for the Protection of Juveniles Deprived of their Liberty. African Commission on Human and Peoples’ Rights, Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa. Council of Europe, Recommendation (2008)11 on European Rules for Juvenile Offenders Subject to Sanctions and Measures-21.1. Inter-American Court of Human Rights. See c. Definition of the child in the Inter-American Human Rights System.

<sup>170</sup> United Nations Standard Minimum Rules for the Treatment of Prisoners, para. 5(2). United Nations Standard Minimum Rules for the Administration of Juvenile Justice (the Beijing Rules).

<sup>171</sup> (Council of Europe, Recommendation (2008)11 on European Rules for Juvenile Offenders Subject to Sanctions and Measures-21.2).



The principle aims of juvenile justice and associated measures for tackling juvenile delinquency should be: (1) to prevent offending and re-offending; (2) to (re)socialize and (re)integrate offenders; and (3) to address the needs and interests of victims.

Culpability should reflect the age and maturity of the offender, with criminal measures being progressively applied as maturity and individual responsibility increase.<sup>172</sup> Put differently, the juvenile justice system should emphasize the well-being of the juvenile, and shall ensure that any sentences are proportional to the circumstances of both the offender and the offence. Legal systems in which juvenile offenders are tried by family courts or administrative authorities provide valuable tools in this regard, but the well-being of the juvenile should also be emphasized in legal systems that follow the criminal court model, in order to avoid purely punitive sanctions.<sup>173</sup>

A broad range of alternative and educational measures should be available at the pre-arrest, pretrial, trial, and post-trial stages in order to prevent recidivism and promote social rehabilitation. Informal dispute resolution mechanisms, including mediation and restorative justice practices (particularly those involving victims) should be utilized whenever appropriate.<sup>174</sup>

States must ensure that law enforcement and judicial officials are adequately trained to deal sensitively and professionally with children who interact with the criminal justice system, whether as suspects, accused, complainants, or witnesses.<sup>175</sup> Also, states must ensure that procedures involving juveniles take account of their age and the desirability of promoting their rehabilitation.<sup>176</sup>

#### *Diversion of Charges*

When appropriate, states shall consider, with the consent of the child and his parents or guardians, dealing with a child offender without resorting to a formal trial, provided the rights of the child and legal safeguards are fully respected. Alternatives to criminal prosecution, with proper safeguards for the protection of the child, may include: (1) the use of community, customary or traditional mediation; (2) issuing of warnings, cautions and admonitions, accompanied by measures to help the child at home, with education, and with problems and difficulties; (3) arranging a conference between the child, the victim, and members of the community; and (4) making use of community programs such as temporary supervision and guidance, restitution, and compensation to victims.<sup>177</sup>

The police, the prosecution, or other agencies dealing with juvenile cases shall be empowered to dispose of such cases, at their discretion, without recourse to formal hearings, in accordance with criteria outlined under national law and international standards. Any diversion involving referral to appropriate community or other services shall require the consent of the juvenile, or his parents

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<sup>172</sup> Council of Europe, Recommendation (2003)20 on new ways of Dealing with Juvenile Delinquency and the role of Juvenile Justice Sections I and 9.

<sup>173</sup> United Nations Standard Minimum Rules for the Administration of Juvenile Justice (the Beijing Rules) 5.1.

<sup>174</sup> United Nations Guidelines for Action on Children in the Criminal Justice System Section 15.

<sup>175</sup> African Commission on Human and Peoples' Rights, Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa Section O (c).

<sup>176</sup> ICCPR Article 14(4).

<sup>177</sup> African Commission on Human and Peoples' Rights, Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa Section O (i). United Nations Standard Minimum Rules for the Administration of Juvenile Justice (the Beijing Rules) 11.4.

or guardian, provided that such a decision shall be subject to review by a competent authority upon application.<sup>178</sup>

Where prosecutorial discretion dictates whether or not a juvenile will be brought to trial, special considerations shall be given to the nature and gravity of the offence, the protection of society, the rights of the victim, and the personality and background of the juvenile. In making this decision, prosecutors shall specifically consider available alternatives to prosecution under relevant juvenile justice laws. Prosecutors shall use their best efforts to prosecute juveniles only to the extent strictly necessary.<sup>179</sup>

### *Pretrial Detention*

Where possible, alternatives to physical custody, such as placements with relatives, foster families, or other supported accommodations, should be used for juvenile suspects. Custodial remand should never be used as a punishment, form of intimidation, or substitute for child protection or mental health measures.<sup>180</sup>

Upon the apprehension of a juvenile, his parents or guardian shall be notified immediately, and, where such immediate notification is not possible, the parents or guardian shall be notified within the shortest possible time thereafter.<sup>181</sup> The African Commission mandates that competent authorities ensure that children are not held in detention for any period beyond 48 hours.<sup>182</sup>

When, as a last resort, juvenile suspects are remanded in custody, this should not be for longer than six months before the commencement of trial. This period can only be extended where a judge not involved in the investigation of the case is satisfied that any delays in proceedings are fully justified by exceptional circumstances.<sup>183</sup>

When pretrial detention is nevertheless used, juvenile courts and investigative bodies shall give the highest priority to the most expeditious processing of such cases to ensure the shortest possible duration of detention.<sup>184</sup>

Every child arrested or detained on the suspicion of having committed a criminal offence shall have the following guarantees: to be treated in a manner consistent with the promotion of the child's dignity and worth; to have the assistance of his parents, a family relative, or legal guardians from the moment of arrest; and to not be questioned without the presence of his parents, a family relative or legal guardians, and a legal representative.<sup>185</sup>

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<sup>178</sup> United Nations Standard Minimum Rules for the Administration of Juvenile Justice (the Beijing Rules) 11.2, 11.3.

<sup>179</sup> United Nations Guidelines on the Role of Prosecutors, Section 19.

<sup>180</sup> Council of Europe, Recommendation (2003)20 on new ways of Dealing with Juvenile Delinquency and the role of Juvenile Justice Section 17.

<sup>181</sup> United Nations Standard Minimum Rules for the Administration of Juvenile Justice (the Beijing Rules) Section 10.1. African Commission on Human and Peoples' Rights, Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa Section O (g).

<sup>182</sup> African Commission on Human and Peoples' Rights, Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa Section O (j).

<sup>183</sup> Council of Europe, Recommendation (2003)20 on new ways of Dealing with Juvenile Delinquency and the role of Juvenile Justice, Section 16.

<sup>184</sup> United Nations Rules for the Protection of Juveniles Deprived of their Liberty, Sections 2 and 17; ICCPR Article 10(2)(b) LII, p. 104.

<sup>185</sup> African Commission on Human and Peoples' Rights, Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa Section O (j).

### *Alternatives to sentencing*

Mediation and other restorative justice measures shall be encouraged at all stages of juvenile criminal justice proceedings.<sup>186</sup>

A large variety of disposition measures shall be made available to the competent authority in order to facilitate flexibility and avoid institutionalization to the greatest extent possible. Such measures, some of which may be combined, include: (a) care, guidance and supervision orders; (b) probation; (c) community service orders; (d) financial penalties, compensation and restitution; (e) intermediate treatment and other treatment orders; (f) orders to participate in group counseling and similar activities; (g) orders concerning foster care, living communities or other educational settings; and (h) other relevant orders.<sup>187</sup> No juvenile shall be removed from parental supervision, whether partly or entirely, unless the circumstances of her or his case make this necessary.<sup>188</sup>

### **3.4. Practices During Detention**

The following practices should be followed at all times when an individual is held in state custody, including during arrest and pretrial detention.

#### *Segregation*

Different categories of prisoners shall be kept in separate institutions or parts of institutions, considering their sex, age, criminal record, reason for detention, and treatment needs.<sup>189</sup> The Inter-American Commission on Human Rights adds additional considerations: the reason for deprivation of liberty, the need to protect the life and integrity of persons deprived of liberty or personnel, special needs of attention, or other circumstances relating to internal security.<sup>190</sup>

Men and women as much as possible shall be detained in separate institutions. An institution which receives both men and women shall keep the whole of the premises allocated to women entirely separate.<sup>191</sup> The African Commission adds the mandate that, while in custody, women shall receive care, protection and all necessary individual assistance – psychological, medical, and physical – that they may require in view of their sex and gender.<sup>192</sup>

Untried prisoners shall be kept separate from convicted prisoners.<sup>193</sup> The Council of Europe adds that a state may elect to regard prisoners who have been convicted and sentenced as “untried

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<sup>186</sup> Council of Europe, Recommendation (2008)11 on European Rules for Juvenile Offenders Subject to Sanctions and Measures, Section 12.

<sup>187</sup> United Nations Standard Minimum Rules for the Administration of Juvenile Justice (the Beijing Rules) Section 18.1. African Commission on Human and Peoples’ Rights, Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa Section O (o).

<sup>188</sup> United Nations Standard Minimum Rules for the Administration of Juvenile Justice (the Beijing Rules), Section 18.2.

<sup>189</sup> United Nations Standard Minimum Rules for the Treatment of Prisoners, para. 8.

<sup>190</sup> Inter-American Commission on Human Rights, Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas.

<sup>191</sup> United Nations Standard Minimum Rules for the Treatment of Prisoners, para. 8.

<sup>192</sup> African Commission on Human and Peoples’ Rights, Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa Section M (7).

<sup>193</sup> United Nations Standard Minimum Rules for the Treatment of Prisoners, para. 8. Inter-American Commission on Human Rights, Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas. United Nations Body of Principles for the Protection of All Persons under Any Form of Detention Principle 8.

prisoners” if their appeals have not been disposed of finally.<sup>194</sup> Article 10(2)(a) of the ICCPR states that not only shall accused persons be segregated from convicted persons (save extraordinary circumstances), they shall also be subject to separate treatment appropriate for their non-convicted status.<sup>195</sup> This provision is designed to emphasize and protect the status of accused persons who have not yet been convicted of a crime. Accused persons should enjoy the right to be presumed innocent as provided in Article 14(2) of the ICCPR.<sup>196</sup> Article 10(2) focuses on “accused persons,” as opposed to persons in custody, and it could be argued that prior to being formally charged this provision does not apply. However, the inherent logic of the article argues in favor of its application to all persons taken into criminal custody by the State.<sup>197</sup> The drafting history of Article 10(2) implies that “strict segregation” between the accused and the convicted was intended.<sup>198</sup> Any derogation from this rule under 10(2)(a) should only be in the case of “exceptional circumstances,” and there is no exception provided for in 10(2)(b) with regard to the separation of adults and juveniles. In *Pinkney v. Canada*, the HRC addressed whether segregation requires that the two classes of detainees be housed in separate buildings. At least insofar as 10(2)(a) is concerned, the HRC concluded that lodging in “separate quarters” is sufficient to satisfy the requirements of 10(2)(a); segregation by building is not required.<sup>199</sup> Untried detainees should be separated from convicted juveniles.<sup>200</sup>

Juveniles shall be kept separate from adults,<sup>201</sup> whether in detention awaiting trial or in an institution,<sup>202</sup> and be accorded treatment appropriate to their age and legal status.<sup>203</sup> Male and female juveniles shall normally be held in separate institutions or separate units within an institution. If juveniles are held in an institution for adults under extraordinary circumstances, they shall be accommodated separately unless this would be patently against their best interest.<sup>204</sup> Juveniles shall not be held in adult institutions, but in institutions specially designed for them. Juveniles who reach the age of majority and young adults dealt with as if they were juveniles shall normally be held in institutions for juvenile offenders or in specialized institutions for young adults, unless their social reintegration can be better effected in an institution for adults.<sup>205</sup> Separation between male and female juveniles need not be applied in welfare or mental health institutions. Even where male and female juveniles are held separately, they shall be allowed to participate jointly in organized activities.<sup>206</sup>

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<sup>194</sup> Council of Europe - European Prison Rules § 94.2; Guidelines and Measures for the Prohibition and Prevention of Torture, Cruel, Inhuman or Degrading Treatment or Punishment in Africa (The Robben Island Guidelines).

<sup>195</sup> ICCPR Article 10(2)(a).

<sup>196</sup> Gen. Cmt. 21, *supra* note 2, ¶ 9.

<sup>197</sup> ICCPR LII, p. 107.

<sup>198</sup> TRAVAUX PRÉPARATOIRES, *supra* note 8, A/4045 § 80, at 227.

<sup>199</sup> *Pinkney v. Canada*, Communication No. 27/1978 (29 October 1981) ¶ 30, CCPR/C/14/D/27/1977.

<sup>200</sup> United Nations Rules for the Protection of Juveniles Deprived of their Liberty Section 17.

<sup>201</sup> United Nations Standard Minimum Rules for the Treatment of Prisoners, para. 8.

<sup>202</sup> United Nations Standard Minimum Rules for the Administration of Juvenile Justice (the Beijing Rules) Sections 13.4 and 26.3. African Charter on the Rights and the Welfare of the Child Section 17(2)(b). African Commission on Human and Peoples’ Rights, Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa Section O. American Convention on Human Rights, Children and their Rights in the Inter-American System of Human Rights. Guidelines and Measures for the Prohibition and Prevention of Torture, Cruel, Inhuman or Degrading Treatment or Punishment in Africa (The Robben Island Guidelines) Section 17(2)(b).

<sup>203</sup> ICCPR Article 10(3).

<sup>204</sup> Council of Europe, Recommendation (2008)11 on European Rules for Juvenile Offenders Subject to Sanctions and Measures Section 59 (1).

<sup>205</sup> Council of Europe - European Prison Rules Sections 59.1 and 59.3.

<sup>206</sup> Council of Europe, Recommendation (2008)11 on European Rules for Juvenile Offenders Subject to Sanctions and Measures Section 60.



Special considerations may apply where non-criminal detainees are housed with criminal offenders or accused criminals. Asylum or refugee status seekers and persons deprived of liberty due to migration issues shall not be deprived of liberty in institutions designed to hold persons convicted of criminal charges.<sup>207</sup> Persons imprisoned for debt and other civil prisoners shall be kept separate from persons imprisoned for criminal offences.<sup>208</sup>

Persons who are suffering from mental illness and whose state of mental health is incompatible with detention in a prison should be detained in an establishment specially designed for that purpose. If such persons are nevertheless held in prison due to extraordinary circumstances, there shall be special regulations to account for their status and needs.<sup>209</sup> In cases of confinement of offenders with mental disabilities, it shall be ensured that the means of confinement is authorized by a competent physician; carried out in accordance with officially approved procedures; recorded in the patient's individual medical record; and immediately transmitted to the patient's family or legal representatives. Persons with mental disabilities who are secluded shall be under the care and supervision of qualified medical personnel.<sup>210</sup>

### *Solitary Confinement*

The United Nations Basic Principles for Treatment of Prisoners encourages the abolition of solitary confinement as a punishment, or at least restriction of its use.<sup>211</sup> The Inter-American Commission on Human Rights states that domestic law should prohibit solitary confinement in punishment cells, and it shall be strictly forbidden to impose solitary confinement for pregnant women; for mothers held in detention with their children; and for children held in detention. Solitary confinement shall only be permitted as a measure of last resort. It should be used for only a strictly limited time when it is necessary to ensure legitimate institutional interests of internal security and the fundamental rights of detainees or personnel. In all cases, the use of solitary confinement must be authorized by the competent authority and shall be subject to judicial control. Prolonged, inappropriate, or unnecessary use of solitary confinement amounts to acts of torture, or cruel, inhuman, or degrading treatment or punishment.<sup>212</sup>

### *Overcrowding*

Exceeding maximum capacity shall be prohibited by law. In cases where such overcrowding results in human rights violations, it shall be considered cruel, inhuman, or degrading treatment or punishment. A competent authority shall determine the maximum capacity of each place of detention according to international standards on living conditions. Information on maximum capacity, occupation ratio, and standards of living conditions shall be public, accessible, and regularly updated. The law shall establish the procedures through which detained persons, their legal representatives, or non-governmental organizations may dispute the data regarding the maximum capacity or the occupation ratio. In these dispute proceedings, independent experts shall be permitted.

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<sup>207</sup> Inter-American Commission on Human Rights, Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas.

<sup>208</sup> United Nations Standard Minimum Rules for the Treatment of Prisoners, para. 8. Inter-American Commission on Human Rights, Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas.

<sup>209</sup> Council of Europe - European Prison Rules Sections 12.1 and 12.2.

<sup>210</sup> Inter-American Commission on Human Rights, Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas Principle XXII, Disciplinary regime 3.

<sup>211</sup> The United Nations Basic Principles for Treatment of Prisoners Section 7.

<sup>212</sup> Inter-American Commission on Human Rights, Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas Principle XXII, Disciplinary regime 3.

The law shall establish remedies immediately available to address overcrowding. The competent judicial authorities shall establish adequate measures in the absence of legal regulation. Once overcrowding is observed, States shall investigate and determine remedial responsibilities of detention institution authorities. Moreover, States shall adopt measures to prevent future overcrowding of detention institutions. In all cases, the law shall establish the procedures through which detained persons, their legal representatives, or non-governmental organizations can participate in creating preventative laws.<sup>213</sup>

### *Mechanisms for Reporting and Remediating Abuse*

Under the UN Standard Minimum Rules for the Treatment of Prisoners, every prisoner must be provided with information on the regulations governing the treatment of prisoners of this category, the institution's disciplinary requirements, methods of seeking information and making complaints, and other information necessary to his understanding of his rights and obligations.<sup>214</sup> Prisoners must have the opportunity to make requests or complaints to the director of the institution or his representative, as well as to the inspector of prisons outside the presence of prison staff.<sup>215</sup> Prisoners also must be permitted to make an uncensored request or complaint to the central prison administration, the judicial authority, or other competent authorities.<sup>216</sup> Unless a request is frivolous or groundless on its plain face, it must be addressed diligently and without undue delay.<sup>217</sup> ICCPR Article 10(1) also encompasses a right to an investigation and remedy of violations.<sup>218 219</sup>

The UN Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment requires that a detained or imprisoned person or his representative have the right to make a request or complaint to the authorities responsible for the administration of the place of detention, to higher authorities and, when necessary, to authorities vested with reviewing or remedial powers.<sup>220</sup>

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<sup>213</sup> Inter-American Commission on Human Rights, Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas Principle XVII

<sup>214</sup> Standard 35(1), (2)

<sup>215</sup> Standard 36(1), (2)

<sup>216</sup> Standard 36(3)

<sup>217</sup> Standard 36(4)

<sup>218</sup> *Collins v. Jamaica*, Communication No. 240/1987 (14 November 1991) ¶ 8.6, CCPR/C/43/D/240/1987.

<sup>219</sup> The above rights also apply to juveniles. See UN Rules for the Protection of Juveniles Deprived of their Liberty 75-78.

<sup>220</sup> Principle 33, Complaints Procedure. See also African Commission Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa M(7)(g), (h); Council of Europe Recommendation 2006(13) on the Use of Remand in Custody, the Conditions in which it takes Place and the Provision of Safeguards against Abuse 44; Inter-American Commission Principle V.







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