

# **Pre-Trial Rights in Africa**

A Guide to International Human Rights Standards

September 2016

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**A Guide to International Human Rights Standards**

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## INTRODUCTION

*Rights on Arrest and Pre-Trial Detention in Africa: A Guide to International Human Rights Standards*, summarizes and explains the rights of people in Africa who are suspected of or charged with a criminal offence from the time of arrest until trial, as set out in standards of the African Union and United Nations (UN).

These standards aim to ensure respect for human dignity, the right to liberty and the right to a fair trial, including the presumption of innocence. They also aim to prevent and protect against violations of the rights of people suspected or accused of a criminal offence. These include the rights to be free from: torture and other cruel, inhuman or degrading treatment or punishment; arbitrary detention; enforced disappearance; and arbitrary deprivation of the right to life. Such acts are prohibited under international law at all times.

This Guide is intended as a tool for lawyers, judges, and law-makers seeking to ensure that criminal laws and practices from arrest until trial comply with a State's obligations under international human rights law. In particular, these laws and practices should be consistent with the standards set by the African Union and the United Nations.

The Guide may also be useful to people observing trials with a view to assessing their fairness in the light of international standards, or others seeking to evaluate the extent to which the country's criminal procedure codes and practices adhere to international standards. The Guide may also be used as an educational and training tool.

This Guide builds on a long established body of work of the ICJ on administration of justice and right to a fair trial, including its Practitioners Guide on Trial Observation Manual for Criminal Proceedings. The Guide was developed in response to a call from some 35 judges from 12 African States who participated in a symposium on Fair Trial Rights in Africa organized by the International Commission of Jurists (ICJ) and the African Judges and Jurists Forum in September 2014. It is expected that the Guide will contribute the realization of the resolution of the Southern Africa Chief Justices Forum in 2015 to adopt administrative, legislative and technological approaches to reduce or eliminate case backlog to ensure a timely dispensation of justice.

The Guide's 11 chapters each set out one or more rights relevant to the various stages and proceedings in a criminal case from arrest until trial, indicating which African and UN standards guarantee the rights and illustrating how the rights and standards have been construed and interpreted by African and universal human rights bodies.

The International Commission of Jurists (ICJ) works to promote and ensure the protection of human rights and the rule of law, including through the effective implementation of international human rights standards. Therefore, when analyzing a case, law or criminal justice system, the ICJ in this guide will typically give prominence to the most protective standards that apply. Generally, it will in the first instance cite a treaty standard that is binding on the States concerned. It also refers to jurisprudence or other authoritative guidance about that treaty provision from appropriate authorities, including courts, treaty monitoring bodies, and from independent expert mechanisms mandated by an inter-governmental organization, such as the African Union or the UN. The ICJ also cites non-treaty standards, which frequently set out in more detail what is required to respect and protect a right, and in some instances will provide an authoritative accounting of treaty sources..

This Introduction contains: a list of the standards cited in the Guide; a table selected treaties applicable each African State; an explanation of the citation forms used; and a list of the abbreviations used.

## 1. INTERNATIONAL HUMAN RIGHTS STANDARDS AND BODIES CITED

This Guide cites provisions from more than 25 instruments of the African Union and the UN that guarantee or the rights of people arrested or charged with a criminal offence up to the time of trial. Both the regional and universal standards are invoked. Most member States of the African Union are parties to both the African Charter on Human and Peoples' Rights and the International Covenant on Civil and Political Rights, and are therefore bound by international law to guarantee the rights set out in both of these treaties (see **Table 1**). Furthermore, when interpreting a State's obligations under the African Charter, the African Court on Human and Peoples' Rights and the African Commission on Human and Peoples' Rights take into consideration a State's obligations under other instruments, including UN treaties.<sup>1</sup> In addition, article 60 of the African Charter mandates the African Commission to draw inspiration not only from the treaties ratified or acceded to by States parties, but also other international instruments, including those adopted by agencies of the UN.

The standards cited include both **treaties**, which are legally binding on those States which are a party to them, and **non-treaty standards**, which may provide greater detail or clarify the scope of rights enshrined in treaties and reflect the consensus on standards to which States should conform. Some treaty and non-treaty standards are reflective of customary international law, binding on all States. Whether they are of a treaty or non-treaty variety, the standards cited are minimum requirements: States should ensure that their laws at least meet these standards, but may go beyond them in terms of human rights protection.

Also included in this Guide are authoritative interpretations of these standards found in the jurisprudence of the African Court on Human and Peoples' Rights and the African Commission as well as the jurisprudence, General Comments and prescriptions of other treaty monitoring bodies. These treaty bodies are the independent expert bodies established to monitor States' implementation of their obligations under the human rights treaties and to investigate complaints that provisions of the treaty are being violated. In addition, recommendations of other independent expert human rights mechanisms, such as the UN Special Rapporteur on torture and the UN Working Group on Arbitrary Detention (both established by UN human rights bodies and currently mandated by the UN Human Rights Council) are cited, as they also provide authoritative guidance to States on measures to be taken to respect and protect the rights of people suspected of or charged with violating criminal laws.

When using this Guide in reference to a particular case or country, it is important to check whether the country under consider is party to any applicable treaty (see **Table 1**).

The treaty and non-treaty standards cited include the following (those marked \* are treaties, binding on States which are party to them):

### 1.1 AFRICAN UNION

#### \*African Charter on Human and Peoples' Rights

The African Charter on Human and Peoples' Rights (African Charter) is the core human rights treaty of the African Union. As noted in **Table 1**, (see below), only one member of the African Union is not yet a party. Therefore all other African Union Member States are bound to implement the provisions of this treaty.

<sup>1</sup> See articles 60-61 of the [African Charter on Human and Peoples' Rights](#), and article 7 of the [Protocol to the African Charter on Human and Peoples' Rights on the Establishment of the African Court on Human and Peoples' Rights](#). A recent example is the judgment of the African Court on Human and Peoples' Rights in the case of [Wilfred Onyango Nganyo & 9 Others](#) (006/2013), judgment of 18 March 2016, paras 162-167. As Tanzania is a party to the ICCPR as well as the African Charter, the Court interpreted the accused's right to counsel under article 7 of the African Charter in the light of the state's obligations under a more specific provision of the ICCPR that includes the right of suspects and accused who do not have their own lawyers to have counsel appointed by the state, in cases where the interest of justice require it, and free of charge to people who do not have sufficient resources to pay.



**The African Commission on Human and Peoples' Rights** (African Commission or ACHPR) is a body established under the African Charter to monitor the implementation of the African Charter by the States that are party to it. In addition to reviewing periodic reports of States about measures they are taking to implement and comply with the African Charter, the African Commission also considers complaints by or on behalf of individuals that a State has violated one or more of its obligations under the African Charter.

In addition, the African Commission has a mandate under the African Charter to formulate standards, principles and rules to guide States on the adoption of legislation compliant with human rights. Under this mandate it has adopted a number of instruments that clarify and strengthen the guarantees set out in the African Charter. The African Commission and the African Court on Human and Peoples' Rights have referred to provisions of these standards when assessing States' implementation of their obligations under the African Charter.

**The African Court on Human and Peoples' Rights** was established by African Union with the aim of enhancing the protection of human and peoples' rights in the continent of Africa. It complements and reinforces the work of the African Commission. The African Court was created by the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of the African Court on Human and Peoples' Rights, ("the Protocol"). In accordance with that treaty, the Court has jurisdiction to consider cases that are submitted to it concerning the interpretation and application of the African Charter, the Protocol and any other human rights treaties to which the State concerned is a party. The Court may consider complaints submitted by the African Commission, a State that is a party to the Protocol (of which there were 30 as of 1 May 2016) or an African intergovernmental organization. It may consider complaints against a State party to the Protocol submitted by individuals or NGOs that have Observer Status with the African Commission only if the State has made a declaration authorizing the Court to do so. (As of 1 May 2016, there were seven such States.) The Court, composed of 11 judges, all of whom are nationals of African Union Member States, began its operations in 2006. It sits in Arusha, United Republic of Tanzania.

#### **\*African Charter on the Rights and Welfare of the Child**

This treaty was adopted in 1990 by the Organization of African Unity (which became the African Union in 2001) and came into force in 1999. It sets out civil, political, economic, social and cultural rights pertaining to people under the age of 18.

The treaty also establishes the African Committee of Experts on the Rights and Welfare of the Child to monitor the implementation of its provisions by States parties. Among its provisions it guarantees the rights of children suspected and accused of having infringed the penal law.

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

In 1992, the African Commission adopted this resolution, clarifying some of the component parts of the broad rights related to criminal proceedings provided for under the African Charter.

#### **Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa**

These Principles and Guidelines, adopted by the African Commission in 2001, elaborate fair trial rights even further than its 1992 Resolution (see above). They address rights, procedures and safeguards at every stage of criminal proceedings, and provide guidance to States on fulfilling their obligations to establish functioning and effective legal aid systems, in particular for people without their own lawyers and without sufficient means to pay for legal assistance. Several of the provisions of this standard are reflected in guidelines on legal aid subsequently developed by the UN.

### **Guidelines and Measures for the Prohibition and Prevention of Torture, Cruel, Inhuman or Degrading Treatment or Punishment in Africa (The Robben Island Guidelines)**

These Guidelines, best known as the Robben Island Guidelines, were adopted by the African Commission in 2002 and approved by the Conference of Heads of State and Government of the African Union in 2003. They grew out of a workshop held with experts from a range of disciplines focussing on the prevention of torture and other cruel, inhuman or degrading treatment or punishment. The Guidelines address measures States must take to meet their obligations to prevent and prohibit torture and to ensure redress and reparation to victims of torture.

### **Guidelines on the Conditions of Arrest, Police Custody and Pre-Trial Detention in Africa**

The Guidelines on the Conditions of Arrest, Police Custody and Pre-Trial Detention in Africa, also known as the Luanda Guidelines, were adopted by the African Commission in 2014. They were elaborated against a backdrop of concern by the African Commission about arbitrary arrests and detention and poor conditions in police custody and facilities across Africa. They promote protection against arbitrary decisions to arrest a person on a criminal charge, limits on the length of police custody, a presumption of release rather than systematic detention pending trial, and safeguards and minimum standards for conditions of detention before trial.

### **Principles and Guidelines on Human and Peoples' Rights while Countering Terrorism in Africa**

These Principles and Guidelines were adopted by the African Commission in 2015. They are based on African Union and UN treaty standards, jurisprudence, and standards and resolutions of the African Commission and the UN Security Council. They take into consideration the standards adopted in the regional human rights systems of Europe and the Americas. They provide clarification and aim to guide States on their obligations to ensure that the measures that they take to counter terrorism are consistent with their obligations to respect and protect human rights. The provisions are accompanied by Explanatory Notes that set out the sources of authority on which they are based. The provisions emphasize that States must respect the rule of law and the rights of people suspected and charged with terrorism-related offences, and highlight some of the particular obligations in that regard.

### **Principles and Guidelines on the Implementation of Economic, Social and Cultural Rights in the African Charter on Human and People's Rights**

These Principles and Guidelines, adopted by the African Commission in 2009, provide clarity about the nature and content of States' obligations under the African Charter to promote and protect economic, social and cultural rights. Among other things, they contain provisions related to States' obligations to protect the right to health of people deprived of their liberty.

## **1.2 UNITED NATIONS**

### **\*International Covenant on Civil and Political Rights (ICCPR)**

The International Covenant on Civil and Political Rights was adopted in 1966 by the UN General Assembly and entered into force in 1976. As of April 2016, the overwhelming majority of UN Member States – some 168 – including almost all African Union Member States, had become parties to this treaty. The ICCPR guarantees wide range of civil and political rights, including the right to liberty, to right be free from torture and other ill-treatment and the right to a fair trial.

The ICCPR establishes a body of independent experts, **the Human Rights Committee**, to monitor States' implementation of the treaty. The Human Rights Committee's General Comments provide authoritative interpretations regarding the scope and nature of State

obligations to respect and ensure the rights set out in the ICCPR. The Committee, reviewing State parties' periodic reports on their implementation of the treaty, and issues observations assessing compliance with their obligations under the ICCPR and views containing prescriptions to guide States on measures that must be taken to ensure compliance with those obligations. The Human Rights Committee also has the competency to consider complaints by individuals and States alleging that a State party to the **Optional Protocol to the ICCPR** has violated one or more rights under the ICCPR. Its jurisprudence on these cases provides yet further guidance on the scope and application of the rights set out in the Covenant.

The following General Comments of the Human Rights Committee are cited repeatedly in this Guide:

- Human Rights Committee General Comment 20, on Article 7 (the prohibition against torture and other cruel, inhuman or degrading treatment or punishment)
- Human Rights Committee General Comment 31, the Nature of the General Legal Obligation Imposed on States Parties to the Covenant
- Human Rights Committee General Comment General Comment 32, Article 14: Right to equality before courts and tribunals and to a fair trial
- Human Rights Committee General Comment 35: Article 9 (Liberty and Security)

#### **\*International Covenant on Economic, Social and Cultural Rights**

This Covenant, adopted by the UN General Assembly in 1966, entered into force in 1976. This Covenant guarantees a range of economic, social and cultural rights. The treaty monitoring body, the **Committee on Economic Social and Cultural Rights**, like the Human Rights Committee, issues General Comments and recommendations following its examination of States parties' periodic reports on implementation of their treaty obligations. The Committee also has jurisdiction to consider cases alleging violation of its provisions by States which are party to the Optional Protocol to this treaty. Provisions cited in this Guide include those related to States' duties to protect the right to health of those who are arrested and detained.

#### **\*Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment** (Convention against Torture)

The Convention against Torture was adopted by the UN General Assembly in 1984 and entered into force in 1987. As of 1 May 2016, 159 States were party to this treaty. These States are obligated under the treaty to take a range of measures to prevent and prohibit torture and other ill-treatment, to bring those responsible to justice and to ensure reparation for victims of torture.

The Convention against Torture establishes **the Committee against Torture** (CAT), a group of 10 independent experts elected by the States parties to the treaty, to monitor implementation of the treaty. It issues conclusions and recommendations after examining periodic reports by States parties on measures they are taking to implement the treaty. It also has adopted General Comments that provide further clarification of States' obligations under this treaty. The Committee against Torture may also consider complaints by individuals and States against States that have authorized it to do so.

Two of the Committee against Torture's General Comments are cited in this Guide:

- CAT General Comment 2: Implementation of article 2 by States Parties
- CAT General Comment 3: Implementation of article 14 by States Parties.

**\*The Optional Protocol to the Convention against Torture**, which came into force in 2006, establishes **the Sub-Committee on the Prevention of Torture** (SPT) and requires States parties to set up independent national prevention mechanisms. Parties to this Optional Protocol mandate the SPT and the national prevention mechanisms to access

and monitor all places within the jurisdiction or control of the State where people are deprived of their liberty.

### **\*Convention on the Rights of the Child**

The Convention on the Rights of the Child was adopted by the UN General Assembly in 1989 and entered into force a year later. All African Union member States are parties to this treaty and therefore are bound to implement its provisions. The Convention guarantees a wide range of civil, cultural, economic, political, social right for children and contains standards for juvenile justice and rights of children who are suspected or accused of infringing the penal law.

The Convention also establishes a treaty body of independent experts, elected by States parties, to monitor implementation of this treaty. The **Committee on the Rights of the Child** (CRC) issues conclusions and recommendations following its consideration of periodic reports by State parties on measures they are taking to implement the treaty. It also issues General Recommendations.

In addition to citing provisions of the Convention on the Rights of the Child that set out the rights of children suspected or accused of infringing the penal law, this Guide cites:

- Committee on the Rights of the Child, General Comment 10, Children's Rights in Juvenile Justice

### **\*International Convention for the Protection of All Persons from Enforced Disappearance**

This treaty, which entered into force in 2010 sets out the obligation of States regarding enforced disappearance, which it affirms as a crime under international law. It requires States parties to take measures to bring those responsible to justice, and to ensure and effective remedy reparation for victims and to prevent enforced disappearance. This Guide cites provisions of this treaty that enshrine rights of people deprived of their liberty and that safeguard against arbitrary detention and enforced disappearance, including the duty of the authorities to register detention.

### **\*International Convention for the Protection of the Rights of All Migrant Workers and Members of their Families**

This treaty was adopted by the UN General Assembly in 1990 and entered into force in July 2003. It includes provisions pertaining to the rights of migrant workers and their families if arrested, detained or charged in connection with a criminal offence. As of 1 May 2016, 46 States were party to this treaty, including 19 African States. The **Committee on the Protection of the Rights of All Migrant Workers and Members of their Families** is the treaty monitoring body established by this treaty. It monitors States parties' implementation of the treaty through a periodic reporting procedure and may consider complaints brought by other States or individuals in certain circumstances.

### **\*The Vienna Convention on Consular Relations**

This treaty was adopted in 1963 and entered into force in 1967. This Guide cites provisions related to the rights of foreign nationals deprived of their liberty or arrested in connection with a criminal offence to be informed of their rights to notify a consular official and the rights of consular officials to communicate, visit and render assistance, including arranging legal representation.

### **Basic Principles on the Role of Lawyers**

This set of principles, adopted in 1990, guides States on the role of independent lawyers and the measures that they must take to protect the role and independence of lawyers. It contains provisions relevant to lawyers representing people accused of criminal offences.

### **Basic Principles for the Treatment of Prisoners**

These Principles, which were adopted by the UN General Assembly in 1990, clarify that only such limitations as are demonstrably necessitated by the fact that a person is deprived of liberty may be imposed. They also clarify the measures States must take to respect the rights of prisoners, including their right to be treated with respect due to their inherent dignity.

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

Adopted in 1990, these Principles were formulated to assist States in ensuring the proper role of law enforcement officials and set out standards for the use of non-lethal and lethal force.

Guideline 3 of the Guidelines on Conditions of Arrest, Police Custody and Pre-Trial Detention in Africa pertaining to procedural guarantees for arrest clarifies that the use of force must conform to these Principles and other international standards. Provisions of these principles are cited in this Guide in relation to the use of force during arrest and in detention.

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

These Principles were adopted by the UN General Assembly in 1988. They are a set of internationally recognized standards, applicable to all States, on how detainees and prisoners should be treated. They serve as a guide for shaping national legislation and the treatment of people deprived of their liberty.

### **CERD General Recommendation XXXI, on the Prevention of Racial Discrimination in the Administration and Functioning of the Criminal Justice System**

This General Comment, adopted by the Committee on the Elimination of Racial Discrimination (CERD), the body established to monitor the implementation of the Convention on the Elimination of All Forms of Racial Discrimination, addresses measures States parties must take to meet their obligation to ensure the administration of criminal justice without discrimination.

### **Code of Conduct for Law Enforcement Officials**

The Code of Conduct for Law Enforcement Officials, adopted by the UN General Assembly in 1979, clarifies that in the performance of their duty, law enforcement officials must uphold the human rights of all people. It contains principles on the rule of law, the duty to combat corruption, the use of force, the absolute nature of the prohibition of torture and other ill-treatment, and the duty to ensure and take measures to protect the health of people in custody.

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

This Declaration was adopted by the UN General Assembly in 1992. It clarifies that the enforced disappearance of a person is an offence to human dignity, which must be criminalized and subject to penalties commensurate with the gravity of the offence. In addition to measures that must be taken to investigate these crimes and to bring those responsible to justice, the Declaration sets out measures that States should take to prevent enforced disappearance.

### **Nelson Mandela Rules: the Standard Minimum Rules for the Treatment of Prisoners** (as revised/updated in 2015)

The Standard Minimum Rules for the Treatment of Prisoners were originally adopted in 1955. They were partially revised and adopted in their current form, as the Nelson Mandela Rules, by the UN General Assembly in 2015. The revision reflects developments in nine particular areas, including the right to respect for the inherent dignity of people deprived of their liberty, their rights to access to legal representation and medical and

health services, as well as in relation to disciplinary measures, complaints mechanisms, the duty of the authorities to investigate torture and other ill-treatment and deaths in custody. These rules are the universally acknowledged minimum standards for the treatment of people deprived of their liberty before and after conviction for a criminal offence.

**Principles on Medical Ethics relevant to the Role of Health Personnel, Particularly Physicians, in the Protection of Prisoners and Detainees against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment**

These Principles were adopted by the UN General Assembly in 1982. They emphasize that it is a contravention of medical ethics for any health professional to have a professional relationship with a detainee or prisoner whose purpose is not solely limited to the evaluation, protection or improvement of the individual's physical and mental health, or to engage in any acts that constitute torture or other inhuman or degrading treatment or punishment. They also clarify the duty of health care professionals to render the same quality and standard of care to detainees and prisoners as they do to individuals who are not deprived of their liberty.

**UN Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems**

These Principles and Guidelines were adopted by the UN General Assembly in December 2012. They are in line with and reflect the Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, and serve as a guide to States on the principles on which a legal aid system in criminal cases should be based. They emphasize that legal aid is an essential element of a criminal justice system that is based on the rule of law and a foundation for the enjoyment of human rights, including the right to a fair trial. It is an important safeguard to ensure fundamental fairness and public trust in the administration of criminal justice.

**UN Standard Minimum Rules for Non-custodial Measures** (the Tokyo Rules)

The Tokyo Rules, which were adopted by the UN General Assembly in 1990, establish a framework for the imposition of alternatives to detention pending trial and custodial sentences following conviction for a criminal offence. In the face of overcrowded detention facilities and prisons, the increasing importance of these standards is evident. They reinforce the principle enshrined in human rights standards (described in **Chapters 5 and 6** of the Guide) that rather than being systematic, detention pending trial should not be the general rule. Instead, it should be a matter of last resort and last no longer than necessary or proportionate to objectives that are consistent with human rights standards.

**UN Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders** (the Bangkok Rules)

The Bangkok Rules, which were adopted by the UN General Assembly in 2010, complement the Nelson Mandela Rules and the Tokyo Rules. They are the first UN standards specifically covering the treatment of detained or imprisoned women or girls.

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

The Beijing Rules, adopted by the UN General Assembly in 1985, set out principles and rules to guide States in ensuring the protection of the rights of children suspected or accused of infringing the criminal law, in a manner consistent with their obligations under the Convention on the Rights of the Child.

**United Nations Rules for the Protection of Juveniles Deprived of their Liberty** (Havana Rules)

The Havana Rules were adopted by the UN General Assembly in 1990 out of concern about the circumstances and conditions in which children – defined as people under the age of 18 – were being deprived of their liberty. They are based on the principle that children are entitled to and in need of special care and protection and must enjoy rights additional to those of adults. They emphasize that detention of a child should be a matter of last resort

and should last only for the shortest appropriate time. The Rules apply to all types and forms of detention, and one section applies specifically to children arrested or detained pending trial in relation to an alleged infraction of the criminal law.

### **WGAD Basic Principles and Guidelines on remedies and procedures on the right of anyone deprived of their liberty to bring proceedings before a court**

Adopted by the UN Working Group on Arbitrary Detention (WGAD), a body of the UN Human Rights Council, these standards were developed over a three-year period in a consultative process involving representatives of governments, human rights bodies and mechanisms, intergovernmental organizations, and civil society. They aim to guide States in the procedures and safeguards necessary to ensure respect for the right of all those deprived of their liberty to challenge the legality of detention before a court, and to receive from the court a determination without delay, and an order of release if the detention is determined to be unlawful. The UN WGAD is the group of independent experts mandated by the UN Human Rights Council to guide States in preventing detention that is arbitrary or otherwise inconsistent with international human rights standards.

## **2. TABLE 1: RATIFICATION BY AFRICAN COUNTRIES OF TREATIES**

This table shows the status of some of the treaties cited in this manual in relation to members of the African Union, as of 1 May 2016. (Updated information about the status of UN treaties may be obtained at: <http://indicators.ohchr.org/>)

COUNTRY	African Charter on Human and Peoples' Rights	International Covenant on Civil and Political Rights	Convention on the Rights of the Child	Convention against Torture and Cruel, Inhuman or Degrading Treatment or Punishment
<b>Algeria</b>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
<b>Angola</b>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<b>S</b>
<b>Benin</b>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
<b>Botswana</b>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
<b>Burkina Faso</b>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
<b>Burundi</b>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
<b>Cameroon</b>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
<b>Cape Verde</b>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
<b>Central African Republic</b>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	
<b>Chad</b>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
<b>Comoros</b>	<input type="checkbox"/>	<b>S</b>	<input type="checkbox"/>	<b>S</b>
<b>Congo</b>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
<b>Cote d'Ivoire</b>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
<b>Democratic Republic of the Congo</b>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
<b>Djibouti</b>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
<b>Egypt</b>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
<b>Equatorial Guinea</b>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
<b>Eritrea</b>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
<b>Ethiopia</b>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
<b>Gabon</b>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
<b>Gambia</b>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<b>S</b>
<b>Ghana</b>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>

<b>Guinea</b>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
<b>Guinea-Bissau</b>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
<b>Kenya</b>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
<b>Lesotho</b>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
<b>Liberia</b>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
<b>Libya</b>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
<b>Madagascar</b>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
<b>Malawi</b>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
<b>Mali</b>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
<b>Mauritania</b>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
<b>Mauritius</b>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
<b>Mozambique</b>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
<b>Namibia</b>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
<b>Niger</b>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
<b>Nigeria</b>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
<b>Rwanda</b>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
<b>Sahrawi Arab Democratic Republic</b>	<input type="checkbox"/>			
<b>Sao Tome and Principe</b>	<input type="checkbox"/>	<b>S</b>	<input type="checkbox"/>	<b>S</b>
<b>Senegal</b>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
<b>Seychelles</b>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
<b>Sierra Leone</b>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
<b>Somalia</b>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
<b>South Africa</b>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
<b>South Sudan</b>			<input type="checkbox"/>	<input type="checkbox"/>
<b>Sudan</b>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<b>S</b>
<b>Swaziland</b>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
<b>Togo</b>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
<b>Tunisia</b>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
<b>Uganda</b>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
<b>United Republic of Tanzania</b>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	
<b>Zambia</b>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
<b>Zimbabwe</b>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	

#### Key

- ☐ Square means party to the treaty  
**S** means signed but not yet ratified the treaty (not yet a party)
- Unfilled box indicating not signed and not ratified (not a party)

### 3.DEFINITIONS

This Guide uses the following definitions of these terms.

#### Arrest

The term “arrest” refers to any apprehension of a person that starts a period of deprivation of liberty. It need not involve a formal arrest as may be defined under national law.

This definition is consistent with the definition used by the Human Rights Committee in its General Comment 35 (Right to Liberty and Security).<sup>2</sup>

<sup>2</sup> UN Doc. [CCPR/C/GC/35](#) (2014) para 13.



## Child

A “child” is person under the age of 18. This definition is set out in the African Charter on the Protection of the Rights and Welfare of the Child and other international standards. In accordance with General Comment 10 of the Committee on the Rights of the Child (para 37), every person under the age of 18 at the time of the alleged commission of an offence must be treated in accordance with the rules of juvenile justice.

## Deprivation of liberty

This Guide uses the same definition as the WGAD in its **Basic Principles and Guidelines on remedies and procedures on the right of anyone deprived of their liberty to bring proceedings before a court** (para 9), which concerns deprivation of personal liberty without free consent.

“... the term “deprivation of liberty” covers the period from the initial moment of apprehension until to the arrest, pre-trial and post-trial detention periods. This includes placing individuals in temporary custody in protective detention or in international or transit zones in stations, ports and airports, house arrest, rehabilitation through labour, retention in recognized and non-recognized centres for non-nationals, including migrants regardless of their migration status, refugees and asylum seekers, and internally displaced persons, gathering centres, hospitals, psychiatric or other medical facilities or any other facilities where they remain under constant surveillance, given that this may not only amount to restrictions to personal freedom of movement, but also constitute a de facto deprivation of liberty.<sup>19</sup> It also includes detention during armed conflicts and emergency situations; administrative detention for security reasons; and the detention of individuals considered as civilian internees under international humanitarian law.

## Detention

The term “detention” refers to the deprivation of liberty that begins with the arrest and continues in time from apprehension until release. It includes detention in police custody and detention ordered by a judge (often called remand detention). This definition is consistent with that used by the Human Rights Committee its General Comment 35 (Right to Liberty and Security).<sup>3</sup>

## Imprisonment

For the purposes of this Guide, “imprisonment” refers to deprivation of liberty pursuant to a sentence passed by a court following conviction for a criminal offence.

## Pre-trial detention

**The Guidelines on the Conditions of Arrest, Police Custody and Pre-Trial Detention in Africa** use the term “pre-trial detention” to refer to the period of detention ordered by a judicial authority pending trial. It does not include detention in police custody or elsewhere that has not been ordered by a judicial authority pending trial.

This Guide has adopted this use of the term. However, it should be noted that other standards and authorities cited in the Guide use the term pre-trial detention in a broader sense to include deprivation of liberty beginning with arrest and continuing from apprehension to release – whether or not ordered by a judge.

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<sup>3</sup> UN Doc. [CCPR/C/GC/35](#) (2014) para 1.

## 5. ABBREVIATIONS

The following abbreviations are used in this Guide:

ACHPR	African Commission on Human and Peoples' Rights
African Charter	African Charter on Human and Peoples' Rights
The Bangkok Rules	UN Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders
The Beijing Rules	United Nations Standard Minimum Rules for the Administration of Juvenile Justice
CAT	Committee against Torture
CERD	Committee on the Elimination of Racial Discrimination
Convention against Torture	Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment
Convention on Enforced Disappearance	International Convention on the Protection of All Persons from Enforce Disappearance
Convention on Migrant Workers	International Convention for the Protection of the Rights of All Migrant Workers and Members of their Families
CRC	Committee on the Rights of the Child
Declaration on Enforced Disappearance	Declaration on the Protection of All Persons from Enforced Disappearance
Guidelines on Arrest, Police Custody and Pre-trial Detention in Africa	Guidelines on the Conditions of Arrest, Police Custody and Pre-Trial Detention in Africa
Havana Rules	UN Rules for the Protection of Juveniles Deprived of their Liberty
HRC	Human Rights Committee
ICCPR	International Covenant on Civil and Political Rights
Istanbul Protocol	Manual on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
Migrant Workers Convention	International Convention on the Protection of the Rights of all Migrant Workers and Members of their Families
Principles on the Right to Fair Trial in Africa	Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa
Principles on Medical Ethics	Principles on Medical Ethics relevant to the Role of Health Personnel, Particularly Physicians, in the Protection of Prisoners and Detainees against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment
The Robben Island Guidelines	Guidelines and Measures for the Prohibition and Prevention of Torture, Cruel, Inhuman or Degrading Treatment of Punishment in Africa
SPT	UN Sub-Committee on the Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment

The Tokyo Rules

U.N. Standard Minimum Rules for Non-custodial Measures

UDHR

Universal Declaration of Human Rights

WGAD

United Nations Working Group on Arbitrary Detention

## 1. THE RIGHT TO LIBERTY AND PROHIBITION OF ARBITRARY DETENTION

### 1.1 RIGHT TO LIBERTY AND SECURITY

Everyone has the right to liberty and security of person.<sup>4</sup>

This right is guaranteed in **article 6** of the **African Charter**, **article 9(1)** of the **ICCPR**, as well as in **article 3** of the **UDHR**, among other human rights standards.

**Article 6 of the African Charter:**

Every individual shall have the right to liberty and to the security of his person. No one may be deprived of his freedom except for reasons and conditions previously laid down by law. In particular, no one may be arbitrarily arrested or detained.

**Article 9(1) of the ICCPR:**

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

**Article 3 of the UDHR:**

Everyone has the right to life, liberty and security of person.

The right to liberty is not absolute. International human rights standards prescribe the circumstances and manner in which people may lawfully be deprived of their liberty, including in the context of law enforcement. The standards include measures and safeguards that aim to protect against abuse by the state of the power of detention. They aim to safeguard the rights, lives and physical and mental integrity of people who are deprived of their liberty.

In accordance with the right to liberty, people arrested on suspicion of having committed a criminal offence and people charged with criminal offences should not, as a general rule, be held in custody pending trial. (See **Chapter 5** relating to police custody and **Chapter 6**. On the right to be brought before a judge.)

As a corollary to the right to liberty, **article 6** of the **African Charter** and **article 9(1)** of the **ICCPR** prohibit both *unlawful* and *arbitrary* arrest and detention.<sup>5</sup>

### 1.2 LEGALITY OF ARREST

A person may only be lawfully deprived of his or her liberty on grounds and in accordance with procedures that are established by law.<sup>6</sup>

As the **Guidelines on Arrest, Police Custody and Pre-Trial Detention in Africa** clarify, this provision requires that "[s]uch laws and their implementation must be clear, accessible and precise...".<sup>7</sup> This reflects the general principle of legality, which is

<sup>4</sup> The UN Human Rights Committee (HRC), the body of independent experts established by the ICCPR to monitor its implementation by states parties, has clarified that liberty of the person concerns freedom from confinement of the body, while security of the person concerns freedom from injury to the body and the mind or bodily and mental integrity. HRC General Comment 35 on article 9, (Liberty and security of person), UN Doc. [CCPR/C/GC/35](#) (2014), para 3.

<sup>5</sup> See, article 9 of the UDHR which states: "No one shall be subjected to arbitrary arrest, detention or exile."

<sup>6</sup> Article 6 of the [African Charter](#); article 9(1) of the [ICCPR](#); [Guidelines on Arrest, Police Custody and Pre-Trial Detention in Africa](#), Guideline 2(a); see Section M(1)(b-c) of the [Principles on the Right to Fair Trial in Africa](#).

<sup>7</sup> [Guidelines on Arrest, Police Custody and Pre-Trial Detention in Africa](#), Guideline 2(a). A similar provision is set out in Part 3(A) of the [Principles and Guidelines on Human and Peoples' Rights while Countering Terrorism in Africa](#).

universally applicable. UN Human Rights Committee explained that this requirement aims to prevent overly broad or arbitrary application or interpretation of such laws.<sup>8</sup>

Furthermore, the laws of a state that set out grounds and procedures for arrest must be “consistent with international standards and respect the rights of the individual”.<sup>9</sup>

Several human rights bodies have raised concerns about the breadth and vagueness of laws defining terrorism or terrorism-related offences and have recommended that such crimes be defined both in terms of their purpose and their nature with sufficient precision.<sup>10</sup>

The African Commission concluded that a decree issued during a state of emergency by the President of the Revolutionary Command Council in Sudan that allowed people to be arrested for vague reasons and upon suspicion, not proven acts, was not in conformity with the spirit of the African Charter.<sup>11</sup>

Deprivation of liberty on grounds or using procedures that are not in accordance with domestic law or international law is unlawful.<sup>12</sup>

In keeping with the protection of the best interests of the child and fundamental principles for the treatment of children suspected of being in conflict with the law, the arrest of children must be a last resort.<sup>13</sup> Under international law, this applies to all individuals under the age of 18 at the time of the alleged crime. If arrested, a child must only be deprived of his or her liberty for the shortest appropriate time.<sup>14</sup>

### 1.2.1 AUTHORITY TO ARREST

The **Guidelines on Arrest, Police Custody and Pre-Trial Detention in Africa**, the **Principles on the Right to Fair Trial in Africa** and the UN Human Rights Committee clarify that in accordance with the right to liberty, arrests and deprivation of liberty may only be carried out by those authorities or officials authorized by law to do so.<sup>15</sup>

<sup>8</sup> HRC General Comment 35, UN Doc. [CCPR/C/GC/35](#) (2014), para 22.

<sup>9</sup> [Guidelines on Arrest, Police Custody and Pre-Trial Detention in Africa](#), Guideline 2(a); See, [Abdel Hadi, Ali Radi & Others v Republic of Sudan](#), (368/09) ACHPR (2013) paras 78-79; WGAD Principles and Guidelines on remedies and procedures on the right of anyone deprived of their liberty to bring proceedings before a court, UN Doc. [A/HRC/30/37](#) (2015), Introduction para 12.

<sup>10</sup> HRC, Concluding Observations: Kenya, UN Doc. [CCPR/C/KEN/CO/3](#) (2012) para 14; Concluding Observations: Morocco, UN Doc. [CCPR/C/82/MAR](#) (2004) para 20; Turkey, UN Doc. [CCPR/C/TUR/CO/1](#) (2012) para 16; Iraq, UN Doc. [CCPR/C/IRQ/CO/5](#) (2015) paras 9-10; Independent Expert on the human rights situation in Somalia, UN Doc. A/[HRC/30/57](#) (2015) paras 29 and 58.

<sup>11</sup> [Amnesty International and Others v Sudan](#), (48/90, 50/91, 52/91, 89/93) ACHPR, (1999), para. 59.

<sup>12</sup> [Abdel Hadi, Ali Radi & Others v Republic of Sudan](#), (368/09) ACHPR (2013) paras 78-84; HRC General Comment 35 on article 9, (Liberty and security of person), UN Doc. [CCPR/C/GC/35](#) (2014), para 44; WGAD Principles and Guidelines on remedies and procedures on the right of anyone deprived of their liberty to bring proceedings before a court, UN Doc. [A/HRC/30/37](#) (2015), Introduction para 12;.

<sup>13</sup> For information on the principles governing the treatment of children suspected of being in conflict with the law, see CRC General Comment 10, Children’s Rights in Juvenile Justice, UN Doc. [CRC/C/GC/10](#) (2007), particularly para 23; See also article 17(1) of [the African Charter on the Rights and Welfare of the Child](#); [Guidelines on Arrest, Police Custody and Pre-Trial Detention in Africa](#), Guideline 31. For a summary of the rights under international standards of children in conflict with the law see Chapter 27 of the [Amnesty International Fair Trial Manual, 2<sup>nd</sup> edition](#).

<sup>14</sup> [Guidelines on Arrest, Police Custody and Pre-Trial Detention in Africa](#), Guideline 31(a)(ii-iv); Article 37(b) of the [Convention on the Rights of the Child](#); See CRC General Comment 10, *Children’s Rights in Juvenile Justice*, UN Doc. [CRC/C/GC/10](#) (2007).

<sup>15</sup> [Guidelines on Arrest, Police Custody and Pre-Trial Detention in Africa](#), Guideline 3(a); Section M(1)(b) of the [Principles on the Right to Fair Trial in Africa](#); Part 3(a) of the [Principles and Guidelines on Human and Peoples’ Rights while Countering Terrorism in Africa](#); HRC General Comment 35 on article 9, (Liberty and security of person), UN Doc. [CCPR/C/GC/35](#) (2014), para 23.

Laws should identify who is authorized to carry out arrests or otherwise deprive a person of liberty.<sup>16</sup> If a State has delegated any powers of arrest or detention to private individuals or private security companies, this authorization should be set out in the law.<sup>17</sup>

Furthermore, officials conducting arrests must be identifiable. The **Guidelines on Arrest, Police Custody and Pre-Trial Detention in Africa** state:

“Officials conducting an arrest must clearly identify themselves and the unit to which they belong by showing an official identity card which visibly displays their name, rank and identity number. Any vehicles used shall have clearly visible number plates and any other required or legally prescribed identity markers or numbers”.<sup>18</sup>

This is a safeguard that aims to facilitate accountability.<sup>19</sup>

The authorities who carry out arrests or detain people may exercise only those powers granted to them under the law.<sup>20</sup>

The exercise of powers of arrest must be subject to strict supervision, including a clear chain of command, and also subject to the effective control of and recourse to a judicial or other authority.<sup>21</sup> (On judicial supervision of arrest and detention, see **Chapter 6**, Right to be brought promptly before a judge and **Chapter 7**, Right to challenge the legality of detention.) When States delegate arrest or detention powers to private security companies, both the State and the company are responsible for the conduct of private security personnel, even if the personnel act beyond the scope of authority delegated or contravene instructions of the state.<sup>22</sup>

The **Guidelines on Arrest, Police Custody and Pre-Trial Detention in Africa** specify that arrests “shall only be carried out pursuant to a warrant or on reasonable grounds to suspect that a person has committed an offence or is about to commit an arrestable offence”.<sup>23</sup>

The **Guidelines on Arrest, Police Custody and Pre-Trial Detention in Africa** also recommend that States make non-compliance with the rules on arrest and custody sanctionable as a disciplinary or, when appropriate, criminal offence.<sup>24</sup>

Examples of unlawful arrests include those for offences not recognized by the law; arrests for offences for which the law does not permit arrest;<sup>25</sup> and arrests without warrant in circumstances that require a warrant.<sup>26</sup> Unlawful detentions include those which, while initially lawful under the law, become unlawful because circumstances have changed, for

<sup>16</sup> Section M(1)(c) of the [Principles on the Right to Fair Trial in Africa](#); See HRC General Comment 35 on article 9, (Liberty and security of person), UN Doc. [CCPR/C/GC/35](#) (2014), para 23.

<sup>17</sup> See, [Principles and Guidelines on Human and Peoples’ Rights while Countering Terrorism in Africa](#), Part 8: Accountability of Private Security Contractors.

<sup>18</sup> [Guidelines on Arrest, Police Custody and Pre-Trial Detention in Africa](#), Guideline 3(b).

<sup>19</sup> See, HRC Concluding Observations: Germany, UN Doc. [CCPR/C/DEU/CO/6](#) (2012), para 10.

<sup>20</sup> Principle 9 of the UN [Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment](#); see, Section M(1)(b-c) of the [Principles on the Right to Fair Trial in Africa](#).

<sup>21</sup> Section M(1)(d) and 2(h) of the [Principles on the Right to Fair Trial in Africa](#); Principle 9 of the UN [Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment](#).

<sup>22</sup> HRC General Comment 35 on article 9, (Liberty and security of person), UN Doc. [CCPR/C/GC/35](#) (2014), para 8. See [Cabal and Pasini Bertran v Australia](#), HRC, UN Doc. [CCPR/C/78/D/1020/2001](#) (2003) para 7.2; articles 5 and 7 of the [Articles on Responsibility of States for Internationally Wrongful Acts](#), International Law Commission (2001), (commented to governments by UN General Assembly [resolution 65/19](#)); CAT General Comment 2, UN Doc. [CAT/C/GC/2](#) (2008) para 15; See, [Principles and Guidelines on Human and Peoples’ Rights while Countering Terrorism in Africa](#), Part 8: Accountability of Private Security Contractors; Chapter 1.4 of the [Amnesty International Fair Trial Manual, 2<sup>nd</sup> edition](#).

<sup>23</sup> [Guidelines on Arrest, Police Custody and Pre-Trial Detention in Africa](#), Guideline 3(a); Part 3(A) of the [Principles and Guidelines on Human and Peoples’ Rights while Countering Terrorism in Africa](#); see Section M(1)(b) of the [Principles on the Right to Fair Trial in Africa](#).

<sup>24</sup> Guideline 35(b) of the [Guidelines on Arrest, Police Custody and Pre-Trial Detention in Africa](#).

<sup>25</sup> [Latifulin v Kyrgyzstan](#), HRC, UN Doc. [CCPR/C/98/D/1312/2004](#) (2010) para 8.2.

<sup>26</sup> HRC General Comment 35 on article 9, (Liberty and security of person), UN Doc. [CCPR/C/GC/35](#) (2014), para 23; [Rolondo v the Philippines](#), HRC, UN Doc. [CCPR/C/82/D/1110/2002](#) (2004), para 5.5; [A.S. v Nepal](#), HRC, UN Doc. [CCPR/C/115/D/2077/2011](#) (2015), para 8.3.

example when the period of detention exceeds that permissible under the law<sup>27</sup> or when an arrested individual is not brought before a court as required or is not released from detention despite a court order to do so.<sup>28</sup>

### 1.2.2 PROCEDURES FOR ARREST

#### Use of Force

To protect the rights to life, to security of the person, to humane treatment and to be free from torture and other ill-treatment, international standards strictly limit the use of force by law enforcement officials, including during arrest.

In accordance with **Guideline 3(c)** of the **Guidelines on Arrest, Police Custody and Pre-Trial Detention in Africa**, the **UN Basic Principles on the Use of Force and Firearms by Law Enforcement Officials**, and **article 3** of the **UN Code of Conduct for Law Enforcement Officials**, States must regulate and otherwise ensure that the use of force by law enforcement officials is in accordance with international standards.

These standards require that the use of force be an exceptional measure of last resort, including during arrest. Force should only be used in situations where it is strictly necessary. In such cases the force used must be proportionate and the minimum necessary.

The use of firearms is considered an extreme measure, and must be additionally restricted. The use of firearms must be strictly limited to situations when it is necessary and proportionate to defend against an imminent threat of death or serious injury or to prevent a crime involving grave threat to life. In such cases, firearms may only be used when less extreme measures are insufficient to make the arrest. Principle 9 of the **Basic Principles on the Use of Force and Firearms by Law Enforcement Officials** further clarifies that: in any event, intentional lethal use of force may only be used when strictly unavoidable in order to protect life.

In the case of *Noah Kazingachire, John Chitsenga, Elias Chemvura and Batani Hadzisi (represented by Zimbabwe Human Rights NGO Forum) v Zimbabwe*, the African Commission examined the (fatal) use of firearms in the light of the UN Code of Conduct for Law Enforcement officials and the UN Basic Principles on the Use of Force and Firearms by Law Enforcement Officials. The Commission emphasized that “it is not the fact that someone suspected of having committed a crime stands to be arrested as such that justifies the use of firearms, but rather the immediate danger that this person poses to life.”<sup>29</sup>

In addition to meeting the principles of necessity and proportionality, those using force must exercise restraint.

Assistance and medical aid are to be rendered to anyone injured or affected as soon as possible, and their families or others are to be notified.

The **UN Basic Principles on the Use of Force and Firearms by Law Enforcement Officials** and **Part 2 of the Principles and Guidelines on Human and Peoples’ Rights while Countering Terrorism in Africa** specify that in cases where injury or death is caused, reports on the incident must be submitted. These and other standards make clear that individuals harmed by the use of force have a right to complain and to an effective remedy and reparation. The authorities have a duty to ensure independent and effective investigations into allegations of human rights violations including excessive or otherwise

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<sup>27</sup> *Abdel Hadi, Ali Radi & Others v Republic of Sudan*, (368/09) ACHPR (2013) paras 81-84; HRC General Comment 35 on article 9, (Liberty and security of person), UN Doc. [CCPR/C/GC/35](#) (2014), para 23; *Israil v Kazakhstan*, HRC, UN Doc. [CCPR/C/103/D/2024/2011](#) (2011) para 9.2.

<sup>28</sup> See, HRC General Comment 35, UN Doc. [CCPR/C/GC/35](#) (2014), paras 11, 22 and 43; *Chambala v Zambia*, HRC, UN Doc. [CCPR/C/78/D/856/1999](#) (2003) para 7.3.

<sup>29</sup> *Noah Kazingachire, John Chitsenga, Elias Chemvura and Batani Hadzisi (represented by Zimbabwe Human Rights NGO Forum) v Zimbabwe*, (295/04) ACHPR (2012), paras 107-123, 139-140 (quotation in paras 111 and 117).

unlawful use of force. They must ensure that those responsible for arbitrary, abusive, excessive or otherwise unlawful use of force are held accountable and that victims' rights to reparation are respected.<sup>30</sup>

### **Guidelines on Arrest, Police Custody and Pre-Trial Detention in Africa**

3(c) The lawful use of force and firearms shall be a measure of last resort and limited to circumstances in which it is strictly necessary in order to carry out an arrest. If the use of force is absolutely necessary in the circumstances:

- i. The level of force must be proportionate and always at the most minimal level necessary.
- ii. Additional restrictions on the use of firearms shall be prescribed by law and require that their use be strictly limited to the arrest of a person presenting an imminent threat of death or serious injury; or to prevent the perpetration of a serious crime involving grave threat to life, and only when less extreme measures are insufficient to make the arrest.
- iii. The use of force shall be strictly regulated under national law and in conformity with international standards, including the UN Basic Principles on the Use of Force and Firearms by Law Enforcement Officials.

### Searches

**Guideline 3(d)** of the **Guidelines on Arrest, Police Custody and Pre-Trial Detention in Africa** clarifies that searches of individuals must be conducted in accordance with the law and in a manner consistent with the inherent dignity of the person and the right to privacy.

Searches must be conducted by officials of the same gender as the suspect.<sup>31</sup> This requires appropriately trained male and female officials to be available.

Before any search, the individual must be informed of the reason for the search. A record of the search must be made, and be accessible to the individual searched. The individual must be given a receipt for any items confiscated. Additional safeguards are set out in relation to strip searches and internal body searches.<sup>32</sup> (see Chapter 11.7.4 on Searches in Police custody or Pre-Trial Detention)

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<sup>30</sup> HRC Concluding Observations: USA, UN Doc. [CCPR/C/USA/CO/4](#) (2013) para 11; HRC Concluding Observations: Greece, UN Doc. [CCPR/C/GRC/CO/2](#) (2015) paras 15-16; HRC Concluding Observations: France, UN Doc. [CCPR/C/FRA/CO/5](#) (2015) para 15; See, HRC Concluding Observations: Canada, UN Doc. [CCPR/C/CAN/CO/6](#) (2015) para 11; See, CAT General Comment 3, Implementation of article 14 by States Parties, UN Doc. [CAT/C/GC/3](#) (2012).

<sup>31</sup> Guideline 32(b)(i) of the [Guidelines on Arrest, Police Custody and Pre-Trial Detention in Africa](#) also clarifies that women or girls in custody should only be searched by female law enforcement officials in a manner that accords with their dignity.

<sup>32</sup> Rules 50-52 of the [Nelson Mandela Rules](#) set out standards for searches of people held in custody.



### 1.2.3 REGISTRATION AND RECORDS

The authorities must officially register every arrest or detention.<sup>33</sup>

The registration should contain at a minimum:

- The identity, age and address of the individual arrested
- If applicable the contact details of the person who is responsible for the care of the arrested individual
- The reason for arrest
- The exact time, date and place of arrest and transfer to a place of custody
- The identity of those carrying out the arrest and those supervising the detention
- The place where the individual is being initially detained
- The date time and place the individual was notified of the reasons for arrest or detention
- The date and time a third person of the arrested person's choice was notified of the arrest or detention
- The time, date and place of any transfers and the identity of those responsible for and making the transfer
- The date of release.<sup>34</sup>

Prompt and accurate registration serves as a safeguard against arbitrary detention, secret detention, enforced disappearance and other human rights violations such as torture and other ill-treatment. The duty to register deprivation of liberty, as well as the timeframe for such deprivation and the other information required to be included should be set out in law.<sup>35</sup>

Human rights bodies and mechanisms have recommended that the register be kept centrally.<sup>36</sup>

A copy of the entry on the register (or similar records kept) and information pertaining to the detainee should be made available to the arrested or detained person, to their lawyer and to judicial or other competent authorities seeking to trace the individual's whereabouts. The information recorded should also be available to relatives of the individual.<sup>37</sup>

There should also be complete and accurate detention and custody records kept in relation to each person who is arrested or detained.<sup>38</sup> In addition to the information that is recorded in the register, custody records should include records of searches and items

<sup>33</sup> E.g. Guideline 15(a) of the [Guidelines on Arrest, Police Custody and Pre-trial Detention in Africa](#); Part 3(D)(iii) of the [Principles and Guidelines on Human and Peoples' Rights while Countering Terrorism in Africa](#); UN Special Rapporteur on Torture: Report on visit to Gambia, UN Doc. [A/HRC/28/68/Add.4](#) (2015), paras 39, 108(a); CAT Concluding Observations: Ghana, UN Doc. [CAT/C/GHA/CO/1](#) (2011) para 10(d).

<sup>34</sup> Section M(6)(b-d) of the [Principles on the Right to Fair Trial in Africa](#); Guidelines 16-17 of the [Guidelines on Arrest, Police Custody and Pre-Trial Detention in Africa](#); Principle 12 of the UN [Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment](#); article 18 of the [International Convention for the Protection of All Persons from Enforced Disappearance](#); [HRC General Comment 20](#), para 11; See Guideline 30 of the [Robben Island Guidelines](#); Guideline 6, para 60 of the WGAD Principles and Guidelines on remedies and procedures on the right of anyone deprived of their liberty to bring proceedings before a court, UN Doc. [A/HRC/30/37](#) (2015). With respect to people held in detention, see Rules 6-9 of the [Nelson Mandela Rules](#).

<sup>35</sup> E.g. CAT Concluding Observations: Sierra Leone, UN Doc. [CAT/C/SLE/CO/1](#) (2014) para 11(c); [HRC General Comment 20](#), para 11. See HRC Concluding Observations: Tajikistan, UN Doc. [CCPR/C/TJK/CO/2](#) (2013) para 16.

<sup>36</sup> E.g. CAT Concluding Observations: Togo, UN Doc. [CAT/C/TGO/CO/2](#) (2012) para 13(h); Rwanda, UN Doc. [CAT/C/RWA/CO/1](#) (2012) para 12; see UN Special Rapporteur on Torture, Report on Follow-up visit to the Republic of Ghana, UN Doc. [A/HRC/31/57/Add.2](#) (2015) para 19.

<sup>37</sup> Section M(6)(c-d) of the [Principles on the Right to Fair Trial in Africa](#); [HRC General Comment 20](#), para 11; Principle 12(2) of the UN [Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment](#); article 18 of the [International Convention for the Protection of All Persons from Enforced Disappearance](#).

<sup>38</sup> E.g. Guideline 18 of the [Guidelines on Arrest, Police Custody and Pre-Trial Detention in Africa](#); See, CAT Concluding Observations: Ghana, UN Doc. [CAT/C/GHA/CO/1](#) (2011) para 10(d).

confiscated;<sup>39</sup> the time and date the individual was informed of their rights and the individual doing so; times and dates of questioning; the date a person is brought before a judge or other judicial authority; the time and date that the individual was granted release or denied release and the reasons given for refusal; the date of notification of the charges and identify of the person provided the notification; and information about injuries; complaints; and discipline.<sup>40</sup> (See **Chapter 10** on records of questioning; **Chapter 6** on right to be brought promptly before a judge and **Chapter 11.X** on registration and custody records.)

There should be a regular periodic review and inspection of custody records, to ensure their accuracy.<sup>41</sup> In view of the implications and risks of human rights violations occasioned by the failure to keep accurate records, sanctions should be imposed on those who fail to record the deprivation of liberty of any person or those who are responsible for falsification of records.<sup>42</sup>

### 1.3 PROHIBITION OF ARBITRARY ARREST AND DETENTION

Arbitrary detention is prohibited by both customary international law and treaties including **article 6** of the **African Charter**, **article 9(1)** of the **ICCPR** and **article 37(b)** of the **Convention on the Rights of the Child**.

The **Principles on the Right to Fair Trial in Africa** clarify: “States must ensure that no one shall be subject to arbitrary arrest or detention.”<sup>43</sup>

Human rights bodies and mechanisms, as well as the International Committee of the Red Cross, have clarified that the prohibition against arbitrary detention is a peremptory norm of international law<sup>44</sup> which must be respected at all times including in times of war or other public emergency.<sup>45</sup>

In explaining the meaning of “arbitrary arrest or detention” in article 9(1) of the ICCPR, the UN Human Rights Committee stated that “arbitrariness” is not to be equated with “against the law” but must be interpreted broadly to include elements of inappropriateness, injustice, lack of predictability and due process of law.<sup>46</sup>

The UN Working Group on Arbitrary Detention – the international expert body mandated to investigate cases of deprivation of liberty imposed in breach of international law – considers deprivation of liberty to be “arbitrary” in the following cases:

(a) When it is clearly impossible to invoke any legal basis to justify the deprivation of

<sup>39</sup> Guideline 3(d) of the [Guidelines on Arrest, Police Custody and Pre-Trial Detention in Africa](#); Rule 51 of the [Nelson Mandela Rules](#).

<sup>40</sup> See, Guidelines 18-19 of the [Guidelines on Arrest, Police Custody and Pre-Trial Detention in Africa](#).

<sup>41</sup> CAT Concluding Observations: Ghana, UN Doc. [CAT/C/GHA/CO/1](#) (2011) para 10(d); Belgium, UN Doc. [CAT/C/BEL/CO/3](#) (2014) para 12; UN Special Rapporteur on Torture: Gambia, UN Doc. [A/HRC/28/68/Add.4](#) (2015), para 108(a).

<sup>42</sup> Article 22 (b) of the [Convention on Enforced Disappearance](#); CAT Concluding Observations: Kazakhstan, UN Doc. [CAT/C/KAZ/CO/3](#) (2014) para 12(b).

<sup>43</sup> [Principles on the Right to Fair Trial in Africa](#), Section M(1)(b). Other non-treaty standards setting out the prohibition of arbitrary arrest or detention include: the [Guidelines on Arrest, Police Custody and Pre-Trial Detention in Africa](#), Guideline 1(b); Part 3(A) of the [Principles and Guidelines on Human and Peoples’ Rights while Countering Terrorism in Africa](#).

<sup>44</sup> Article 52 of the [Vienna Convention on the Law of Treaties](#) defines a peremptory norm of general international law (also known as *jus cogens*) as “a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character”.

<sup>45</sup> HRC: General Comment 29, States of Emergency (Article 4 of the ICCPR), UN Doc. [CCPR/C/21/Rev.1/Add.11](#) (2001) paras 8 and 10, General Comment 35 on article 9, (Liberty and security of person), UN Doc. [CCPR/C/GC/35](#) (2014) para 66 and General Comment 24 UN Doc. [CCPR/C/21/Rev.1/Add.6](#) (1994) para 8; and WGAD Deliberation No. 9 UN Doc. [A/HRC/22/44](#) (2012) paras 37-75. See, International Committee of the Red Cross (ICRC) [Rule 99, Customary International Humanitarian Law](#), Jean-Marie Henckaerts, Louise-Doswald-Beck.

<sup>46</sup> HRC General Comment 35 on article 9, (Liberty and security of person), UN Doc. [CCPR/C/GC/35](#) (2014) para 12; *Gorji-Dinka v Cameroon*, (1134/2002), HRC, UN Doc. [CCPR/C/83/D/1134/2002](#) (2005) para 5.1.

liberty (such as when a person is kept in detention after the completion of his or her sentence, or despite an amnesty law applicable to the detainee, or when a person detained as a prisoner of war is kept in detention after the cessation of effective hostilities);

(b) When the deprivation of liberty results from the exercise of one or more of the following rights: to be free from discrimination; to freedom of movement, thought, conscience and belief, opinion, expression, peaceful assembly and association; to take part in the conduct of public affairs; to equal access to public service in one's own country; to seek and enjoy asylum; and the right of minorities to enjoy their culture, language and religion;

(c) When the total or partial non-observance of the international norms relating to the right to a fair trial is of such gravity as to give the deprivation of liberty an arbitrary character;

(d) When asylum seekers, migrants or refugees are subjected to prolonged administrative custody without the possibility of administrative or judicial review or remedy;

(e) When the deprivation of liberty constitutes a violation of international law for reasons of discrimination based on birth, national, ethnic or social origin, language, religion, economic condition, political or other opinion, gender, sexual orientation, disability or other status, and is aimed at, or may result in, ignoring the equality of human rights.<sup>47</sup>

An arrest or detention that is authorised by domestic law may, nonetheless, be arbitrary. For example, arrests for the exercise of freedom of expression<sup>48</sup> or arrests based on discriminatory laws are considered to be arbitrary under international human rights law.<sup>49</sup> The African Commission has held that arrests and detentions carried out "on grounds of ethnic origin alone... constitute arbitrary deprivation of the right to liberty of the individual".<sup>50</sup>

In addition, a court order remanding a person in custody after a lawful arrest may be permissible under domestic law, but if it is not also reasonable and necessary in all the circumstances, for example, "to prevent flight, interference with evidence or the recurrence of crime", it would be arbitrary.<sup>51</sup> (See **Chapter 6.3, the right to regular periodic review of detention.**)

Enforced disappearances, detaining family members of an alleged criminal who are not themselves accused of wrongdoing, the holding of hostages, arrests to extort bribes and imposing detention as a retroactive punishment are all arbitrary. In addition, imprisonment following a manifestly unfair trial is considered to be arbitrary.<sup>52</sup> So too is keeping anyone in detention prior to trial without periodic re-evaluation of the necessity and

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<sup>47</sup> WGAD Principles and Guidelines on remedies and procedures on the right of anyone deprived of their liberty to bring proceedings before a court, UN Doc. [A/HRC/30/37](#) (2015), Introduction para 10; WGAD website, Individual Complaints and Urgent Appeals, available at <http://www.ohchr.org/EN/Issues/Detention/Pages/Complaints.aspx>.

<sup>48</sup> Communication of 24 January 2013 about the detention without charge of journalists in Somalia, from WGAD, Special Rapporteurs on freedom of opinion and expression, the situation of human rights defenders and violence against women, its causes and consequences, and the Independent Expert on the situation of human rights in Somalia, [UA G/SO 218/2 G/SO 214 \(67-17\) G/SO 214 \(107-9\) G/SO 214 \(89-15\) SOM 1/2013](#); Report of the Independent Expert on the situation of human rights in the Sudan, UN Doc. [A/HRC/27/69](#) (2014) paras 47-49, 60, 81; *Abega v Cameroon*, WGAD, Opinion No 38/2013, UN Doc. [A/HRC/WGAD/2013/38](#) (2014) paras 18-25.

<sup>49</sup> This includes, among others, arrests or detention under laws which discriminate on grounds of sexual orientation or gender identity, eg, *Ayissi et al v Cameroon*, WGAD, Opinion 22/2006, UN Doc. [A/HRC/4/40/Add.1](#) at 91 (2006) paras 19-20.

<sup>50</sup> *Organization Mondiale Contre la Torture and others v Rwanda*, (27/89, 46/91, 49/91 and 99/93) ACHPR, (October 1996), para 28.

<sup>51</sup> HRC General Comment 35 on article 9, (Liberty and security of person), UN Doc. [CCPR/C/GC/35](#) (2014) para 12; *A.W. Mukong v Cameroon*, (458/1991), HRC, UN Doc. CCPR/C/51/D/458/1991 (1994) para 9.8; *Baruani v Democratic Republic of the Congo*, (1890/2009), HRC, UN Doc. CCPR/C/110/D/1890/2009 (2014) para 6.5 (detention on alleged national security grounds without charge, access to counsel).

<sup>52</sup> HRC General Comment 35 on article 9, (Liberty and security of person), UN Doc. [CCPR/C/GC/35](#) (2014) paras 16-17.

reasonableness of the deprivation of liberty.<sup>53</sup> (See **Chapter 6.3**, the right to regular periodic review of detention.)

The African Commission has also held that indefinite detention amounts to arbitrary arrest.<sup>54</sup>

The UN Human Rights Committee has explained that the prohibitions of unlawful and arbitrary detention are distinct but can also overlap. So an arrest can be in violation of national law but not arbitrary, consistent with national law but arbitrary, or be both unlawful and arbitrary. It explained that an arrest that lacks legal basis is both unlawful and arbitrary as is continued confinement of a detainee despite a judicial order for his or her release.<sup>55</sup>

In the case of *Monim Elgak, Osman Hummeida and Amir Suliman (represented by FIDH and OMCT) v Sudan*, the African Commission held that the arrest of two human rights defenders was both arbitrary and unlawful. The men were deprived of their liberty without a warrant, in absence of reasonable suspicion that they had committed a crime or a basis in Sudanese law. They were not informed of the reasons for their arrest, any charges against them or their right to access to a lawyer; one, who was a foreign national, was also denied access to consular assistance, despite his request. The African Commission concluded that their treatment violated the right to liberty and that their arrest in connection with their activities as human rights defenders violated their rights of freedom of expression guaranteed under the African Charter.<sup>56</sup>

**Section M(1)(g)** of the **Principles on the Right to Fair Trial in Africa** reinforces the prohibition of arbitrary detention. It provides that: "States shall ensure, including by the enactment of legal provisions, that officials or persons who arbitrarily arrest or detain any person are brought to justice."

<sup>53</sup> HRC General Comment 35 on article 9, (Liberty and security of person), UN Doc. [CCPR/C/GC/35](#) (2014) para 12.

<sup>54</sup> [World Organization Against Torture and Others v Zaire](#) (25/89, 47/90, 56/91 and 100/93) ACHPR (March 1996).

<sup>55</sup> HRC General Comment 35 on article 9, (Liberty and security of person), UN Doc. [CCPR/C/GC/35](#) (2014) para 11.

<sup>56</sup> *Monim Elgak, Osman Hummeida and Amir Suliman (represented by FIDH and OMCT) v Sudan*, ([379/09](#)), ACHPR (2014) paras 102-107.

## 2. RIGHTS TO INFORMATION UPON ARREST

### 2.1 RIGHT TO BE INFORMED OF THE REASONS FOR ARREST OR DETENTION

Everyone who is arrested or detained has the right to be informed of the reasons for his or her arrest.

This right is set out in **article 9(2)** of the **ICCPR**. While not expressly set out in the African Charter, the duty to inform of reasons for arrest or detention are necessary to ensure the effectiveness of the prohibition of arbitrary arrest and detention in **article 6** of the **African Charter**. To that end, this important safeguard of the right to liberty is set out in standards established by the African Commission including: **Section M(2)(a)** of the **Principles on the Right to Fair Trial in Africa**; **Guideline 4(b)** of the **Guidelines on Arrest, Police Custody and Pre-Trial Detention in Africa**; **Guideline 25** of the **Robben Island Guidelines**; and **Part 3(B)(ii)** of the **Principles and Guidelines on Human and Peoples' Rights while Countering Terrorism in Africa**.

The right applies broadly to any form of deprivation of liberty regardless of its formality, legality or reason. It applies from the outset.<sup>57</sup>

#### **Article 9(2) of the ICCPR**

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

#### **Section (M)(2)(a) of the Principles on the Right to Fair Trial in Africa**

Anyone who is arrested shall be informed, at the time of arrest, of the reasons for his or her arrest and shall be promptly informed, in a language he or she understands, of any charges against him or her.

A key function of this right is to enable individuals deprived of liberty to seek their release if they believe that the reasons given are invalid or unfounded. Therefore, the information given should provide sufficient detail on the factual and legal basis to enable the individual to challenge the lawfulness of their arrest or detention effectively.

The UN Human Rights Committee has explained that the reasons given must include not only the general legal basis for the arrest but also enough information about the facts to indicate the substance of the complaint, such as identifying the wrongful act and the alleged victim.<sup>58</sup>

The provision of information about the reasons for arrest at the outset of detention is considered to be among the fundamental safeguards against arbitrary detention.<sup>59</sup> Knowledge at the outset of the reasons for arrest may also be key to a person's making critical decisions, including in respect of the exercise of the right to counsel and the right to remain silent in the face of questioning.

The African Commission has considered the failure to inform individuals of the reasons for their arrest to be among the reasons for finding the detention to be arbitrary, violating **Article 6 of the African Charter**, guaranteeing the right to liberty and prohibition of unlawful and arbitrary detention.<sup>60</sup>

#### 2.1.1 TIMING AND LANGUAGE OF NOTIFICATION

<sup>57</sup> HRC General Comment 35 on article 9, (Liberty and security of person), UN Doc. [CCPR/C/GC/35](#) (2014), para 24.

<sup>58</sup> HRC General Comment 35 on article 9, (Liberty and security of person), UN Doc. [CCPR/C/GC/35](#) (2014), para 25.

<sup>59</sup> For example, CAT Concluding Observations: Togo, UN Doc. [CAT/C/TGO/CO/2](#) (2012) para 10(a); Senegal, UN Doc. [CAT/C/SEN/CO/3](#) (2012) Para 10(a).

<sup>60</sup> *Monim Elgak, Osman Hummeida and Amir Suliman (represented by FIDH and OMCT) v Sudan*, ([379/09](#)), ACHPR (2014) paras 106-107.

The information about the reasons for arrest should be provided at the time of arrest.<sup>61</sup>

The information must be communicated in a language and using means that are accessible and that the arrested or detained person understands.<sup>62</sup> This means that the language used must be adapted to the individual, for example using simple, non-technical language rather than legal jargon. The information given to people under the age of 18 must be provided in a manner appropriate to their age and maturity.<sup>63</sup>

The UN Human Rights Committee has noted that in addition to informing the arrested person directly of the reason for arrest, in some cases, depending on a person's age, disability or condition, the authorities may also be required to inform others of such reasons. For example, when children are arrested, the child's legal representative and his or her parents or a legal guardian must be informed of the arrest and the reasons for it. They must also be notified of the child's rights, including the right to legal assistance.<sup>64</sup>

If the individual does not speak or understand the language used by the arresting officials, some leeway in the timeframe for notification will be allowed, in order, for example, to allow an interpreter to be found. Interpreters must be provided free of charge to the arrested person.<sup>65</sup>

## 2.2 RIGHT TO BE INFORMED IN A LANGUAGE THE PERSON UNDERSTANDS

Everyone who is arrested or detained must be informed of their rights and be provided with an explanation of how they may avail themselves of such rights, in a language that they understand.<sup>66</sup> This right must be guaranteed by law.<sup>67</sup>

Knowledge of one's rights is essential to claiming them.

International standards variously require that arrested and detained persons receive notification of at least the following rights:<sup>68</sup>

<sup>61</sup> Article 9(2) of the [ICCPR](#), Principle 10 of the UN [Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment](#); Section M(2)(a) of the [Principles on the Right to Fair Trial in Africa](#); Guidelines 4(b) and 5 of the [Guidelines on Arrest, Police Custody and Pre-Trial Detention in Africa](#); Guideline 25 of the [Robben Island Guidelines](#) and Part 3(B)(ii) of the [Principles and Guidelines on Human and Peoples' Rights while Countering Terrorism in Africa](#).

<sup>62</sup> Principle 7, para 10 of the WGAD Principles and Guidelines on remedies and procedures on the right of anyone deprived of their liberty to bring proceedings before a court, UN Doc. [A/HRC/30/37](#) (2015); Guideline 4(h) of the [Guidelines on Arrest, Police Custody and Pre-Trial Detention in Africa](#).

<sup>63</sup> Article 40(2)(b)(ii) of the Convention on the Rights of the Child; CRC General Comment 10, UN Doc. [CRC/C/GC/10](#) (2007), paras 47-48; Guideline 10, para 53(e) of the [UN Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems](#); Guideline 18, para 100 of the WGAD Principles and Guidelines on remedies and procedures on the right of anyone deprived of their liberty to bring proceedings before a court, UN Doc. [A/HRC/30/37](#) (2015).

<sup>64</sup> HRC General Comment 35 on Article 9, (Liberty and security of person), UN Doc. [CCPR/C/GC/35](#) (2014), para 28; Guideline 31(c)(i-ii) of the [Guidelines on Arrest, Police Custody and Pre-Trial Detention in Africa](#).

<sup>65</sup> Article 14(3)(f) of the [ICCPR](#); [Guidelines on Arrest, Police Custody and Pre-Trial Detention in Africa](#), Guidelines 4(h), 33(c); see [Titanji Duga Ernest \(on behalf of Cheonumu Martin and Others\) v Cameroon](#), (287/04) ACHPR (2014) para 69; CRC General Comment 10, UN Doc. [CRC/C/GC/10](#) (2007), paras 62-63.

<sup>66</sup> Principles 13 and 14 of the UN [Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment](#); Guideline 2, para 42(d) and Guideline 3, para 43(i) of the [UN Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems](#); HRC General Comment 35 on Article 9, (Liberty and security of person), UN Doc. [CCPR/C/GC/35](#) (2014), para 58; Principle 7 of the WGAD Principles and Guidelines on remedies and procedures on the right of anyone deprived of their liberty to bring proceedings before a court, UN Doc. [A/HRC/30/37](#) (2015); CAT General Comment 2, UN Doc. [CAT/C/GC/2/CRP.1/Rev.4](#) (2007), para 13; Guidelines 5 and 4 of the [Guidelines on Arrest, Police Custody and Pre-Trial Detention in Africa](#); Part 3(B)(i) of the [Principles and Guidelines on Human and Peoples' Rights while Countering Terrorism in Africa](#).

<sup>67</sup> For example, SPT: [Maldives](#), UN Doc. CAT/OP/MDV/1 (2009) para 97. See, HRC Concluding Observations: [Algeria](#), UN Doc. CCPR/C/DZA/CO/3 (2007) para 18.

<sup>68</sup> Guidelines 5 and 4 of the [Guidelines on Arrest, Police Custody and Pre-Trial Detention in Africa](#); Section M(2)(b) of the [Principles on the Right to Fair Trial in Africa](#); Guideline 20 of the Robben Island Guidelines; Guidelines 2(para 42)(c)) and Guideline 3(para 43(i)) of the [UN Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems](#); HRC General Comment 35, UN Doc.



- The right to legal counsel (of choice and legal aid)
- The right to notify a third person about the fact of arrest and place of detention (and any transfers)
- The right to a medical examination and medical assistance
- The right to challenge the lawfulness of detention before a court
- The right to apply for release on bail
- The right not to incriminate oneself, including the right to remain silent during questioning and at trial
- The right not to be subjected to torture or other ill-treatment
- The right to humane conditions
- The right to complain and to redress for complaints about ill-treatment or conditions.

People arrested or detained on a criminal charge should also be informed of their right to be brought promptly before a judge or judicial officer following arrest.

In addition, international standards require that foreign nationals and stateless people be informed of the right to communicate with consular officials or an appropriate international organization. (See **Section 2.4** below.)

Everyone who has been arrested or detained should receive information about their rights from the outset of their arrest or detention.<sup>69</sup> The information should be communicated in a language and in a way that the arrested or detained person understands.<sup>70</sup> Interpreters should be provided for people who do not understand or speak the language used by the authorities.<sup>71</sup>

The information should be provided orally and in writing,<sup>72</sup> in such formats as are necessary to accommodate an individual's disability.

When a person under the age of 18 is arrested or detained, in addition to informing the child of their rights, the parents (unless it is not in the child's best interests) or legal guardian must also be informed of the child's rights.<sup>73</sup>

Due to the importance of this notification, it has been recommended that the authorities establish a means of verifying that a person has been informed of their rights, such as by audio tape, video tape, documentation or witnesses.<sup>74</sup>

### 2.2.1. RIGHT TO BE INFORMED OF THE RIGHT TO LEGAL COUNSEL

Everyone arrested or detained must be informed of their right to have legal assistance provided either by a lawyer of their choice or by appointed counsel in certain circumstances.<sup>75</sup>

Notice of the right to counsel should be provided immediately upon arrest or detention.

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[CCPR/C/GC/35](#) (2014), para 46; see also Principles 13-14 of the UN [Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment](#)

<sup>69</sup> Guideline 5 [of the Guidelines on Arrest, Police Custody and Pre-Trial Detention in Africa](#); HRC Concluding Observations: Armenia, UN Doc. [CCPR/C/ARM/CO/2](#) (2012) para 19; CAT Concluding Observations: Rwanda, UN Doc. [CAT/C/RWA/CO/1](#) (2012) para 12.

<sup>70</sup> Guideline 3 para 43(i) of the [UN Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems](#); Guideline 5 of the [Guidelines on Arrest, Police Custody and Pre-Trial Detention in Africa](#).

<sup>71</sup> Guideline 4(h) of the [Guidelines on Arrest, Police Custody and Pre-Trial Detention in Africa](#)

<sup>72</sup> Guideline 5 of the [Guidelines on Arrest, Police Custody and Pre-Trial Detention in Africa](#).

<sup>73</sup> Guideline 31(c) of the [Guidelines on Arrest, Police Custody and Pre-Trial Detention in Africa](#).

<sup>74</sup> See, Guideline 5, para 58 of the WGAD Principles and Guidelines on remedies and procedures on the right of anyone deprived of their liberty to bring proceedings before a court, UN Doc. [A/HRC/30/37](#) (2015).

<sup>75</sup> Principle 5 of the [Basic Principles on the Role of Lawyers](#); Sections M(2)(b) and N(2) of the [Principles on the Right to Fair Trial in Africa](#); Guideline 20(c) of [the Robben Island Guidelines](#); Guideline 2, paras 42(c)-(d) of the [UN Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems](#).

The individual should be informed that they have the right to the assistance of counsel before they are questioned and that counsel may also assist them during questioning as well as throughout any criminal proceedings.<sup>76</sup> (For further information on the scope of the right to legal counsel before trial, see **Chapter 3**.)

The individual should also be advised of their right to counsel before each time they are questioned if they do not have counsel present, as well as when they are charged. (See **Chapter 10.2** on notice of rights before questioning and **10.3** the right to counsel during questioning.)

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

Governments shall ensure that all persons are immediately informed by the competent authority of their right to be assisted by a lawyer of their own choice upon arrest or detention or when charged with a criminal offence.

**Guideline 3, Para 43(a) of the UN Principles and Guidelines on the Right to Legal Aid in Criminal Justice Systems:**

States should introduce measures:

To promptly inform every person detained, arrested, suspected or accused of, or charged with a criminal offence of his or her right to remain silent; his or her right to consult with counsel or, if eligible, with a legal aid provider at any stage of the proceedings, especially before being interviewed by the authorities; and his or her right to be assisted by an independent counsel or legal aid provider while being interviewed and during other procedural actions;

### 2.2.2. RIGHT TO BE INFORMED OF THE RIGHT TO SILENCE

In order to ensure effective protection of the right not to incriminate oneself and the presumption of innocence, individuals suspected or accused of a crime should be informed of their right to remain silent. They should be informed of this right upon arrest and before being questioned by police, judicial or other authorities.<sup>77</sup> (See **Chapter 10.5** for more information on the right to remain silent.)

### 2.3 RIGHT TO BE PROMPTLY INFORMED OF ANY CRIMINAL CHARGES

Everyone who is arrested or detained has the right to be promptly informed of any charges against him or her. This right is set out in **article 9(2)** of the **ICCPR** and a number of other standards, including **Section M(2)(a)** of the [Principles on the Right to Fair Trial in Africa](#).<sup>78</sup>

Prompt provision of information to a person taken in custody is key to enabling the person to exercise the right to challenge the lawfulness of their arrest, and to challenge the necessity and reasonableness or lawfulness of any request to continue the individual's detention. The information may also enable the individual to seek dismissal of the charges at an early stage.<sup>79</sup> (See **Chapter 6** on the right to be brought promptly before a judge and **Chapter 7** on the right to challenge the lawfulness of detention.)

The information about the charges that is to be given promptly after arrest does not have to be as detailed as the information that must be provided later, once formal charges have

<sup>76</sup> Guideline 3, para 43(a) of the [UN Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems](#); see Part 3(B)(iii) of the [Principles and Guidelines on Human and Peoples' Rights while Countering Terrorism in Africa](#).

<sup>77</sup> Guideline 3, para 43(a) of the [UN Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems](#); see Guidelines 5 and 4(c) of the [Guidelines on Arrest, Police Custody and Pre-Trial Detention in Africa](#).

<sup>78</sup> Other standards enshrining this right include: Article 17(2)(c)(ii) of the [African Charter on the Rights and Welfare of the Child](#); Guideline 4(b) of the [Guidelines on Arrest, Police Custody and Pre-Trial Detention in Africa](#); Guideline 26 of the Robben Island Guidelines; Part 3(B)(ii) the [Principles and Guidelines on Human and Peoples' Rights while Countering Terrorism in Africa](#); Principle 10 of the [UN Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment](#).

<sup>79</sup> Section 2.3 of [Amnesty International Fair Trial Manual, 2<sup>nd</sup> edition](#).



been brought. The standards applying to the later stage, including article 14(3)(a) of the ICCPR (described in **Chapter 9.3** on the right to adequate time to prepare a defence), clarify that the information given after formal charges have been laid must be detailed enough about the nature and cause of the charge so as to allow the individual to prepare a defence for trial.<sup>80</sup>

The information about charges, like the other information to be provided following arrest, must be provided in a clear, plain and accessible manner and in a language that the individual understands. If the individual does not speak or understand the language spoken by the authorities, the State must provide an interpreter.<sup>81</sup>

In the case of children charged with an offence, the parents (unless it is not in the child's best interests) or guardian as well as the child must also be informed directly of the charges.<sup>82</sup>

## 2.4. NOTIFICATION OF THE RIGHT TO CONSULAR ASSISTANCE

Foreign nationals who are arrested or detained must also be informed of their right to communicate with officials from the embassy or consular post of their country. If the individual is stateless or a refugee, or is under the protection of an intergovernmental organization, he or she must be informed of their right to communicate with an appropriate intergovernmental organization or with a representative of the state where they reside.

This right is contained in **article 36(1)(b)** of the [Vienna Convention on Consular Relations](#), and a number of other standards including **Section M(2)(d)** of the [Principles on the Right to Fair Trial in Africa](#) and **Guideline 34** of the [Guidelines on Arrest, Police Custody and Pre-Trial Detention in Africa](#).<sup>83</sup>

The right to notification of this right and to its effective exercise must be provided for in law as well as respected in practice.<sup>84</sup>

The obligation to respect this right has been emphasized in rulings of the International Court of Justice.<sup>85</sup>

In addition to monitoring the well-being of the detained individual and whether his or her rights are being respected, consular or other relevant officials may be of other assistance, such as in finding counsel with relevant experience or medical professionals who speak the same language as the detainee.

The International Court of Justice has clarified that the arresting authorities have a duty to inform an individual of this right as soon as it is realized that a person is a foreign national or once there are grounds to think that the person is probably a foreign national.<sup>86</sup>

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<sup>80</sup> HRC General Comment 35 on article 9, (Liberty and security of person), UN Doc. [CCPR/C/GC/35](#) (2014), para 30.

<sup>81</sup> Section M(2)(a) of the [Principles on the Right to Fair Trial in Africa](#), Guideline 4(h) of the [Guidelines on Arrest, Police Custody and Pre-Trial Detention in Africa](#).

<sup>82</sup> Guideline 31(c) of the [Guidelines on Arrest, Police Custody and Pre-Trial Detention in Africa](#); HRC General Comment 35 on article 9, (Liberty and security of person), UN Doc. [CCPR/C/GC/35](#) (2014), paras 28.-30

<sup>83</sup> Other standards enshrining the right include article 16(7) of the [Migrant Workers Convention](#); Principle 16(2) of the UN [Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment](#); HRC General Comment 35 on article 9, (Liberty and security of person), UN Doc. [CCPR/C/GC/35](#) (2014), para 58.

<sup>84</sup> CAT Concluding Observations: Sierra Leone, UN Doc. [CAT/C/SLE/CO/1](#) (2014) para 11(a).

<sup>85</sup> [LaGrand Case](#) (*Germany v United States of America*), International Court of Justice (2001); [Avena and Other Mexican Nationals, \(Mexico v United States of America\)](#), International Court of Justice (2004).

<sup>86</sup> [Avena and Other Mexican Nationals, \(Mexico v United States of America\)](#), International Court of Justice (2004), para 88.

The African Commission considered the failure to notify a foreign national of this right and the right to counsel when it ruled that the detention of human rights defenders, one of whom was a foreign national, was arbitrary.<sup>87</sup>

Best practice indicates that this right should apply to individuals who are nationals of both the country arresting or detaining them and another country.<sup>88</sup>

Furthermore, if the individual holds the nationality of two foreign states, he or she should be afforded the right to contact and receive visits from either or both of the countries, should he or she so choose.<sup>89</sup>

The decision as to whether or not to communicate with consular officials or a relevant international organization is for the arrested or detained individual to make. The authorities of the detaining State have a duty to ensure that the detainee is able to contact the consular authorities or other relevant organization without delay, if they decide to do so. However, the detaining officials should not do so unless the detainee makes the request.<sup>90</sup>

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<sup>87</sup> [Monim Elgak, Osman Hummeida and Amir Suliman v Sudan](#) (379/09), ACHPR (2014), para 81 (allegations), paras 106 -107 (findings).

<sup>88</sup> Rule 27 (2) of the [Council of Europe Rules on the use of remand in custody, the conditions in which it takes place and the provision of safeguards against abuse](#), (appended to Committee of Ministers Recommendation Rec (2006)13).

<sup>89</sup> See, Chapter 2.5 of [Amnesty International Fair Trial Manual, 2<sup>nd</sup> edition](#).

<sup>90</sup> Article 36(1)(b) of the [Vienna Convention on Consular Relations](#); article 16(7)(a) of the [Migrant Workers Convention](#); Guideline 34 of the [Guidelines on Arrest, Police Custody and Pre-Trial Detention in Africa](#).

### 3. THE RIGHT TO LEGAL ASSISTANCE BEFORE TRIAL

#### 3.1 THE RIGHT TO LEGAL COUNSEL

Everyone arrested or detained has the right to legal counsel. This right applies to everyone in detention, whether or not in connection with a criminal offence. It also applies to everyone suspected or charged with a criminal offence, whether or not they are deprived of their liberty.<sup>91</sup>

The Principles on the Right to Fair Trial in Africa affirm that “[l]egal representation is regarded as the best means of legal defence against infringements of human rights and fundamental freedoms.”<sup>92</sup>

Access to legal counsel is an important safeguard against arbitrary detention, torture and other ill-treatment, coerced confessions and enforced disappearance. Representation by counsel facilitates challenges to the legality of detention. For people charged with a criminal offence, the assistance of a lawyer from the outset allows them to begin to prepare their defence.

The right to legal counsel is guaranteed in a number of treaty and non-treaty standards.<sup>93</sup> These include the following:<sup>94</sup>

- **Article 7(1)(c) of the African Charter**
- **Articles 14 (3)(b) and 14(3)(d) of the ICCPR**
- **\*Article 17(2)(d) of the Convention on Enforced Disappearance**
- **\*Article 37(d) of the Convention on the Rights of the Child**
- **\*Guideline 20(c) of the Robben Island Guidelines**
- **Sections A(2)(f) and \*M(2)(f) and N(2) of the Principles on the Right to Fair Trial in Africa**
- **\*Guidelines 4(d) and 8(d)(i) of the Guidelines on Arrest, Police Custody and Pre-Trial Detention in Africa**
- **\*Part 3(B)(iii) of the Principles and Guidelines on Human and Peoples’ Rights while Countering Terrorism in Africa**
- **Principle 3 and \*Guideline 4 of the UN Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems**
- **\*Principle 17 of the UN Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment**
- **\*Principle 9 of the WGAD Principles and Guidelines on the right of anyone deprived of their liberty to bring proceedings before a court**

The right to defend oneself in criminal proceedings, including through counsel, is set out in **article 7(1)(c) of the African Charter** and in a more detailed way in **articles 14(3)(b) and 14(3)(d) of the ICCPR**.

**Article 7(1)(c) of the African Charter:**

7(1).Every individual shall have the right to have his cause heard. This comprises:

...

(c): The right to defence, including the right to be defended by counsel of his choice;

**Article 14(3)(b) and 14(3)(d) of the ICCPR:**

<sup>91</sup> For further information about the right to a lawyer throughout criminal proceedings see, for example, ICJ [Trial Observation Manual for Criminal Proceedings, Practitioners Guide No. 5](#) (2009) pp 49-51, 60-63; 89-92, 114, 127-129, 134, 146; [Amnesty International: Fair Trial Manual, 2<sup>nd</sup> edition](#), Chapters 3, 8.1, 9.2, 20, 26.5, 27.6.3, 28.6.1, 28.7, 32.4.3.

<sup>92</sup> Section N(2)(a) of the [Principles on the Right to Fair Trial in Africa](#).

<sup>93</sup> For an explanation of treaty and non-treaty standards, see Introduction.

<sup>94</sup> Note that those marked “\*” expressly pertain to persons who are arrested or detained

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

....

(b) To have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing;

...

d) To be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it;

Both the African Commission and the UN Human Rights Committee have clarified that the right to legal assistance applies upon arrest, before and during questioning, and during preliminary investigation in the course of criminal proceedings (as well as throughout the proceedings).

The right of a person arrested or detained to access to and assistance of counsel is essential in order to protect a number of rights including the rights to be free from arbitrary detention, to freedom from torture or other ill-treatment, as well as to fair trial rights, including the right to a defence.

For example, in its decision of 2003 in the case of *Liesbeth Zegveld and Mussie Ephrem v Eritrea* (250/2002),<sup>95</sup> concerning the arrest and incommunicado detention without charge or trial of 11 individuals for expressing their political opinions, the African Commission clarified that: “every detained person must have prompt access to a lawyer”.

In more recent rulings, the African Commission has emphasized that the right of any person who has been arrested or detained to prompt access to a lawyer has been expressly enshrined in standards it has established including **the Robben Island Guidelines** and the **Principles on the Right to a Fair Trial in Africa**. It held that the lack of such access constituted a violation of the right to defend oneself set out in **article 7(1)(c)** of the **African Charter**.<sup>96</sup>

The UN Human Rights Committee has also repeatedly stressed that States must permit arrested and detained people access to lawyers. Furthermore, when such access has been denied or impeded, it has found violations of fair trial rights, including **articles 14(3)(b)** (right to adequate time and facilities to prepare a defence and communicate with counsel) and **14(3)(d)** (right to defend, including through counsel) of the **ICCPR**.<sup>97</sup>

Therefore, although the provisions of the African Charter and ICCPR do not expressly state that the right to counsel applies throughout any criminal proceedings, they should be read to include the right of anyone arrested or detained, suspected or accused of a crime, to the assistance of counsel from the outset, including before trial.<sup>98</sup>

The right to legal counsel includes the rights to: access to a lawyer, including in police custody; effective assistance of the lawyer including before and during questioning; adequate time and facilities to consult the lawyer; and the right to confidential communications with the lawyer.<sup>99</sup> (It also includes the right to adequate time and facilities to prepare a defence, which is addressed in **Chapter 9**.)

<sup>95</sup> *Liesbeth Zegveld and Mussie Ephrem v Eritrea* (250/2002), ACHPR, 17th Annual Report (2003) para 55.

<sup>96</sup> For example, *Abdel Hadi, Ali Radi & Others v Republic of Sudan*, 368/09, ACHPR (2013) paras 89-90.

<sup>97</sup> HRC General Comment 35 on article 9, (Liberty and security of person), UN Doc. [CCPR/C/GC/35](#) (2014), paras 35 and 58; HRC [General Comment 20](#) HRI/GEN/1/Rev.9 (Vol. I), para 11; HRC Concluding Observations: Chad, UN Doc. [CCPR/C/TCD/CO/2](#) (2014), para 15; Finland, UN Doc. [CCPR/C/FIN/CO/6](#) (2013) para 11; Kenya, UN Doc. [CCPR/C/KEN/CO/3](#) (2012) para 19; *Selyan v Belarus*, HRC, UN Doc. [CCPR/C/115/D/2289/2013](#) (2015) para 7.6.

<sup>98</sup> See also, *Amnesty International: Fair Trial Manual, 2<sup>nd</sup> edition*, Chapter 3.1.

<sup>99</sup> Principle 7 of the *UN Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems*; see, *Egyptian Initiative for Personal Rights and Interights v Egypt* (334/06) ACHPR, (2011), para 182.

The right to legal counsel applies to everyone suspected or charged, arrested or detained in connection with a criminal offence, no matter how serious or minor the charge.<sup>100</sup>

### 3.1.1 TIMING

Everyone who is arrested or detained in police custody has the right to access their lawyer (whether their lawyer of choice or an appointed lawyer) and other legal service providers without delay.<sup>101</sup>

In accordance with the **Guidelines on Arrest, Police Custody and Pre-Trial Detention in Africa** and the jurisprudence of the UN Human Rights Committee, such access must occur before any questioning by any authority, and continue during such questioning and throughout the criminal justice process.<sup>102</sup>

This right obtains irrespective of the nature of the crime that the individual is suspected or accused of committing.<sup>103</sup> Standards established by the African Commission and statements and jurisprudence of other human rights bodies clarify that the right to access a lawyer throughout criminal proceedings applies equally in cases in which people have been arrested or detained in connection with national security matters, such terrorism.<sup>104</sup>

The right to the presence and assistance of a lawyer during questioning also applies to people not deprived of their liberty.

In accordance with the **Guidelines on Arrest, Police Custody and Pre-Trial Detention in Africa**, people under the age of 18 who are arrested must be guaranteed the right to the presence of a lawyer or other legal service provider of their choice from the moment of their arrest and throughout all subsequent stages of the criminal justice process.<sup>105</sup> The Committee on the Rights of the Child has clarified that individuals under the age of 18 at the time of the alleged crime have the right to legal assistance at interviews and questioning by the police.<sup>106</sup>

<sup>100</sup> See UN Special Rapporteur on torture: Report on Mission to Ghana, UN Doc. [A/HRC/25/60/Add.1](#) (2014), paras 26 and 96(b)-(c) (legal aid only available to indigent people accused of capital crimes; recommendation to ensure right to lawyer in all circumstances and expand legal aid for all offences from moment of apprehension and throughout investigation and proceedings); Follow up Report on follow-up visit to Ghana, UN Doc. [A/HRC/31/57/Add.2](#) (2015) para 25.

<sup>101</sup> Guideline 4(d) and Guideline 8(d)(i) of the [Guidelines on Arrest, Police Custody and Pre-Trial Detention in Africa](#). CAT Concluding Observations: Burkina Faso, UN Doc. [CAT/C/BFA/CO/1](#) (2013) para 11; CAT Concluding Observations: Kenya, UN Doc. [CAT/C/KEN/CO/2](#) (2013) para 10; CAT Concluding Observations: Jordan, [CAT/C/JOR/CO/3](#) (2015) paras 17-18; CAT Concluding Observations: Sierra Leone, [CAT/C/SLE/CO/1](#) (2014), para 11; Principle 9, para 12 and Guideline 8 paras 67 and 71 of the WGAD Principles and Guidelines on remedies and procedures on the right of anyone deprived of their liberty to bring proceedings before a court, UN Doc. [A/HRC/30/37](#) (2015).

<sup>102</sup> Guideline 8(d)(i) of the [Guidelines on Arrest, Police Custody and Pre-Trial Detention in Africa](#); HRC Concluding Observations: Kenya, UN Doc. [CCPR/C/KEN/CO/3](#) (2012) para 19. See, HRC Concluding Observations: Suriname, UN Doc. [CCPR/C/SUR/CO/3](#) (2015) paras 33-34; Guideline 3, para 43(b) of the [Principles on the Right to Fair Trial in Africa](#); Guideline 8, para 67 of the WGAD Principles and Guidelines on remedies and procedures on the right of anyone deprived of their liberty to bring proceedings before a court, UN Doc. [A/HRC/30/37](#). See UN Special Rapporteur on torture, Report on Mission to Gambia, UN Doc. [A/HRC/28/68/Add.4](#) (2015) paras 41, 43, 44 and 108(b) and (e).

<sup>103</sup> HRC Concluding Observations: Finland, UN Doc. [CCPR/C/FIN/CO/6](#) (2013) para 11; See, UN Special Rapporteur on torture: Report on Mission to Ghana, UN Doc. [A/HRC/25/60/Add.1](#) (2014), paras 26 and 96(b)-(c) (legal aid only available to indigent people accused of capital crimes; recommendation to ensure right to lawyer in all circumstances and expand legal aid for all offences from moment of apprehension and throughout investigation and proceedings) and Follow up Report on follow-up visit to Ghana, UN Doc. [A/HRC/31/57/Add.2](#) (2015) para 25.

<sup>104</sup> Part 3(B)(iii) of the [Principles and Guidelines on Human and Peoples' Rights while Countering Terrorism in Africa](#) states that the right to legal assistance from a lawyer of choice or appointed counsel applies at the moment of arrest or detention and prior to and during any questioning. See, HRC Concluding Observations: United Kingdom, UN Doc. [CCPR/C/GBR/CO/6](#) (2008) para 19; WGAD: Report on Visit to Morocco, UN Doc. [A/HRC/27/48/Add.5](#) (2014), paras 77-78, 83(a); CAT Concluding Observations: China, UN Doc. [CAT/C/CHN/CO/5](#) (2015) paras 12-13.

<sup>105</sup> Guideline 31(g) of the [Guidelines on Arrest, Police Custody and Pre-Trial Detention in Africa](#).

<sup>106</sup> CRC General Comment 10, UN Doc. [CRC/C/GC/10](#) (2007) para 52. See, Guideline 10, para 53(b) of the [UN Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems](#).

International standards that permit access to counsel to be delayed make clear that such delay is permissible only in individual cases in exceptional circumstances, which are set out in the law. The decision to delay access should be made by a judicial or other authority and only in cases in which the delay is considered indispensable in order to maintain security and good order. Even in such cases, however, these standards require that access to counsel should begin not later than 48 hours from the time of arrest or detention.<sup>107</sup> In contrast, the UN Special Rapporteur against torture has repeatedly prescribed that anyone who has been arrested “should be given access to legal counsel no later than 24 hours after the arrest”.<sup>108</sup>

In keeping with these standards, the Committee against Torture has expressed disapproval of laws that permit access to counsel only from the 25<sup>th</sup> hour of detention.<sup>109</sup>

Access to lawyers or legal service providers must not be unlawfully or unreasonably restricted. In addition, states must ensure effective and adequate remedies for those who are not informed of their right to counsel in a timely manner, or whose access to legal assistance is delayed or denied.<sup>110</sup>

#### **Guidelines on Arrest, Police Custody and Pre-Trial Detention in Africa:**

4. The following rights shall be afforded to all persons under arrest:

(d). The right of access, without delay, to a lawyer of his or her choice, or if the person cannot afford a lawyer, to a lawyer or other legal service provider, provided by state or non-state institutions.

8(d). All persons detained in police custody enjoy the following rights in relation to legal assistance:

(i) Access without delay to lawyers and other legal service providers, at the latest prior to and during any questioning by an authority, and thereafter throughout the criminal justice process...

(v) Access to lawyers or other legal service providers should not be unlawfully or unreasonably restricted. If access to legal services is delayed or denied, or detained persons are not adequately informed of their right to access providers of legal services in a timely manner, then States shall ensure that a range of remedies are available, in accordance with the principles set out in Part 8 of these Guidelines.

### **3.2 THE RIGHT TO A LAWYER OF CHOICE**

The right to legal counsel generally means that a person has the right to choose the lawyer who will represent him or her.

The right to legal counsel of choice, including during the pre-trial phase of criminal proceedings, is expressly set out in:

- **Guidelines 4(d) and 31(g) of the Guidelines on Arrest, Police Custody and Pre-Trial Detention in Africa**
- **Sections H(d) and M(2)(e)-(f) and N(2)(d) of the Principles on Fair Trial in Africa**

<sup>107</sup> Principle 7 of the [Basic Principles on the Role of Lawyers](#); Principle 18(3) of the UN [Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment](#); See Principle 15 of the UN [Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment](#); ICJ [Trial Observation Manual for Criminal Proceedings, Practitioners Guide No. 5](#) (2009), Chapter v (4) Right to Legal Assistance Before Trial.

<sup>108</sup> UN Special Rapporteur on torture, UN Doc. [E/CN.4/1990/17](#) (1989) para 272(c); See Special Rapporteur on torture: UN Doc. [E/CN.4/1995/34](#) (1995) para 926(d), UN Doc. [A/56/156](#) (2001) para 39(f).

<sup>109</sup> CAT Concluding Observations: Senegal, UN Doc. [CAT/C/SEN/CO/3](#) (2012) para 10; Togo, UN Doc. [CAT/C/TGO/CO/2](#) (2012) para 10.

<sup>110</sup> Guideline 8(d)(v) [of the Guidelines on Arrest, Police Custody and Pre-Trial Detention in Africa](#), Principle 9 of the [UN Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems](#); see Part 3 (B)(iii) of the [Principles and Guidelines on Human and Peoples' Rights while Countering Terrorism in Africa](#).



- **Part 3(B)(iii) of the Principles and Guidelines on Human and Peoples' Rights while Countering Terrorism in Africa**
- **Principles 1 and 5 of the Basic Principles on the Role of Lawyers**
- **Principle 9, para 12 of the WGAD Principles and Guidelines on remedies and procedures on the right of anyone deprived of their liberty to bring proceedings before a court**

The right to counsel is set out more generally in **article 7(1)(c) of the African Charter** and **article 14(3)(d) of the ICCPR**, which, as noted in **Section 3.1** above, have been interpreted to apply to the pre-trial as well as trial phases of criminal proceedings.

However, individuals do not have an unqualified right to choose their lawyer if the lawyer is appointed by the authorities to represent them.

### 3.3 RIGHT TO AN APPOINTED LAWYER AND TO FREE LEGAL ASSISTANCE

In order to give effect to the right to counsel, particularly where the individual does not have counsel of choice, people who are arrested, detained, suspected of or charged with a criminal offence have the right to have independent and suitably qualified counsel appointed by the State to represent them in cases in which the interests of justice so require.

Furthermore, in order to ensure the right to counsel without discrimination, the services of appointed counsel must be made available free of charge to the individual, if he or she does not have sufficient means to pay for them.

The right to legal aid before trial is expressly set out in the following standards, among others:<sup>111</sup>

- **Guidelines 4(d) and 8(iii) of the Guidelines on Arrest, Police Custody and Pre-Trial Detention in Africa**
- **Principle 6 of the Basic Principles on the Role of Lawyers**
- **Principle 17(2) of the UN Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment**
- **Principle 3 and Guidelines 4 and 11 §55(a) of the UN Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems**
- **Rule 119(2) of the Nelson Mandela Rules.**

These standards are in addition to other standards regarding legal aid, such as **article 14(3)(d) of the ICCPR** and **Principle H(a) of the Principles on the Right to Fair Trial in Africa**.

**Article 7(1)(c) of the African Charter** does not include a specific reference to legal aid. However, the African Court on Human and Peoples' Rights has ruled that the failure of a State, that was also a party to the ICCPR, to ensure that 10 detainees charged with serious crimes were provided with legal aid, or at least were informed of their right to legal aid, after their lawyers withdrew from representing them, violated article 7(1)(c) of the African Charter.<sup>112</sup>

<sup>111</sup> See also the [Lilongwe Declaration on Accessing Legal Aid in the Criminal Justice System in Africa](#), para 3, which states that legal aid programmes should provide legal assistance to individuals at all stages of the criminal justice process including arrest, investigation, bail hearings, pre-trial detention, trials, appeals and other proceedings. The Declaration was adopted by the Conference on Legal Aid in Criminal Justice: the Role of Lawyers and Other Service providers in Africa held in November 2004. It was endorsed by the African Commission in 2006 and has been cited by the African Court on Human and Peoples' Rights (*Thomas v Tanzania*, (005/2013) African Court on Human and Peoples' Rights (2015) para 121).

<sup>112</sup> *Onyango Nganyi & 9 Others v United Republic of Tanzania* (006/2013), Judgment of the African Court on Human and Peoples' Rights (18 March 2016), paras 163 *et seq*; The Court reached the same conclusion in *Thomas v Tanzania*, (005/2013) African Court on Human and Peoples' Rights (2015) paras 86-90, 114-115. In both of these judgments, the Court applied article 7(1)(c) of the African Charter in the light of Tanzania's obligations under article 14(3)(d) of the ICCPR, pursuant to article 7

The determination of whether the interests of justice require the appointment of counsel in a particular case will generally depend on the seriousness of the charges, the complexity of the case and the severity of the potential penalty.<sup>113</sup> In addition, vulnerabilities of the individual related to their age, health or disability should be taken into account.<sup>114</sup>

The interests of justice always require that people facing the death penalty who are not represented by counsel of choice have appointed counsel throughout the proceedings, including pre-trial, trial, appeal, clemency proceedings or pardon, petitions seeking commutation of a sentence and any constitutional challenges.<sup>115</sup>

In accordance with the **UN Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems** people who are charged with offences that are punishable by imprisonment are also entitled to appointed counsel, at all stages of the criminal justice process.<sup>116</sup> In addition, if the interests of justice so require, for example as a consequence of the urgency or complexity of the case, legal aid should be provided regardless of the individual's means.<sup>117</sup>

People under the age of 18 at the time of the alleged crime should be provided with legal aid, without means testing, during interviewing and throughout any proceedings.<sup>118</sup>

The African Commission has, also, repeatedly prescribed that States extend free legal aid to individuals charged with *any* crime who cannot afford to pay the cost of being represented by a lawyer.<sup>119</sup>

The UN Special Rapporteur on torture raised concern about the legal aid system in Gambia that limited legal aid to people charged with serious offences, and left the vast majority of people suspected or accused of criminal offences unrepresented. The Special Rapporteur recommended that authorities invest resources into the national legal aid agency to ensure it has capacity to operate independently and that there are a sufficient number of qualified lawyers to provide legal representation to individuals charged with *any* offence from the moment of their apprehension, through all stages of criminal proceedings including interrogation and investigation.<sup>120</sup>

If a financial means test is applied to determine eligibility for legal aid, preliminary legal aid should be granted to individuals urgently requiring legal assistance pending the outcome of the means test.<sup>121</sup> Ultimately the determination of whether the interest of justice require that counsel be appointed should be made by a judge.

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of the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of the African Court of Human and Peoples' Rights.

<sup>113</sup> Principle 3 of the [UN Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems](#); [HRC General Comment 32](#), UN Doc. CCPR/C/GC/32 (2007), para 38; Section H(b)(i) and (c) of the [Principles on the Right to Fair Trial in Africa](#); Guideline 8(d)(iii) [of the Guidelines on Arrest, Police Custody and Pre-Trial Detention in Africa](#).

<sup>114</sup> Principle 3 (para 23) and Principle 10 of the [UN Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems](#); Guideline 8(d)(iii) [of the Guidelines on Arrest, Police Custody and Pre-Trial Detention in Africa](#).

<sup>115</sup> Section H(c) of the [Principles on the Right to Fair Trial in Africa](#); *Groupe de Travail sur les Dossiers Judiciaires Stratégiques v Democratic Republic of Congo*, (259/2002) ACHPR, (2013), para 82; [HRC General Comment 32](#), UN Doc. CCPR/C/GC/32 (2007), para 38.

<sup>116</sup> Principle 3 (para 20) of the [UN Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems](#).

<sup>117</sup> Principle 3 (para 21) of the [UN Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems](#).

<sup>118</sup> Principle 3 (para 22) and Guideline 1 (para 41(c)), Guideline 6 (para 46) of the [UN Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems](#). See, CRC General Comment 10, UN Doc. C/PRC/C/GC/10 (2007) paras 49 and 52.

<sup>119</sup> ACHPR Concluding Observations: [Botswana](#) (2010), paras 41 and 62; [Sudan](#) (2012) para 79.

<sup>120</sup> UN Special Rapporteur on torture, Report on Mission to Gambia, UN Doc. [A/HRC/C/28/68/Add.4](#) (2015), paras 41-44, 108 (b), (c) and (d).

<sup>121</sup> Guideline 1 (para 41(c)) of the [UN Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems](#).



8(d). All persons detained in police custody enjoy the following rights in relation to legal assistance:

....

iii) Detainees shall be provided with the means to contact a lawyer or other legal service provider of their choice or one appointed by the state. State legal assistance should be provided if the detainee does not have sufficient means or if the interests of justice require, for example given the gravity, urgency or complexity of the case, the severity of the potential penalty, and/or the status of the detainee as vulnerable or otherwise protected under Part 7 of these Guidelines.

**Section H (a), b(i) and (c) of the Principles on the Right to Fair Trial in Africa:**

(a) "the accused ... has a right to have legal assistance assigned to him/her in any case where the interest of justice so require, and without payment by the accused ... if he or she does not have sufficient means to pay for it".

(b) The interests of justice should be determined by considering:

(i) in criminal matters:

- 1) the seriousness of the offence;
- 2) the severity of the sentence...

(c) The interests of justice always require legal assistance for an accused in any capital case, including for appeal, executive clemency, commutation of sentence, amnesty or pardon.

A person who is entitled to have counsel appointed does not have an unqualified right to choose the lawyer who is appointed to represent him or her. However the **Principles on the Right to Fair Trial in Africa** specify that the individual may contest the choice of the lawyer appointed.<sup>122</sup>

The State, and ultimately the judiciary, must ensure that the lawyer appointed is qualified to represent the accused and has the necessary training, experience and skills commensurate with the nature and gravity of the offence allegedly committed and the rights and particular needs of the accused, and that the lawyer is in a position to and exercises the role effectively.<sup>123</sup>

The state must make available adequate means – including financial and human resources – to ensure that legal assistance is available throughout the country, including for those who cannot afford to pay for it.<sup>124</sup> This includes organizing the system to ensure that legal aid is available without delay following arrest or detention, including free of charge, to individuals who are unable to pay.<sup>125</sup>

### 3.4 RIGHT TO INDEPENDENT, COMPETENT AND EFFECTIVE COUNSEL

The right to legal counsel, whether the counsel is a lawyer of choice or is appointed, includes the right to independent, competent and effective counsel.

<sup>122</sup> Section H(d) of the [Principles on the Right to Fair Trial in Africa](#).

<sup>123</sup> Guideline 8(c) and 8(d)(vi) [of the Guidelines on Arrest, Police Custody and Pre-Trial Detention in Africa](#); [HRC General Comment 32](#), UN Doc. CCPR/C/GC/32 (2007) para 38; See Section H(e) of the [Principles on the Right to Fair Trial in Africa](#); see also Principle 13 of the [UN Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems](#).

<sup>124</sup> Principle 3 of the [Basic Principles on the Role of Lawyers](#); Principles 10 (para 33) and Guidelines 11 and 12 of the [UN Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems](#); Guideline 8(a) [of the Guidelines on Arrest, Police Custody and Pre-Trial Detention in Africa](#). See Section G(a) of the [Principles on the Right to Fair Trial in Africa](#). HRC Concluding Observations: Mauritania, UN Doc. [CCPR/C/MRT/CO/1](#) (2013) para 20; Cote d'Ivoire, UN Doc. [CCPR/C/CIV/CO/1](#) (2015) para 20. CAT Concluding Observations: Sierra Leone, UN Doc. [CAT/C/SLE/CO/1](#) (2014) para 11(b); Burkina Faso, UN Doc. [CAT/C/BFA/CO/1](#) (2013) para 11(b); Kenya, UN Doc. [CAT/C/KEN/CO/2](#) (2013), para 25.

<sup>125</sup> CAT Concluding Observations: Senegal, UN Doc. [CAT/C/SEN/CO/3](#) (2012) para 10(c); Togo, UN Doc. [CAT/C/TGO/CO/2](#) (2012) para 10(a); Principle 9 (para 13) of the WGAD Principles and Guidelines on remedies and procedures on the right of anyone deprived of their liberty to bring proceedings before a court, UN Doc. [A/HRC/30/37](#) (2015); [Lilongwe Declaration on Accessing Legal Aid in the Criminal Justice System in Africa](#), para 3.

In certain situations, it may be appropriate to have the work of counsel supplemented by legal assistance provided by legal assistants, law students, paralegals or non-accredited legal advisers with the requisite training and experience. These auxiliary advisers should function in the case under the supervision of a qualified lawyer. In any event, the services provided by persons other than accredited lawyers shall in no way constitute an adequate substitute for the enjoyment of the right to access and assistance by a qualified lawyer.<sup>126</sup>

The role of lawyers is to advise their client of their rights and to act diligently to assist, in every appropriate way, in protecting the rights and interests of their clients. In doing so they must act to uphold human rights. Lawyers must be able act freely and diligently, in accordance with national and international law and recognized standards and ethics of the legal profession.<sup>127</sup>

The authorities, including the courts, must ensure that lawyers are able to perform their professional functions without intimidation, hindrance, harassment or improper interference. They must ensure that lawyers are not identified with their clients or their clients' causes as a result of discharging their professional functions. Furthermore, lawyers must enjoy immunity for statements made in good faith in written and oral pleadings and in appearances before courts and other authorities.<sup>128</sup>

The authorities, and particularly the courts, must ensure and protect the right of individuals to the effective assistance of counsel. When an individual is represented by appointed counsel, the authorities must ensure that the lawyer assigned has the requisite training, skills and experience and competence to represent the individual in the particular case.<sup>129</sup> If appointed counsel is not effective, the court or other responsible authorities must ensure that either counsel performs their duties or is replaced.<sup>130</sup>

### 3.5 RIGHT TO ADEQUATE TIME AND FACILITIES TO COMMUNICATE WITH COUNSEL

In order for the right to counsel to be effective, detained individuals must have adequate opportunity and facilities to communicate confidentially with their lawyer, whether of choice or appointed.

For individuals who are deprived of their liberty in connection with a criminal offence, this right is not only inherent in the right to counsel but also part of the right to adequate time and facilities for the preparation of the defence which is expressly guaranteed under **article 14(3)(b)** of the **ICCPR** and implicitly guaranteed under **article 7** of the **African Charter**.

The right to adequate time and facilities to communicate, in confidence, with counsel, applies upon arrest, to people held in police custody as well as to people held in detention, including pending trial.<sup>131</sup>

<sup>126</sup> Guidelines 8(c) and 8(d)(vi) of the [of the Guidelines on Arrest, Police Custody and Pre-Trial Detention in Africa](#); Guidelines 4 (para 44), 5(para 45(e) and (f)), 14 (paras 67-68) and 16 of the [UN Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems](#); Guideline 8, para 71 of the WGAD Principles and Guidelines on remedies and procedures on the right of anyone deprived of their liberty to bring proceedings before a court, UN Doc. [A/HRC/30/37](#) (2015).

<sup>127</sup> Section I (j-i) of the [Principles on the Right to Fair Trial in Africa](#); Principles 13-15 of the UN [Basic Principles on the Role of Lawyers](#).

<sup>128</sup> Section I (b), (g) and (e) of the [Principles on the Right to Fair Trial in Africa](#); Principles 16-20 of the [Basic Principles on the Role of Lawyers](#).

<sup>129</sup> Section H (e) (ii) and (f)(i) of the [Principles on the Right to Fair Trial in Africa](#); Guideline 8(d)(vi) of the [Guidelines on Arrest, Police Custody and Pre-Trial Detention in Africa](#), Principle 6 of the [Basic Principles on the Role of Lawyers](#); Principle 13 of the [UN Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems](#).

<sup>130</sup> See, HRC [General Comment 32](#), UN Doc. CCPR/C/GC/32 (2007), para 38.

<sup>131</sup> Guidelines 8(d)(ii) (pertaining to police custody) and 14(c) (pertaining to pre-trial detention) of the [Guidelines on Arrest, Police Custody and Pre-Trial Detention in Africa](#); Section N (3)(e) of the [Principles on the Right to Fair Trial in Africa](#); Principle 8 of the [Basic Principles on the Role of Lawyers](#); Principle 18 of the UN [Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment](#); Principles 7 (para 28) and 12 and Guidelines 3 (para 43(d), 4 (para 44(g)) and 5

Access to counsel must not be unlawfully or unreasonably denied or restricted.<sup>132</sup>

The UN Human Rights Committee has raised concern about delays in permitting detainees access to counsel, and about time limits placed on a detainee's meetings with counsel, including in relation to people suspected of terrorism-related offences.<sup>133</sup>

The UN Human Rights Committee concluded that limiting an arrested person's access to counsel to a five-minute conversation and not permitting the individual access to his counsel during questioning or other investigative measures violated the individual's right to adequate time and facilities to prepare a defence and communicate with counsel (**article 14(3)(b)** of the **ICCPR**) and to legal assistance to defend oneself (guaranteed under article **14(3)(d)** of the **ICCPR**).<sup>134</sup>

### 3.5.1 RIGHT TO CONFIDENTIAL COMMUNICATION WITH COUNSEL

The authorities must respect the confidentiality of all communications and consultations between an individual and his or her lawyer, within the bounds of the professional relationship.<sup>135</sup> The authorities must ensure that people deprived of their liberty can consult with their legal counsel without delay, interception or censorship.<sup>136</sup>

This applies to telephone calls, written and electronic correspondence, face-to-face meetings and all other forms of communication.<sup>137</sup>

The authorities are required to ensure that all police stations and detention centres throughout the country, including in rural areas, have adequate facilities for individuals to communicate privately (including by telephone) and to meet in private with their lawyers. The facilities must be organized to ensure the confidentiality of oral and written communications between individuals and their lawyers.<sup>138</sup> Taking security needs into consideration, oral communications between an individual and his or her lawyer may be held in sight of officials but must be out of the hearing of officials.<sup>139</sup>

In addition an arrested or detained individual should be permitted to keep documents related to the case in his or her possession. The confidentiality of such documents should be respected.<sup>140</sup>

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(para 45(b)) of the [UN Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems](#); Rules 61 and 120 of the Nelson Mandela Rules.

<sup>132</sup> Paragraph 8(d)(v) of the [Principles and Guidelines on Human and Peoples' Rights while Countering Terrorism in Africa](#); Guideline 8, para 70 of the WGAD Principles and Guidelines on remedies and procedures on the right of anyone deprived of their liberty to bring proceedings before a court, UN Doc. [A/HRC/30/37](#) (2015).

<sup>133</sup> HRC Concluding Observations: France, UN Doc. [CCPR/C/FRA/CO/5](#) (2015), para 9.

<sup>134</sup> *Zhuk v Belarus*, (1010/2009) HRC, UN Doc. [CCPR/C/109/D/1010/2009](#) (2013) para 8.5; see also *Kovaleva and Kozar v Belarus*, (2120/2011), HRC, UN Doc. [CCPR/C/106/D/2120/2011](#) (2012) para 11.5 (allegations para 3.6).

<sup>135</sup> Section I(c) of the [Principles on the Right to Fair Trial in Africa](#); Guidelines 8(d)(ii), 14(c) and 31(c)(iii) of the [Guidelines on Arrest, Police Custody and Pre-Trial Detention in Africa](#); Principle 8 of the [Basic Principles on the Role of Lawyers](#).

<sup>136</sup> Section N (3)(e) of the [Principles on the Right to Fair Trial in Africa](#); Principle 8 of the [Basic Principles on the Role of Lawyers](#); Principle 18(3) of the UN [Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment](#); Principles 7 and 12 and Guidelines 3 §43(d), 4 §44(g) and 5 §45(b) of the [UN Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems](#); Rules 61 and 120 of the [Nelson Mandela Rules](#).

<sup>137</sup> For example, Guideline 8(d)(ii) of the [Guidelines on Arrest, Police Custody and Pre-Trial Detention in Africa](#); Guideline 8, para 69 of the WGAD Principles and Guidelines on remedies and procedures on the right of anyone deprived of their liberty to bring proceedings before a court, UN Doc. [A/HRC/30/37](#) (2015).

<sup>138</sup> CAT Concluding Observations: Jordan, UN Doc. [CAT/C/JOR/CO/2](#) (2010) para 12.

<sup>139</sup> For example, Guideline 8(d)(ii) of the [Guidelines on Arrest, Police Custody and Pre-Trial Detention in Africa](#); Principle 8 of the [Basic Principles on the Role of Lawyers](#); Rules 60 and 120 of the [Nelson Mandela Rules](#).

<sup>140</sup> Rule 53 of Nelson Mandela Rules; See Principle 7 (para 28) of the [UN Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems](#).

The failure to ensure that an arrested person has prompt and adequate access to counsel and the failure to ensure the confidentiality of communications between a person and their counsel can result in a violation of the right to assistance of counsel.<sup>141</sup> It may also render unfair the criminal proceedings brought against the individual.

Information gained by failing to respect the confidentiality of an individual's communication with his or her lawyer is inadmissible as evidence, unless it concerns the commission of a continuing or contemplated crime.<sup>142</sup>

### 3.6 WAIVER OF COUNSEL

Individuals who are suspected or accused of a criminal offence may decide not to be represented by a lawyer during questioning or the investigation.<sup>143</sup> This is consistent with the right to defend oneself set out in **article 14(3)(d)** of the **ICCPR**.

A person's decision to waive the right to legal representation during questioning or pre-trial should be established in an unequivocal manner and accompanied by adequate safeguards. Such safeguards should ensure that the person has been fully informed of and understands his or her right to counsel, including appointed counsel, and that they are aware of the risks of waiving their right to counsel.<sup>144</sup>

In order to ensure respect for the right to counsel, the police must be prohibited from interviewing any individual in the absence of a lawyer, unless the individual has made an informed and voluntary waiver of counsel.<sup>145</sup> However, if the individual is under the age of 18, no interview may be carried out in the absence of a lawyer or other legal aid provider and the parent (if in the child's best interests) or guardian.<sup>146</sup>

The mere fact that an accused person has answered questions from the police without speaking to a lawyer must not, in itself, be interpreted as a waiver.

A waiver of counsel must be revocable at any time.

The right to represent oneself, including in pre-trial proceedings, may be subject to restrictions, in the interests of justice, such as when the individual is charged with a particularly serious offence or when there is a risk of intimidation of witnesses. However any such restrictions must have an objective basis and be reasonable and proportionate in the circumstances of the particular case.<sup>147</sup>

<sup>141</sup> *Grishkovtsov v Belarus*, HRC, UN Doc. [CCPR/C/113/D/2013/2010](#) (2015) para 8.5.

<sup>142</sup> Principle 18(5) of the UN [Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment](#); Guideline 8(d)(ii) [of the Guidelines on Arrest, Police Custody and Pre-Trial Detention in Africa](#); Guideline 8, para 69 of the WGAD Principles and Guidelines on remedies and procedures on the right of anyone deprived of their liberty to bring proceedings before a court, UN Doc. [A/HRC/30/37](#) (2015).

<sup>143</sup> For information about self-representation during trial, see ICJ, [Trial Observation Manual for Criminal Proceedings, Practitioners Guide No. 5](#) (2009), Chapter vi (5) Right to Defence; [Amnesty International: Fair Trial Manual, 2<sup>nd</sup> edition](#), (2014), Chapter 20.2.

<sup>144</sup> See Principle 8, para 29 and Guideline 3, para 43(b) and (i) of the [UN Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems](#).

<sup>145</sup> Guideline 3 (para 43(b)) of the [UN Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems](#).

<sup>146</sup> Guideline 10, para 53(b) of the [UN Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems](#).

<sup>147</sup> HRC General Comment 32, UN Doc. [CCPR/C/GC/32](#) (2007) para 37.

## 4. RIGHT TO CONTACT WITH OTHERS

### 4.1 RIGHT TO NOTIFY FAMILY MEMBER OR THIRD PERSON

Everyone who is arrested or detained has the right to inform, or have the authorities notify, a family member or another person that they have been arrested or detained and where they are being held. In addition, each time the individual is transferred, they have the right to notify their family or third person where they are being held.<sup>148</sup>

Such notification should take immediately or at least promptly.<sup>149</sup> While the AU standards do not expressly contemplate delay, UN standards do allow for some small delay in notification if absolutely necessary, if provided for by law and if the transmission of the information would hinder a criminal investigation.<sup>150</sup> Such delays however should be strictly limited in duration, lasting no more than a matter of days.<sup>151</sup>

While the right to notify family or a third person is not expressly set out in the ICCPR, the UN Human Rights Committee has held that the detention of a man for three days, without informing his relatives of his whereabouts and in the absence of legal process to challenge the legality of his detention, violated his rights to liberty and the prohibition of arbitrary detention under **article 9(1)** of the **ICCPR**.<sup>152</sup>

Women and men who are caregivers responsible for children who are arrested or detained should be permitted to make arrangements for any children for whom they are responsible. Moreover, reasonable alternatives to detention should be explored, to take into account the best interests of the children. People deprived of their liberty must be provided with facilities to contact their families, including their children, their children's guardians and legal representatives.<sup>153</sup>

If a child is arrested, the parent(s) or, if applicable, guardian, of the child must be notified immediately, unless it is not in the child's best interests to do so, in which case the authority charged with the welfare of the child must be notified.<sup>154</sup>

As described in **Chapter 11.2**, all persons who are arrested or detained must be held only in facilities that are officially acknowledged and gazetted places of detention and no one shall be held in secret detention.<sup>155</sup>

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<sup>148</sup> Principle 16(1) of the UN [Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment](#); Rule 68 of the [Nelson Mandela Rules](#); Guideline 3 para 43(e) of the [UN Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems](#); CAT General Comment 2, UN Doc. [CAT/C/GC/2](#) (2008) para 13; Guideline 20(a) of [the Robben Island Guidelines](#); Section M(2)(c) of the [Principles on the Right to Fair Trial in Africa](#); Guideline 4(f) and 5, and 25(i) of [the Guidelines on Arrest, Police Custody and Pre-Trial Detention in Africa](#);

<sup>149</sup> Guideline 5 indicates that the facilities to notify family of the arrest or detention should be provided at the time of arrest, but neither the Guidelines nor the provisions of the Robben Island Guidelines or the Principles on the Right to Fair Trial cited in footnote 1 specify a timeframe within which the notification should occur. Paragraphs 1 and 4 of Principle 16 of the UN [Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment](#) state that it should occur "promptly and "without delay", in all but exceptional circumstances.

<sup>150</sup> Principles 16(4) and 15 of the UN [Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment](#); Guideline 3, para 43(e) of the [UN Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems](#).

<sup>151</sup> Principles 16(4) and 15 of the UN [Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment](#); UN Special Rapporteur on torture, UN Doc. [A/HRC/13/39/Add.5](#) (2010) para 82.

<sup>152</sup> *Khadzhiev v Turkmenistan*, UN Doc. [CCPR/C/113/D/2079/2011](#) (2015), para 8.6.

<sup>153</sup> Guideline 32(b)(iii-iv) of [the Guidelines on Arrest, Police Custody and Pre-Trial Detention in Africa](#), Rule 2(2) of [the Bangkok Rules](#); UN General Assembly Resolution 65/229, UN Doc. [A/RES/65/229](#) (2011), para 9.

<sup>154</sup> Section O(g) of the [Principles on the Right to Fair Trial in Africa](#); Guideline 31(c)(i) of [the Guidelines on Arrest, Police Custody and Pre-Trial Detention in Africa](#); Rule 10.1 of [The Beijing Rules](#); Guideline 10 para 53(b) of the [UN Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems](#).

<sup>155</sup> Guideline 10(f) of [the Guidelines on Arrest, Police Custody and Pre-Trial Detention in Africa](#); Section M(6) the [Principles on the Right to Fair Trial in Africa](#); articles 17(2)(c), 17(3) and 18 of the [Convention on Enforced Disappearance](#); HRC General Comment 35, UN Doc. [CCPR/C/GC/35](#) (2014), para 58; [HRC General Comment 20](#), para 11.

## 4.2 RIGHT TO CONTACT WITH THE OUTSIDE WORLD AND VISITS

In addition to the right of access to counsel, individuals who are arrested or detained in connection with a criminal offence have the right to communicate with and receive visits from family. They also have the right to communicate with the outside world. Such communication and visits with family and members of the outside world should be subject only to conditions or restrictions that are set out in law and are both necessary and reasonable in the administration of justice and security of the institution.<sup>156</sup> (For information about access to and communication with lawyers see **Chapter 3**.)

The right to such contact is also an essential safeguard against incommunicado or secret detention and human rights violations such as arbitrary detention, enforced disappearance, and torture or other ill-treatment.

The right to contact with family and others may also facilitate the individual's access to a lawyer of his or her choice.

The UN Human Rights Committee has called for people held in *garde a vue* or preventive detention to have access to their family, a lawyer, and a doctor as well as to be brought promptly before a judge.<sup>157</sup> It also raised concern about provisions of a criminal procedure code which prevent a person arrested or detained in connection with a terrorism-related offence, or violent or organized crime, from communicating with others before being brought before a court.<sup>158</sup>

To ensure respect for the right to contact with the outside world, authorities must ensure that facilities such as telephones are available in all places where people who have been arrested or detained are held so that they can communicate with relatives, lawyers and others.<sup>159</sup> Facilities must also be provided so that they can receive visits. (See also **Chapter 3.5.1** regarding facilities for confidential communications with lawyers.)

The authorities should particularly encourage and facilitate the contact by detainees with their families, including children, and take measures to counterbalance disadvantages faced by women and men detained in institutions far from their homes. The authorities should also provide facilities which ensure that visits of children take place in an environment that is conducive to a positive experience and allows open contact between the parent and child.<sup>160</sup> Entry procedures and searches of visitors including children must not be degrading; they should be carried out with respect and sensitivity. Body cavity searches should be avoided and not carried out on children.<sup>161</sup>

The failure to permit a detained person access to their family may amount to inhuman treatment.<sup>162</sup>

## 4.3 INCOMMUNICADO DETENTION

Incommunicado detention is detention without access to the outside world. It leaves the detainee at the mercy of those holding him or her, without independent oversight. It facilitates torture and other ill-treatment and enforced disappearance. It may, depending on the circumstances, itself constitute torture or other cruel, inhuman or degrading treatment or enforced disappearance.<sup>163</sup>

<sup>156</sup> These rights and the scope of permissible restrictions are set out variously in: article 17(2)(d) of the [Convention on Enforced Disappearance](#); Section M(2)(g) of the [Principles on the Right to Fair Trial in Africa](#); Rule 26 of the [Bangkok Rules](#); Guidelines 20 and 31 of the [Robben Island Guidelines](#); Part 3(b)(vii) of the [Principles and Guidelines on Human and Peoples' Rights while Countering Terrorism in Africa](#); Principle 19 of UN [Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment](#); Rule 58 of the [Nelson Mandela Rules](#); Rule 26 of the [Bangkok Rules](#). See Guideline 4(f) (contact and access) of the Guidelines on Arrest, Police Custody and Pre-Trial Detention in Africa.

<sup>157</sup> HRC Concluding Observations: Chad, UN Doc. [CCPR/C/TCD/CO/2](#) (2014), para 15.

<sup>158</sup> HRC Concluding Observations: Portugal, UN Doc. [CCPR/C/PRT/CO/4](#) (2012) para 6.

<sup>159</sup> See, WGAD Report on visit to Brazil, UN Doc. [A/HRC/27/48/add.3](#) (2014) para 110.

<sup>160</sup> See Rules 26 and 28 of the [Bangkok Rules](#).

<sup>161</sup> Rule 60 of the [Nelson Mandela Rules](#); Rule 21 of the [Bangkok Rules](#).

<sup>162</sup> [Civil Liberties Organisation v Nigeria](#) (151/96), ACHPR, 13th Annual Report (1999), para 27.

<sup>163</sup> Article 2 of the [Convention on Enforced Disappearance](#) defines enforced disappearance as "the arrest, detention, abduction or any other form of deprivation of liberty by agents of the State or by persons or groups of persons acting with the authorization, support or acquiescence of the State,



When incommunicado detention results in the failure to bring a detainee before a court promptly (generally within 48 hours) following the deprivation of their liberty, it violates **article 9(3)** of the **ICCPR**, and is inconsistent with **Guideline 27** of the **Robben Island Guidelines** and **Section M(3)** of the **Principles on the Right to Fair Trial in Africa**.<sup>164</sup> (See **Chapter 6** on the right to be brought promptly before a judge.)

Prolonged incommunicado detention, meaning incommunicado detention beyond a very short period, necessarily violates the right to liberty and is generally regarded as a violation of the prohibition of torture and other ill-treatment.<sup>165</sup>

WGAD held that detaining an individual for 10 days without bringing him to a court or allowing him access to a lawyer, and, during this time, denying his detention to his family, amounted to a violation of the right to liberty.<sup>166</sup>

Incommunicado detention is altogether prohibited in **Guideline 24** of the **Robben Island Guidelines**.

The UN Human Rights Committee has called on States to legislate against the practice of incommunicado detention and to end it.<sup>167</sup>

Holding an individual incommunicado is inherently coercive. The **ICCPR** and standards established by the African Commission prohibit people from being coerced into “confessing” guilt or testifying against themselves.<sup>168</sup> Therefore, any confession, statement or other information or evidence obtained from a person held incommunicado may not be admitted as evidence or considered as probative of any fact at trial or in sentencing.<sup>169</sup>

#### 4.4 RIGHT OF ACCESS TO DOCTORS AND HEALTH CARE IN POLICE CUSTODY

Police and those in charge of detention facilities are responsible for ensuring protection and respect for the health of the people in their custody. To meet these obligations they must ensure that anyone deprived of their liberty has the right to be examined by a doctor as promptly as possible, and, when it is needed, to receive health care and treatment, free of charge.<sup>170</sup> Medical examinations of women, and their medical care and treatment, must take into account the particular needs of women.<sup>171</sup> As noted in **Chapter 11.4** (on respect for detainees’ right to health) women have the right to request to be examined by a women health care professional rather than a man; and if the request is not accommodated, have the right to have a woman present during the examination.<sup>172</sup>

Medical examinations must be undertaken in full confidentiality. Public officials should not be present during medical examinations of people in custody, unless there are exceptional and justifiable circumstances.<sup>173</sup>

Accurate medical records must be kept, and are subject to the rules of medical confidentiality. Thus the individual examined has a right to them and they should be

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followed by a refusal to acknowledge the deprivation of liberty or by concealment of the fate or whereabouts of the disappeared person, which place such a person outside the protection of the law.”

<sup>164</sup> HRC General Comment 35, UN Doc. [CCPR/C/GC/35](#) (2014), para 35.

<sup>165</sup> HRC General Comment 35, UN Doc. [CCPR/C/GC/35](#) (2014), para 56.

<sup>166</sup> [Rizvi Hassan v People’s Republic of Bangladesh](#), (Opinion No. 51/2013), WGAD, UN Doc. A/HRC/WGAD/2013/51 (2014), paras. 17, 20-23.

<sup>167</sup> [HRC General Comment 20](#), para 11; HRC Concluding Observations: Spain, UN Doc. [CCPR/C/ESP/CO/6](#) (2015), para 17.

<sup>168</sup> Article 14(3)(g) of the **ICCPR**; Section N (6)(d) of the [Principles on the Right to Fair Trial in Africa](#).

<sup>169</sup> Section N(6)(d)(i) of the [Principles on the Right to Fair Trial in Africa](#); [Egyptian Initiative for Personal Rights and Interights v Egypt](#) (334/06) ACHPR (2011), paras 212-213, 218-219; Part 4(C)(i) of the [Principles and Guidelines on Human and Peoples’ Rights while Countering Terrorism in Africa](#). For further information on the requirements to exclude evidence obtained in violation of international standards, see, ICJ [Trial Observation Manual for Criminal Proceedings, Practitioners Guide No. 5](#) (2009), Chapter vi (11) and [Amnesty International: Fair Trial Manual, 2<sup>nd</sup> edition](#), Chapter 17.

<sup>170</sup> Article 6 of the [Code of Conduct for Law Enforcement Officials](#); Rules 24-25, 27, 28, 30 of the [Nelson Mandela Rules](#); Principle 24 of the UN [Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment](#); Guideline s 20(b) and 31 of [the Robben Island Guidelines](#); Guideline 4(g) of [the Guidelines on Arrest, Police Custody and Pre-Trial Detention in Africa](#); See, Part 3(B)(vi) of the [Principles and Guidelines on Human and Peoples’ Rights while Countering Terrorism in Africa](#).

<sup>171</sup> Rule 28 of the [Nelson Mandela Rules](#).

<sup>172</sup> Rule 102 of [the Bangkok Rules](#).

<sup>173</sup> Rule 31 of the [Nelson Mandela Rules](#); CAT Concluding Observations: Ghana, UN Doc. [CAT/C/GHA/CO/1](#) (2011) para 10(e).

disclosed to those persons to whom the individual authorizes disclosure. They should be transferred in full confidentiality if the individual is transferred from one place of custody to another.

People in police custody should be informed of their right to see a doctor.<sup>174</sup> Detainees should have the right to see and be examined by an independent medical doctor of their choice.<sup>175</sup>

Requests to see a doctor should not be screened by police officers.<sup>176</sup>

The relationship between the physician or other health-care professionals and individuals in custody should be governed by the same ethical and professional standards as those applicable to patients in the community.<sup>177</sup>

The **Nelson Mandela Rules** contain detailed provisions about the rights of people deprived of their liberty to medical examinations, care and treatment. They cover access to medical records, medical confidentiality and the duties of the authorities and medical professionals.<sup>178</sup> The **Bangkok Rules** contain additional and gender-specific provisions concerning medical examinations and health care for women deprived of their liberty.<sup>179</sup>

If, in the course of examining a detainee upon admission or providing medical care thereafter, health-care professionals become aware of any signs of torture or other cruel, inhuman or degrading treatment or punishment, they should fully and accurately document them and report the case to the competent medical, administrative or judicial authority. Proper procedural safeguards should be followed in order not to expose the detainee or associates to foreseeable risk of reprisals.

People who allege that they have been subjected to torture or other ill-treatment should be examined without delay by an independent doctor, in a manner consistent with the Istanbul Protocol.<sup>180</sup>

Denial of medical care to an injured detainee or those otherwise in need can amount to a violation of the detained individual's right to be treated with dignity and to inhuman or degrading treatment or punishment.<sup>181</sup>

(See, Chapter 11.4 of the Right of detainees to health)

#### 4.5 RIGHT OF FOREIGN NATIONALS TO CONSULAR ASSISTANCE

Foreign nationals who are arrested or detained have the right to communicate and receive visits from officials of the country of which they are nationals. If they are refugees or are under the protection of an intergovernmental organization, they have the right to communicate and receive visits from representatives of the organization or of the State

<sup>174</sup> Section M(2)(b) of the [Principles on the Right to Fair Trial in Africa](#); Guideline 20(b) and (d) of [the Robben Island Guidelines](#).

<sup>175</sup> For example, CAT Concluding Observations: Ghana, UN Doc. [CAT/C/GHA/CO/1/1](#) (2011) para 10; Rwanda, UN Doc. [CAT/C/RWA/CO/1](#) (2012), para 12; See, CAT Concluding Observations: Azerbaijan, UN Doc. [CAT/C/AZE/CO/4](#) (2015) paras 12-13

<sup>176</sup> SPT: Sweden, UN Doc. [CAT/OP/SWE/1](#) (2008), para 64.

<sup>177</sup> Rule 32 of the [Nelson Mandela Rules](#).

<sup>178</sup> Rules 24-35 of the [Nelson Mandela Rules](#), see also rules 46, 70 and 71; See also Guideline 16(d) of [the Guidelines on Arrest, Police Custody and Pre-Trial Detention in Africa](#).

<sup>179</sup> Rules 6-18 of [the Bangkok Rules](#).

<sup>180</sup> Guideline 19 of the Robben Island Guidelines; *Egyptian Initiative for Personal Rights and Interights v Egypt*, (334/06) ACHPR (2011) paras 172-177; see *Titanji Duga Ernest (on behalf of Cheonumu Martin and Others) v Cameroon*, (287/04) ACHPR (2014) para 52.

<sup>181</sup> See, *Egyptian Initiative for Personal Rights and Interights v Egypt*, (334/06) ACHPR (2011) paras 172-177; *Titanji Duga Ernest (on behalf of Cheonumu Martin and Others) v Cameroon*, (287/04) ACHPR (2014); *A.S. v Nepal*, HRC, UN Doc. [CCPR/C/115/D/2077/2011](#) (2015) para 8.4; *E.N. v Burundi*, (578/213), CAT, UN Doc. [CAT/C/56/D/578/2013](#) (2015) para 7.2, 7.5-7.6.



where they reside.<sup>182</sup> The choice of whether to make such contact and receive visits is up to the detainee.

Representatives of the detainee's country or relevant organization are often able to help the individual procure legal representation and monitor its quality and obtain evidence in the country of origin. They have the right to visit the detainee and can also monitor the conditions under which the individual is held. (See **Chapter 2.4** on the right to notification of consular assistance)

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<sup>182</sup> Article 36 of [the Vienna Convention on Consular Relations](#); Article 16(7) of [Convention on Migrant Workers](#); Article 17(2)(d) of [Convention on Enforced Disappearance](#); Rule 62 of the [Nelson Mandela Rules](#); Rule 2(1) of [the Bangkok Rules](#); Section M(2)(e) of the [Principles on the Right to Fair Trial in Africa](#); Guideline 4(f) of the [Guidelines on Arrest, Police Custody and Pre-Trial Detention in Africa](#); Part 3(B)(vii) of the [Principles and Guidelines on Human and Peoples' Rights while Countering Terrorism in Africa](#).

## 5. PRESUMPTION OF RELEASE FROM CUSTODY AND POLICE BAIL

### 5.1 PRESUMPTION OF RELEASE

States must ensure that it is not the general rule that individuals arrested, detained or charged with a criminal offence are held in custody pending investigation or trial. Rather, unless and until individuals are convicted of a criminal offence, they generally may not be deprived of liberty, although certain exceptions may obtain, as described below.

The presumption of release is based on and considered to be inherent in the right to liberty. It is also inherent in the right of every person suspected or accused of a criminal offence to be presumed innocent until and unless proved guilty in the course of proceedings that meet international standards of fairness before an independent, impartial and competent court. (See also **Chapter 10.1** on the presumption of innocence).

While the presumption of release is not expressly set out in the **African Charter** it is implicit in the right to liberty in **article 6**, and it is set out in the following standards that have been established by the African Commission:

- **Section M(1)(e) of the Principles on Fair Trial in Africa**
- **Paragraphs 1(b), 7, 10-11, 31, 32(a) of the Guidelines on Arrest, Police Custody and Pre-Trial Detention in Africa**
- **Part 3(C) of the Principles and Guidelines on Human and Peoples' Rights while Countering Terrorism in Africa**

The presumption of release is also expressly set out in a number of international treaty and non-treaty standards adopted by the UN including:

- **Article 9(3) of the ICCPR**
- **Article 37(b) of the Convention on the Rights of the Child**
- **Article 16(6) of the Migrant Workers Convention**
- **Principle 39 of the UN Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment**
- **Rule 6 of the Tokyo Rules**

Standards that affirm a presumption of release, and certain others, explicitly recognize that:

- a person's release may be subject to guarantees to appear for trial, such as bail, or requirements to report to the authorities, or monitoring, for example by wearing an electronic tag;
- there are circumstances when an accused may, exceptionally, be detained pending trial, when necessary and proportionate to a legitimate purpose on which the continued detention is based .

#### **Section M(1)(e) of the [Principles on the Right to Fair Trial in Africa](#):**

Unless there is sufficient evidence that deems it necessary to prevent a person arrested on a criminal charge from fleeing, interfering with witnesses or posing a clear and serious risk to others, States must ensure that they are not kept in custody pending their trial. However, release may be subject to certain conditions or guarantees, including the payment of bail.

#### **Article 9(3) of the ICCPR:**

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

When the authorities seek to impose conditions on a person's release following arrest or seek their continued detention pending investigation or trial, the burden rests with the State to prove the need for such conditions for release or detention. In particular, the State must prove that the conditions of detention are necessary and proportionate, in light of evidence in the particular case that there is a risk that the individual will flee from justice, harm others or interfere with the evidence or investigation. In the case of a request for detention, the State must also establish that the risk cannot be allayed by other means.<sup>183</sup> This standard remains applicable no matter how serious the offence for which the person has been arrested, detained or charged.<sup>184</sup>

Detention pending trial is never permissible if the criminal offence concerned is not punishable by a term of imprisonment.<sup>185</sup>

The UN Human Rights Committee has stated that the relevant factors to be considered when determining whether to extend detention pending trial in connection with an imprisonable offence should be set down in law in clear and restrictive terms "and should not include vague and expansive standards such as public security".<sup>186</sup>

Furthermore, the UN Human Rights Committee clarified that:

- detention before trial must not be mandatory for all people charged with a particular offence or based on the potential punishment alone; instead a determination must be based on the circumstances of the particular case and the individual;
- the fact that the suspect is a foreign national is not, in and of itself, adequate proof that the individual presents a flight risk.<sup>187</sup>

Based on the principles and standards of juvenile justice, the detention of people under the age of 18 should be a matter of last resort and for the shortest appropriate period of time.<sup>188</sup> Additionally, pregnant women and mothers of infants should not generally be kept in custody pending trial.<sup>189</sup> At a minimum, for women with caretaking responsibilities for children, the best interests of the child should be considered, along with the possibility of suspending any detention.<sup>190</sup> The same consideration is applicable to men with caretaking responsibilities for children.

## 5.2 POLICE BAIL

<sup>183</sup> HRC General Comment 35, UN Doc. [CCPR/C/GC/35](#) (2014), para 38; paragraph 7(a) and 11(a-c) of the [Guidelines on Arrest, Police Custody and Pre-Trial Detention in Africa](#). See, Section M(1)(e) of the [Principles on the Right to Fair Trial in Africa](#); Part 3(C) of the [Principles and Guidelines on Human and Peoples' Rights while Countering Terrorism in Africa](#).

<sup>184</sup> HRC Concluding Observations: United Kingdom, UN Doc. [CCPR/C/GBR/CO/7](#) (2014) para 14.

<sup>185</sup> Paragraph 10(c) of the [Guidelines on Arrest, Police Custody and Pre-Trial Detention in Africa](#).

<sup>186</sup> HRC General Comment 35, UN Doc. [CCPR/C/GC/35](#) (2014), para 38.

<sup>187</sup> HRC General Comment 35, UN Doc. [CCPR/C/GC/35](#) (2014), para 38.

<sup>188</sup> Article 37(b) of the Convention on the Rights of the Child; Guideline 31(a)(iv) of the [Guidelines on Arrest, Police Custody and Pre-Trial Detention in Africa](#); HRC [General Comment 32](#), UN Doc. [CCPR/C/GC/32](#) (2007) para 42. See, [CRC General Comment 10](#), UN Doc. [CRC/C/GC/10](#) (2007) paras 79-80.

<sup>189</sup> Section M(1)(f) of the [Principles on the Right to Fair Trial in Africa](#); Part 3(C) of the [Principles and Guidelines on Human and Peoples' Rights while Countering Terrorism in Africa](#); UN [General Assembly resolution 65/229](#), UN Doc. [A/RES/65/229](#) (2010) para 9.

<sup>190</sup> See, Guideline 32(b)(iii) of the [Guidelines on Arrest, Police Custody and Pre-Trial Detention in Africa](#).

The first opportunity at which release should be considered is immediately following the arrest and detention of an individual in police custody.

The **Guidelines on Arrest, Police Custody and Pre-Trial Detention in Africa** affirm that everyone detained in police custody has the right to apply for release from police custody on bail or bond and has a presumptive right to be released on bail or bond, pending investigation and questioning by an investigating authority or appearance before a court.<sup>191</sup>

The **Guidelines on Arrest, Police Custody and Pre-Trial Detention in Africa** require States to ensure that officials authorized to make decisions on police bail or bond do so on the basis of the principle that continuing to detain an individual in police custody should be a measure of last resort, used only when necessary and when no other alternatives are available.<sup>192</sup>

In addition such officials may decide to continue police custody only if:

- there are reasonable grounds to believe that the individual has been involved in the commission of a criminal offence that carries a term of imprisonment as a possible punishment;
- there is a danger that the individual will abscond or commit a serious offence or that the release will not be in the interests of justice;
- there are no alternatives to detention that will adequately address the risk(s).<sup>193</sup>

If the official decides not to release the individual on bail or bond, the individual has the right to prompt access to a judicial body to appeal or seek review of the decision.<sup>194</sup>

A lawful decision to detain an individual in police custody is time limited. The maximum period a person may be detained in police custody must be set out in the law.

The **Guidelines on Arrest, Police Custody and Pre-Trial Detention in Africa** specify and the Committee against Torture has indicated that the maximum duration of police custody should be no more than 48 hours. Any extensions to this period must be made by a competent judicial authority, on grounds and in a manner consistent with international standards.<sup>195</sup>

This standard takes into account the (generally limited) conditions of detention in most police stations as well as the role of the police in investigations, and is consistent with the rights to liberty and the right of everyone arrested or detained with a criminal offence to be brought promptly before a court. As described in **Chapter 6.1.2** (on the timeframe for the hearing), international human rights bodies have clarified that an individual arrested or detained in connection with a criminal charge must, in the absence of extenuating circumstances, be brought before a court within 48 hours of the arrest. As also explained in **Chapter 6.1** (on the right to be brought promptly before a judge), for people arrested or detained on a criminal offence, this hearing before a judicial authority should mark the end of detention in police custody. If the judge orders the individual to continue to be detained, as a safeguard, including against ill-treatment, he or she should be transferred to a facility that is not under the control of the same authorities who are charged with investigating the alleged offence.<sup>196</sup>

#### **Guidelines on Arrest, Police Custody and Pre-Trial Detention in Africa:** 4. Rights of an arrested person

<sup>191</sup> Guidelines 4(i) and 7(a) [of the Guidelines on Arrest, Police Custody and Pre-Trial Detention in Africa](#).

<sup>192</sup> Guidelines 7(a) [of the Guidelines on Arrest, Police Custody and Pre-Trial Detention in Africa](#).

<sup>193</sup> Guidelines 7(a) and 11 [of the Guidelines on Arrest, Police Custody and Pre-Trial Detention in Africa](#).

<sup>194</sup> Paragraph 7(b)(i) [of the Guidelines on Arrest, Police Custody and Pre-Trial Detention in Africa](#).

<sup>195</sup> Paragraph 7(b)(ii) [of the Guidelines on Arrest, Police Custody and Pre-Trial Detention in Africa](#); CAT Concluding Observations: Burundi, UN Doc. [CAT/C/BDI/CO/2](#) (2014) para 10.

<sup>196</sup> See, HRC General Comment 35, UN Doc. [CCPR/C/GC/35](#) (2014), para 36; UN Special Rapporteur on torture, UN Doc. [E/CN.4/2003/68](#) (2002) para 26(g).

The following rights shall be afforded to all persons under arrest:

...

i. The right to apply for release on bail or bond pending investigation or questioning by an investigating authority and/or appearance in court.

....

7. Safeguards for police custody

a. All persons detained in police custody shall have a presumptive right to police bail or bond. States shall ensure that competent authorities and officials within the state's criminal justice system authorised to grant police bail or bond make decisions based on the criteria set out in Part 3 of these Guidelines.

b. If detention in police custody is determined by the competent authority to be absolutely necessary:

i. All persons arrested and detained have the right to prompt access to a judicial authority to review, renew and appeal decisions to deny police bail or bond.

ii. The maximum duration of police custody, prior to the obligation to bring the arrested person before a judge, shall be set out in national law that prescribes time limits of no more than 48 hours extendable in certain circumstances by a competent judicial authority, consistent with international law and standards.



## 6. THE RIGHT TO BE BROUGHT PROMPTLY BEFORE A JUDGE

To safeguard the right to liberty and other human rights, all forms of detention or imprisonment must be ordered by or subject to the effective control of judicial authorities.<sup>197</sup>

It should be noted that this right is distinct from, and not alternative to, the right of a person to access a court in order to challenge the lawfulness of his or her or another person's detention (through *habeas corpus* or similar procedures), which is discussed in **Chapter 7**.

### 6.1 THE RIGHT TO BE BROUGHT PROMPTLY BEFORE A JUDGE

Everyone suspected of or charged with a criminal offence who is arrested or detained must be brought by the authorities before a judge or other person authorized by law to discharge judicial power, promptly following their arrest.

This right, which is set out in **article 9(3) of the ICCPR** and a number of other international standards,<sup>198</sup> is an important safeguard of the right to liberty and, in criminal cases, the presumption of innocence. It aims to prevent human rights violations including unlawful or arbitrary arrest and detention, enforced disappearance and torture or other ill-treatment. This right therefore must never be restricted, even during times of emergency.<sup>199</sup>

While the **African Charter** does not expressly set out this right, it is generally considered to be inherent in the right to be free from torture and other ill-treatment<sup>200</sup> and the right to liberty is included in standards established by the African Commission, including the African Commission's **Resolution on the Right to Recourse and Fair Trial**, the **Principles on the Right to Fair Trial in Africa**, and the **Robben Island Guidelines**.<sup>201</sup>

It is the State's obligation to ensure that the detainee is brought promptly before a judge, irrespective of whether or not the detainee challenges the detention or asks to be brought before a judge.<sup>202</sup> This right and the associated procedure are, thus, separate and distinct from the right of any detained person to have access to a court to challenge the lawfulness of their detention, in *habeas corpus* or other similar procedures, which is discussed in **Chapter 7**.

For people arrested or detained in connection with a criminal offence, this initial hearing before a judge, promptly after arrest, should mark the end of detention in police custody.<sup>203</sup> (See **Chapter 5.2**.) If the individual is not released from custody by the judge or judicial officer at this hearing, he or she should be transferred to a detention facility that

<sup>197</sup> Principle 4 of the UN [Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment](#).

<sup>198</sup> Of the following standards, those marked \* apply to all detainees, not only to those arrested or detained in connection with criminal proceedings: article 9(3) of the [ICCPR](#); article 16(6) of the [Convention on Migrant Workers](#); \*Principles 4 and 11 of the UN [Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment](#); \*Article 10(1) of the Declaration on the Protection of All Persons from Enforced Disappearance.

<sup>199</sup> HRC report, [UN Doc. A/49/40, vol. I](#), annex XI, p119, §2 (also cited in footnote 9 of [HRC General Comment 29](#)); See, HRC Concluding Observations: [Israel](#), UN Doc. CCPR/C/ISR/CO/3 (2010), para 7(c).

<sup>200</sup> [Egyptian Initiative for Personal Rights and Interights v Egypt](#) (334/06), ACHPR (2011) para 186.

<sup>201</sup> Section M(3) of the [Principles on the Right to Fair Trial in Africa](#); \*Guideline 27 of the [Robben Island Guidelines](#); Paragraph 2(c) of ACHPR [Resolution on the Right to Recourse and Fair Trial](#) (1992).

<sup>202</sup> HRC General Comment 35, UN Doc. [CCPR/C/GC/35](#) (2014), para 32; *Kovsh v Belarus*, HRC, UN Doc. [CCPR/C/107/D/1787/2008](#) (2013) para 7.3; *Pichugina v Belarus*, HRC, UN Doc. [CCPR/C/108/D/1592/2007](#) (2013) para 7.3.

<sup>203</sup> HRC General Comment 35, UN Doc. [CCPR/C/GC/35](#) (2014), para 36; HRC Concluding Observations: Finland, UN Doc. [CCPR/C/FIN/CO/6](#) (2013), para 11; Azerbaijan, UN Doc. [CCPR/C/AZE/CO/3](#) (2009) para 8; UN Special Rapporteur on torture, UN Doc. [E/CN.4/2003/68](#) (2002) para 26(g); CAT Concluding Observations: Senegal, UN Doc. [CAT/C/SEN/CO/3](#) (2012) para 10. See, Guideline 7(b)(ii) [of the Guidelines on Arrest, Police Custody and Pre-Trial Detention in Africa](#).

(unlike police custody) is not under the control of the investigating authorities<sup>204</sup> and where the conditions are more suitable for detention of more than a few days,. (See **Chapter 11** on humane conditions and treatment in custody.)

### 6.1.1 JUDGE OR OTHER AUTHORITY AUTHORIZED TO EXERCISE JUDICIAL CONTROL

The official before whom the detainee is brought at this stage should ordinarily be an independent and impartial judge. If, however, rather than a judge, the detainee is brought before an “officer authorized to exercise judicial power”, the official must have the authority to review the lawfulness of the arrest. The official must also be competent to order the release of the individual or, following consideration of the relevant evidence, order detention. Moreover, the judicial officer must be independent, objective and impartial in relation to the issues to be addressed. Accordingly, both the African Commission and the UN Human Rights Committee have clarified that a prosecutor cannot be considered appropriate for this purpose, particularly given that the prosecutor personally or the institution he or she represents (the prosecution) will typically have a vested interest in and may be a formal party against the individual in the (criminal) case<sup>205</sup> (For further information on the independence and impartiality of judges, see **Chapter 7.2.1.**)

In cases involving individuals under the age of 18, the judge or other judicial officer should be suitably trained not only in the relevant national and international law but also in the principles of juvenile justice and in working with children.<sup>206</sup>

### 6.1.2 TIMEFRAME FOR THE HEARING

**Article 9(3)** of the **ICCPR** and **Section M(3)** of the **Principles on the Right to a Fair Trial in Africa**, among other standards, require that the authorities bring an individual before a judge *promptly* after his or her arrest or detention.

The requirement of promptness is aimed at making the right to liberty effective by ensuring that detention following arrest and prior to trial is an exception, is as short as possible, and is subject to judicial control and oversight.<sup>207</sup>

While the requirement of promptness allows some flexibility and is to be determined in the light of the circumstances of each case, the UN Human Rights Committee has construed the term “promptly” to mean that the period of custody before an individual is brought before a judge “should not exceed a few days from the time of arrest”. It has clarified that in most cases 48 hours allows the authorities sufficient time to transport the individual to a court and gives the parties time to prepare for the proceedings. The Committee has therefore clarified that: “any delay longer than 48 hours must remain absolutely exceptional and be justified under the circumstances”.<sup>208</sup>

The promptness requirement applies even to particularly serious offences, including terrorism-related offences and offences against national security.<sup>209</sup>

With respect to children, a shorter time frame applies. People under the age of 18 at the time of their arrest should be brought before a judge within 24 hours.<sup>210</sup> This is consistent

<sup>204</sup> HRC General Comment 35, UN Doc. [CCPR/C/GC/35](#) (2014), para 36.

<sup>205</sup> *Egyptian Initiative for Personal Rights and Interights v Egypt* (334/06), ACHPR (2011) para 187; HRC General Comment 35, UN Doc. [CCPR/C/GC/35](#) (2014) para 32; *Musaev v Uzbekistan*, HRC, UN Doc. [CCPR/C/104/D/1914,1915,1916/2009](#) (2012) para 9.3; *N.S. Nenova et al v Libya*, HRC, UN Doc. [CCPR/C/104/D/1880/2009](#) (2012) para 7.8; *Burdyko v Belarus*, HRC, UN Doc. [CCPR/C/114/D/2017/2010](#) (2015), para 8.3.

<sup>206</sup> See, [CRC General Comment 10](#), UN Doc. CRC/C/GC/10 (2007) paras 92, 97.

<sup>207</sup> *Kovsh v Belarus*, HRC, UN Doc. [CCPR/C/107/D/1787/2008](#) (2013) para 7.3.

<sup>208</sup> HRC General Comment 35, UN Doc. [CCPR/C/GC/35](#) (2014) para 33.

<sup>209</sup> HRC Concluding Observations: Mauritania, UN Doc. [CCPR/C/MRT/CO/1](#) (2013) para 18; HRC Concluding Observations: France, UN Doc. [CCPR/C/FRA/CO/5](#) (2015) para 9; *Baruani v Democratic Republic of the Congo*, HRC, UN Doc. [CCPR/C/110/D/1890/2009](#) (2014) para 6.8.

<sup>210</sup> [CRC General Comment 10](#), UN Doc. CRC/C/GC/10 (2007) para 83; HRC General Comment 35, UN Doc. [CCPR/C/GC/35](#) (2014), para 33.



with the principle of international law that the deprivation of a child's liberty must be a measure of last resort and last only for the shortest appropriate period of time.<sup>211</sup>

The timeframe, in relation to cases of both adults and people under the age of 18, begins to run from the moment the person is actually deprived of liberty, not from when they arrive at a police station or other place of detention.<sup>212</sup>

## 6.2 SCOPE OF REVIEW AND DETAINEES RIGHTS DURING THE HEARING

### 6.2.1 SCOPE AND PURPOSE OF HEARING

The overall purpose of the requirement to bring detainees promptly before a judge is to bring their detention under judicial control<sup>213</sup> and to safeguard their rights, including the rights to liberty and security of the person and to freedom from torture and other ill-treatment.<sup>214</sup>

**The Principles on the Right to Fair Trial in Africa** set out the purposes and scope of the hearing, which in summary are:

- to assess whether there was sufficient legal reason for the arrest, and, if not, to order release;
- to safeguard the well-being of the detainee;
- to prevent violations of the detainee's fundamental rights.

If the arrest is determined to be lawful then, the purpose of the hearing is also:

- to determine whether the detainee should be released from custody and the conditions, if any, which should be imposed on release;
- in criminal cases involving imprisonable offences,<sup>215</sup> to assess whether detention pending further investigation or trial is necessary and proportionate to a legitimate purpose of detention.<sup>216</sup>

### 6.2.2 RIGHTS OF THE DETAINEE

The arrested or detained individual's rights in relation to the hearing include:

- the right to be informed of the date of the hearing(s) and any adjournments;<sup>217</sup>
- the right to be physically present before the judge (or judicial officer);<sup>218</sup>
- the right to legal assistance, including by appointed counsel if the offence involved is punishable by imprisonment or if it is otherwise in the interests of justice, and free of charge to the individual if he or she does not have sufficient means to pay;<sup>219</sup> (see **Chapter 3.3** on the right to an appointed lawyer and to free legal assistance)
- the right to access to relevant information and documents;<sup>220</sup>
- the right to be heard on all relevant issues, including challenging the lawfulness of the arrest and detention or the necessity and proportionality of a request for continued or extended detention;<sup>221</sup>

<sup>211</sup> Article 37(b) of the [Convention on the Rights of the Child](#); see, Section O(j) of the [Principles on the Right to Fair Trial in Africa](#).

<sup>212</sup> *Kovsh v Belarus*, HRC, UN Doc. [CCPR/C/107/D/1787/2008](#) (2013) para 7.3; *Pichugina v Belarus*, HRC, UN Doc. [CCPR/C/108/D/1592/2007](#) (2013) para 7.3.

<sup>213</sup> HRC General Comment 35, UN Doc. [CCPR/C/GC/35](#) (2014), para 32.

<sup>214</sup> See, for example, *Egyptian Initiative for Personal Rights and Interights v Egypt* (334/06) ACHPR (2011) para 184; HRC Concluding Observations: Tajikistan, UN Doc. [CCPR/C/TJK/CO/2](#) (2013), para 14.

<sup>215</sup> Guideline 10(c) [of the Guidelines on Arrest, Police Custody and Pre-Trial Detention in Africa](#).

<sup>216</sup> Section M(3)(b) of the [Principles on the Right to Fair Trial in Africa](#); HRC General Comment 35, UN Doc. [CCPR/C/GC/35](#) (2014), para 36.

<sup>217</sup> Guideline 10(e) [of the Guidelines on Arrest, Police Custody and Pre-Trial Detention in Africa](#).

<sup>218</sup> Guideline 11(f) [of the Guidelines on Arrest, Police Custody and Pre-Trial Detention in Africa](#); HRC General Comment 35, UN Doc. [CCPR/C/GC/35](#) (2014), para 34.

<sup>219</sup> Guideline 11(f) [of the Guidelines on Arrest, Police Custody and Pre-Trial Detention in Africa](#); HRC General Comment 35, UN Doc. [CCPR/C/GC/35](#) (2014), para 34; see HRC Concluding Observations: Kenya, UN Doc. [CCPR/C/KEN/CO/3](#) (2012) para 19.

<sup>220</sup> Guideline 11(f) [of the Guidelines on Arrest, Police Custody and Pre-Trial Detention in Africa](#).

- the right to free assistance of an interpreter and translation of relevant documents, if the individual cannot speak or understand the language being used by the judicial body;<sup>222</sup>
- the right to an individualized, adequately reasoned and specific, written decision.<sup>223</sup>

### 6.2.3 BURDEN OF PROOF AND PRESUMPTION OF RELEASE

The burden of proving the lawfulness of the arrest and detention as well as any claim that continued or extended detention of the individual is necessary and proportionate lies with the State – in most cases the prosecutor.<sup>224</sup>

As described in **Chapter 5.1**, in accordance with the right to liberty and the presumption of innocence, international standards including the **ICCPR**, the **Principles on the Right to Fair Trial in Africa** and the **Convention on the Rights of the Child** provide that people charged with criminal offences should not, as a general rule, be detained pending trial.<sup>225</sup> Detention pending the completion of the investigation or trial must be the exception, rather than systematic.<sup>226</sup>

In accordance with these standards however, an order of release may, when necessary, be subject to conditions such as monetary bail or requirements to report to the authorities at stated intervals.<sup>227</sup> In order to protect against arbitrariness and discrimination, when setting conditions for release, only conditions that are necessary and proportionate in view of the particular risks and circumstances of the case should be imposed. For example, in order to protect against discrimination, if it is determined that bail is necessary, the financial circumstances of the individual should be among the factors considered when setting the level of bail.<sup>228</sup>

The presumption of release is even higher in cases of children,<sup>229</sup> pregnant women and mothers of young children.<sup>230</sup> The **Principles on the Right to Fair Trial in Africa** state that pregnant women and mothers of young children shall not be kept in custody pending their trial.<sup>231</sup> Consideration should also be given to the best interests of such children as it may relate to a male detainee's caretaking responsibilities for children, when assessing whether detention of a man pending trial is necessary and reasonable. A decision to detain

<sup>221</sup> Guideline 11(f) and, related to children, 31(e) [of the Guidelines on Arrest, Police Custody and Pre-Trial Detention in Africa](#); [CRC General Comment 10](#), UN Doc. CRC/C/GC/10 (2007) paras 43-45 (child's right to be heard).

<sup>222</sup> Section N(4) of the [Principles on the Right to Fair Trial in Africa](#).

<sup>223</sup> Guideline 11(c-d) [of the Guidelines on Arrest, Police Custody and Pre-Trial Detention in Africa](#); see *Pinchuk v Belarus*, HRC, UN Doc. [CCPR/C/112/D/2165/2012](#) (2014) para 8.2; see also *Cedeño v Bolivarian Republic of Venezuela*, HRC, UN Doc. [CCPR/C/106/D/1940/2010](#) (2012) para 7.10.

<sup>224</sup> Guideline 11(g) [of the Guidelines on Arrest, Police Custody and Pre-Trial Detention in Africa](#).

<sup>225</sup> HRC General Comment 35, UN Doc. [CCPR/C/GC/35](#) (2014), para 38.

<sup>226</sup> HRC General Comment 35, UN Doc. [CCPR/C/GC/35](#) (2014), para 38; HRC Concluding Observations: Cote d'Ivoire, UN Doc. [CCPR/C/CIV/CO/1](#) (2015) paras 18, 20(f); HRC Concluding Observations: Turkey, UN Doc. [CCPR/C/TUR/CO/1](#) (2012) para 17.

<sup>227</sup> Article 9(3) of the ICCPR; HRC General Comment 35, UN Doc. [CCPR/C/GC/35](#) (2014) para 38; article 37(b) of the Convention on the Rights of the Child; Section M(1)(e) of the [Principles on the Right to Fair Trial in Africa](#); See WGAD, UN Doc. [A/HRC/19/57](#) (2011) para 55.

<sup>228</sup> [CERD General Recommendation XXXI](#), on the prevention of racial discrimination in the administration and functioning of the criminal justice system, para 26(b); WGAD, UN Doc. [E/CN.4/2006/7](#) (2005) paras 65-66. See CAT Concluding Observations: [Kenya](#), UN Doc. CAT/C/KEN/CO/1 (2008) para 12; [Amnesty International, Fair Trial Manual, 2<sup>nd</sup> edition](#), Chapter 5.4 and 5.4.1.

<sup>229</sup> Article 37(b) of the [Convention on the Rights of the Child](#); Guideline 31(a)(iv) [of the Guidelines on Arrest, Police Custody and Pre-Trial Detention in Africa](#); [HRC General Comment 32](#), UN Doc. [CCPR/C/GC/32](#) (2007) para 42; HRC General Comment 35, UN Doc. [CCPR/C/GC/35](#) (2014), paras 38 and 62. See, [CRC General Comment 10](#), UN Doc. CRC/C/GC/10 (2007) para 80.

<sup>230</sup> Section M(1)(f) of the [Principles on the Right to Fair Trial in Africa](#); Part 3(C) of the [Principles and Guidelines on Human and Peoples' Rights while Countering Terrorism in Africa](#); UN [General Assembly resolution 65/229](#), UN Doc. A/RES/65/229 (2010) para 9.

<sup>231</sup> Section M(1)(f) of the [Principles on the Right to Fair Trial in Africa](#).

any individual under 18 at the time of the alleged offence must not only be a matter of last resort but also in the child's best interest.<sup>232</sup>

The African Commission has clarified that the failure of the detaining or other authorities to respect a court order to release an individual would not only constitute arbitrary detention but would also be inconsistent with the principle of independence of the judiciary by which the executive must respect the decisions of judges.<sup>233</sup>

#### 6.2.4 PERMISSIBLE REASONS FOR ORDERING DETENTION

International standards recognize that in some instances, depending on the particular circumstances of the case, detention pending completion of the investigation or trial may be warranted.

For the State to establish that the individual's detention should be continued or extended, it must prove that:

- there are reasonable grounds to believe that the individual has been involved in the commission of a criminal offence which is punishable by imprisonment;
- releasing the particular individual would create a substantial risk, for example of flight from justice, interference with the investigation, harm to others, or commission of a serious criminal offence;
- there are no alternatives to detention that will adequately allay the risk.<sup>234</sup>

For a decision taken by a judge to detain an individual to be lawful, the decision must be on grounds established by law, consistent with international standards, including those set out above, and not motivated by discrimination.<sup>235</sup> Statements or information elicited as a result of torture or other ill-treatment must not be considered in making such a determination. As discussed in **Chapter 10**, they are not admissible in any proceedings.

As set out in **Chapter 5**, any decision to detain an individual must be based on a determination of the circumstances of the individual in each case. Therefore laws requiring mandatory pre-trial detention of individuals charged with a particular crime (such as terrorism-related crimes) or a crime punishable by a sentence of a particular length would be a breach of international standards safeguarding the right to liberty.<sup>236</sup> Nor should such a decision be based solely on the grounds of the gravity of the crime.<sup>237</sup> In cases involving violent crime, including gender-based violence such as domestic abuse, the court must assess the risks posed by the suspect to the safety of others. A failure to protect victims of violence from a known risk violates the rights of the victim. In such cases, a range of options proportionate to the risk should be considered.<sup>238</sup>

Detention pending trial should be a preventive measure serving the interests of justice, including ensuring the presence of the individual at trial or protecting individuals and the community, rather than a punitive measure (which would violate the presumption of innocence). Therefore, if pre-trial detention is ordered, the court should impose the least

<sup>232</sup> HRC General Comment 35, UN Doc. [CCPR/C/GC/35](#) (2014), para 62.

<sup>233</sup> [Constitutional Project and Civil Liberties Organization v Nigeria](#) (143/95 and 150/96), ACHPR, 13<sup>th</sup> Annual Report (1999) para 30; Part 3(C) of the [Principles and Guidelines on Human and Peoples' Rights while Countering Terrorism in Africa](#). The East African Court of Justice came to the same conclusion: [Katabazi & 21 Others v Secretary General of the EAC & another](#), (1 of 2007), East African Court of Justice (2007) pp 20-23.

<sup>234</sup> Guideline 11(a)-(c) [of the Guidelines on Arrest, Police Custody and Pre-Trial Detention in Africa](#); HRC General Comment 35, UN Doc. [CCPR/C/GC/35](#) (2014), para 38; *Hill v Spain*, HRC, UN Doc. [CCPR/59/D/526/1993](#) (1997) para 12.3.

<sup>235</sup> Guideline 11(a) [of the Guidelines on Arrest, Police Custody and Pre-Trial Detention in Africa](#).

<sup>236</sup> HRC General Comment 35, UN Doc. [CCPR/C/GC/35](#) (2014), para 38; HRC Concluding Observations: United Kingdom, UN Doc. [CCPR/GBR/CO/7](#) (2015), para 14.

<sup>237</sup> HRC Concluding Observations: Tajikistan, UN Doc. [CCPR/C/TJK/CO/2](#) (2013) para 17.

<sup>238</sup> [A.T. v Hungary](#) (2/2003), CEDAW, UN Doc. A/60/38 (Part I), Annex III (2005) paras 8.4, 9.2-9.4; [Goekce v Austria](#) (5/2005), CEDAW, UN Doc. CEDAW/C/39/D/5/2005 (2007) para 12.1.5; see, [Amnesty International, Fair Trial Manual, 2<sup>nd</sup> edition](#), (2014), Chapter 5.4.

restrictive measures that will reasonably address the risks on which the decision to detain is based.<sup>239</sup>

As noted above, the decision of the judicial authority must be individualized and precisely reasoned and demonstrate that the court has considered alternatives to pre-trial detention.<sup>240</sup>

In view of the right to trial within a reasonable time (or to release), described in **Chapter 8**, a decision to detain an individual pending further investigation or trial is time limited.

Furthermore, as described below, the continuing necessity and proportionality of any such detention must be subject to regular periodic review.

### 6.3 RIGHT TO REGULAR PERIODIC REVIEW OF DETENTION

States must ensure that courts regularly and periodically review the necessity and proportionality of continuing the detention of any individual who is detained pending completion of a criminal investigation or trial.<sup>241</sup>

This obligation is separate from, and is not relieved by, the availability of procedures such as *habeas corpus*, through which the detainee can challenge the lawfulness of their detention, which are described in **Chapter 7**.<sup>242</sup>

The right to review and periodicity of such reviews should be set out in the law.<sup>243</sup>

The UN Human Rights Committee has clarified that a decision to keep an individual in detention would be considered arbitrary if it is not subject to periodic re-evaluation of the necessity and reasonableness of the detention.<sup>244</sup>

In cases of children, whose detention must be in the child's best interest, a matter of last resort and for the shortest possible appropriate time, the Committee on the Rights of the Child has recommended that the review take place every two weeks.

Detention pending investigation and trial for a criminal offence is only lawful for such time as it is necessary and proportionate to prevent the risk(s) that are set out in the detention order. These must be consistent with international law, and include the risks of flight from justice, interference with the investigation, harm to others or serious crime. If another justification for detention that is not set out in the detention order but is consistent with international standards is alleged to have arisen, the authorities should ensure that a new hearing, that meets the standards set out above in this chapter, is held before a court. In those proceedings the existence of the newly arisen risk and the necessity and proportionality of detention in view of that risk should be assessed.

Detention that had been lawful at its inception may become unlawful (see **Chapter 1.2.1 on the authority to arrest and 1.3 on the prohibition of arbitrary arrest and detention**). This is the case, for example, if the period of detention exceeds the maximum time allowable under law, or if it exceeds the maximum sentence permissible for the

<sup>239</sup> Guideline 11(b) of the Guidelines on Arrest, Police Custody and Pre-trial Detention in Africa.

<sup>240</sup> Guideline 11(d) of the Guidelines on Arrest, Police Custody and Pre-trial Detention in Africa.

<sup>241</sup> Guideline 12(a) of the Guidelines on Arrest, Police Custody and Pre-Trial Detention in Africa; Principle 39 of the UN [Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment](#); HRC General Comment 35, UN Doc. [CCPR/C/GC/35](#) (2014), para 38 and in respect of children, para 62; [CRC General Comment 10](#), UN Doc. [CRC/C/GC/10](#) (2007) para 80.

<sup>242</sup> Guideline 7, para 65 of the WGAD Principles and Guidelines on the right of anyone deprived of their liberty to bring proceedings before a court, UN Doc. [A/HRC/30/37](#) (2015). The UN Human Rights Committee has indicated that obligation of the State to ensure the regular and periodic review by a judge of the continuing reasonableness and necessity of an individual's pre-trial detention falls under article 9(3) of the ICCPR; in contrast the obligation of the state to ensure that a detained person has access to a court to challenge the legality of their detention in a *habeas corpus* or similar procedure falls under article 9(4) of the ICCPR.

<sup>243</sup> [CRC General Comment 10](#), UN Doc. [CRC/C/GC/10](#) (2007) para 83.

<sup>244</sup> HRC General Comment 35, UN Doc. [CCPR/C/GC/35](#) (2014) para 12.

offence with which the individual is charged.<sup>245</sup> Moreover, detention becomes unlawful if it is no longer necessary or reasonable. For instance, there will be cases in which the particular risk the detention sought to avert has abated, such as a risk of interference with the investigation diminishing as investigation progresses. Another such example would be where alternatives to detention which have become available and adequate to address the risk.

The aim of the review is to ensure that detention lasts no longer than is necessary or proportionate.<sup>246</sup> It is therefore a safeguard of the right to liberty. In criminal cases it also serves to safeguard the right of detainees to trial within a reasonable time or release (see **Chapter 8**) and the presumption of innocence.

In accordance with these rights, pre-trial detention must be time limited. The longer such detention lasts, the greater the need for careful scrutiny of the necessity and proportionality of the detention.<sup>247</sup>

Such periodic reviews of detention must be carried out in hearings before independent and impartial judges or competent independent and impartial judicial authorities with the power to order the release of detainees.<sup>248</sup> (See **Chapter 7.2.1** for information on judicial independence and impartiality.)

In such hearings, as in all other hearings concerning deprivation of liberty, the burden of proving the lawfulness of the initial detention and the lawfulness, necessity and proportionality of continued detention lies with the State.<sup>249</sup>

The detained individual has the right to:

- be present before the court;<sup>250</sup>
- legal assistance (including counsel of choice, or appointed counsel, free of charge if he or she lacks the means to pay);<sup>251</sup>
- access to relevant documents and information;<sup>252</sup>
- be heard,<sup>253</sup> including through the presentation and challenge of evidence and arguments, on a basis of equality with the state.

In the course of such review, the judge should assess and consider the lawfulness and need for continued pre-trial detention in the light of whether sufficient legal reasons exist for the arrest or detention. If not the court must order the release of the detainee. In criminal cases, the court must assess and determine whether, in the circumstances of the case and the individual, detention pending trial remains necessary and proportionate. Among other things, the court should consider whether the risks on which the order of pre-trial detention was based still exist; whether the alternatives to detention would adequately address relevant remaining risks; and whether the authorities are proceeding with due diligence in carrying out and completing the investigation and the preparation of the case for trial.<sup>254</sup> During the review, the court should also enquire about and take means necessary to safeguard the well-being of the detainee.<sup>255</sup>

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<sup>245</sup> HRC General Comment 35, UN Doc. [CCPR/C/GC/35](#) (2014) para 38.

<sup>246</sup> See HRC General Comment 35, UN Doc. [CCPR/C/GC/35](#) (2014) para 15; Report of WGAD, UN Doc. [A/HRC/30/36](#) (2015) para 62.

<sup>247</sup> [Amnesty International Fair Trial Manual, 2<sup>nd</sup> edition](#), Chapter 6.3.

<sup>248</sup> See, Guideline 12(a) of the Guidelines on Arrest, Police Custody and Pre-Trial Detention in Africa; HRC General Comment 35, UN Doc. [CCPR/C/GC/35](#) (2014), para 32.

<sup>249</sup> Guideline 11(g) of the Guidelines on Arrest, Police Custody and Pre-Trial Detention in Africa

<sup>250</sup> Guideline 11(f) of the Guidelines on Arrest, Police Custody and Pre-Trial Detention in Africa.

<sup>251</sup> Guideline 11(f) of the Guidelines on Arrest, Police Custody and Pre-Trial Detention in Africa Guideline 4, para 44(c) of the [UN Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems](#); HRC General Comment 35, UN Doc. [CCPR/C/GC/35](#) (2014) para 34.

<sup>252</sup> Guideline 11(f) of the Guidelines on Arrest, Police Custody and Pre-Trial Detention in Africa.

<sup>253</sup> Guideline 11(f) of the Guidelines on Arrest, Police Custody and Pre-Trial Detention in Africa.

<sup>254</sup> Guideline 12(b) of the Guidelines on Arrest, Police Custody and Pre-Trial Detention in Africa; see *Griffiths v Australia*, HRC UN Doc. [CCPR/C/112/D/1973/2010](#) (2014) para 7.5.

<sup>255</sup> Guideline 12(b)(iv) of the Guidelines on Arrest, Police Custody and Pre-Trial Detention in Africa

The reviewing judicial authorities should provide written reasons, without delay, for their decisions, particularly those that, in effect, authorize the continued detention of the individual.<sup>256</sup>

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<sup>256</sup> Guideline 12(c) of the Guidelines on Arrest, Police Custody and Pre-Trial Detention in Africa. [Link](#)



## 7. THE RIGHT TO CHALLENGE THE LAWFULNESS OF DETENTION

### 7.1 THE RIGHT TO CHALLENGE THE LAWFULNESS OF DETENTION

Everyone deprived of their liberty has the right to bring proceedings before a court to challenge the lawfulness of their detention. The court must consider and rule on such challenges without delay, and order the release of the individual if the detention is unlawful.<sup>257</sup>

This right is enshrined in **article 9(4)** of the **ICCPR** among other international standards. The jurisprudence of the African Commission has clarified that the right to challenge the lawfulness of detention is inherent in **article 7(1)** of the **African Charter**,<sup>258</sup> although the Charter does not explicitly set out this right. The right is also set out in standards established by the African Commission including the **Principles on the Right to Fair Trial in Africa**, the **Guidelines on Arrest, Police Custody and Pre-Trial Detention in Africa**, the **Principles and Guidelines on Human and Peoples' Rights while Countering Terrorism in Africa** and the **Robben Island Guidelines**.<sup>259</sup>

In legal systems throughout the world, this right is typically invoked by procedures known as *habeas corpus* or *amparo*.

The right to challenge the lawfulness of detention is different from both the right to be brought before a judge and the related right to regular periodic review of detention that are described in **Chapter 6**, principally because the procedure is initiated by the detainee or another on the detainee's behalf, rather than by the authorities.<sup>260</sup>

This right is guaranteed to all people deprived of their liberty by or with the consent or acquiescence of a State agent. It applies whether or not the individual is detained in relation to a criminal offence. It also applies no matter the form of detention, including house arrest and administrative detention, and irrespective of the grounds, including national security.<sup>261</sup>

Laws that exclude a category of detainees from entitlement to such review are inconsistent with the right.<sup>262</sup> Practices like incommunicado detention or enforced disappearance that prevent the detainee from accessing a court to challenge the legality of detention violate the right.<sup>263</sup>

In order to ensure that everyone has access to the remedy without discrimination, including detainees who cannot afford to hire their own lawyer, the UN Special Rapporteur on torture recommended that the national association of legal aid lawyers visit places of detention to locate individuals who might wish to file a *habeas corpus* petition.<sup>264</sup>

<sup>257</sup> Article 9(4) of the [ICCPR](#); Section M(4) and (5) of the [Principles on the Right to Fair Trial in Africa](#); Guidelines 4(j), 11(e) and 35 of the [Guidelines on Arrest, Police Custody and Pre-Trial Detention in Africa](#); Part 3(B)(v) of the [Principles and Guidelines on Human and Peoples' Rights while Countering Terrorism in Africa](#); Guideline 32 of the [Robben Island Guidelines](#).

<sup>258</sup> For example, [Constitutional Rights Project v Nigeria](#) (156/96), ACHPR, 13th Annual Report (1999) para 18.

<sup>259</sup> Section M(4) and (5) of the [Principles on the Right to Fair Trial in Africa](#); Guidelines 4(j), 11(e) and 35 of the [Guidelines on Arrest, Police Custody and Pre-Trial Detention in Africa](#); Part 3(B)(v) of the [Principles and Guidelines on Human and Peoples' Rights while Countering Terrorism in Africa](#).

<sup>260</sup> HRC General Comment 35, UN Doc. [CCPR/C/GC/35](#) (2014), para 46; see, [Amnesty International Fair Trial Manual, 2<sup>nd</sup> edition](#) (2014), Chapter 6.

<sup>261</sup> HRC General Comment 35, UN Doc. [CCPR/C/GC/35](#) (2014) para 40; Guideline 1, para 47 of the WGAD Principles and Guidelines on the right of anyone deprived of their liberty to bring proceedings before a court, UN Doc. [A/HRC/30/37](#) (2015); [Abbassi v Algeria](#), HRC, UN Doc. CCPR/C/89/D/1172/2003 (2007) para 8.5; Part 3(B)(v) of the [Principles and Guidelines on Human and Peoples' Rights while Countering Terrorism in Africa](#).

<sup>262</sup> [Constitutional Project and Civil Liberties Organization v Nigeria](#) (143/95 and 150/96), ACHPR, 13<sup>th</sup> Annual Report (1999); [Constitutional Rights Project v Nigeria](#) (156/96), ACHPR, 13th Annual Report (1999) paras 11-18; HRC General Comment 35, UN Doc. [CCPR/C/GC/35](#) (2014), para 46.

<sup>263</sup> [Abdel Hadi, Ali Radi & Others v Republic of Sudan](#), 368/09, ACHPR (2013) paras 85-88; HRC General Comment 35, UN Doc. [CCPR/C/GC/35](#) (2014), para 46.

<sup>264</sup> UN Special Rapporteur on torture: Gambia, UN Doc. [A/HRC/28/68/Add.4](#) (2015), para 108(c).

This judicial remedy is crucial for the protection of the rights to personal liberty and personal integrity (including security of the person). It aims to prevent or ensure a remedy for a range of human rights violations including torture or other ill-treatment, arbitrary detention, incommunicado detention, and enforced disappearance. It also provides safeguards against other gross human rights violations: the procedure has been used in cases of secret detention and enforced disappearance as a means to establish the whereabouts and well-being of the detainee and who is responsible for the detention and where the individual is being held.<sup>265</sup>

*Habeas corpus* and equivalent protections may act as a remedy against violations of rights that may not be subject to restriction or derogation even during war or other states of emergency, such the prohibition of torture and other ill-treatment. In that connection, the right to challenge the lawfulness of detention before a court must apply at all times, including during times of emergency.<sup>266</sup>

Furthermore, the right must not be diminished by a State's decision to derogate from its obligations under a treaty to ensure the full enjoyment of a right that may be subject to temporary proportionate and non-discriminatory limitations that are deemed necessary in a time of declared state of emergency.<sup>267</sup>

The **Principles on the Right to Fair Trial in Africa** (Section M(5)(e)) state and the African Commission has held that no circumstances whatsoever may be invoked as a justification for denying any person the right to challenge the legality of detention through *habeas corpus*, *amparo* or similar procedure.

When considering a Nigerian decree law prohibiting courts from issuing writs of *habeas corpus* on behalf of individuals detained on state security grounds, the African Commission stated: "While the Commission is sympathetic to all genuine attempts to maintain public peace, it must note that too often extreme measures to curtail rights simply create greater unrest. It is dangerous for the protection of human rights for the executive branch of government to operate without such checks as the judiciary can usefully perform."<sup>268</sup>

Given the importance of such challenges to the protection of liberty and security of the person, the **Convention against Enforced Disappearance** requires States to ensure that any person who delays or obstructs the procedure, including by failing to disclose information, is subject to sanction. UN human rights bodies and mechanisms have also recommended this.<sup>269</sup>

#### Article 9(4) of the ICCPR:

<sup>265</sup> [Amnesty International Fair Trial Manual, 2<sup>nd</sup> edition](#) (2014), Chapter 6.

<sup>266</sup> Section M(5)(e) of the [Principles on the Right to Fair Trial in Africa](#); HRC General Comment 35, UN Doc. [CCPR/C/GC/35](#) (2014) para 67; Principles 4 and 16 of the WGAD Principles and Guidelines on the right of anyone deprived of their liberty to bring proceedings before a court, UN Doc. [A/HRC/30/37](#) (2015).

<sup>267</sup> HRC General Comment 35, UN Doc. [CCPR/C/GC/35](#) (2014) para 67; [HRC General Comment No. 29](#), para 16; Principles 4 and 16 and Guideline 3 of the WGAD Principles and Guidelines on the right of anyone deprived of their liberty to bring proceedings before a court, UN Doc. [A/HRC/30/37](#) (2015). It should be noted that the African Charter does not permit states to derogate from their obligations to ensure the full enjoyment of the rights set out in the Charter in times of emergency. Article 4 of the ICCPR however permits states, in times of declared emergencies, to impose measures that temporarily restrict the partial enjoyment of certain rights enshrined in the ICCPR in prescribed and circumscribed circumstances and ways.

<sup>268</sup> [Constitutional Project and Civil Liberties Organization v Nigeria](#) (143/95 and 150/96), African Commission, 13<sup>th</sup> Annual Report (1999) paras 31-34 (quote in para 33).

<sup>269</sup> Article 22(a) of the [Convention on Enforced Disappearance](#); Guideline 22, para 120 of the WGAD Principles and Guidelines on the right of anyone deprived of their liberty to bring proceedings before a court, UN Doc. [A/HRC/30/37](#) (2015); Joint Study by UN Special Procedures on Global Practices in Relation to Secret Detention in the Context of Countering Terrorism, UN Doc. [A/HRC/13/42](#) (2010) para 292(b).



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

#### **Section M of the Principles on the Right to Fair Trial in Africa**

##### **4) Right of arrested or detained person to take proceedings before a judicial body:**

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

##### **5) Right to habeas corpus:**

a) States shall enact legislation, where it does not exist, to ensure the right to habeas corpus, amparo or similar procedures.

b) Anyone concerned or interested in the well-being, safety or security of a person deprived of his or her liberty has the right to a prompt and effective judicial remedy as a means of determining the whereabouts or state of health of such a person and/or identifying the authority ordering or carrying out the deprivation of liberty.

c) In such proceedings, competent national authorities shall have access to all places where persons deprived of their liberty are being held and to each part of those places, as well as to any place in which there are grounds to believe that such persons may be found.

d) Any other competent authority entitled under law of the State or by any international legal instrument to which the State is a party may also have access to such places.

e) Judicial bodies shall at all times hear and act upon petitions for habeas corpus, amparo or similar procedures. No circumstances whatever must be invoked as a justification for denying the right to habeas corpus, amparo or similar procedures.

## **7.2 PROCEDURE**

The detainee or people acting on his or her behalf may bring a petition challenging the lawfulness of detention. The petition may be brought at any time from the moment of arrest and so long as the detainee remains deprived of liberty.

The **Principles on the Right to Fair Trial in Africa** clarify that anyone concerned or interested in the well-being, safety or security of a detainee has the right to bring such petitions as a means to discover the whereabouts of the detained individual, his or her state of health and the identity of those responsible for his or her detention.<sup>270</sup> WGAD has clarified that the detainee's consent is not required when the challenge is lodged by a third party.<sup>271</sup>

### **7.2.1 HEARING BY AN INDEPENDENT, IMPARTIAL COURT**

The petition must be heard by an independent, impartial court.

**Article 9(4) of the ICCPR**, and other international standards<sup>272</sup> refer to the competent decisional body expressly as a "court". The **Principles on the Right to Fair Trial in Africa** and the **Guidelines on Arrest, Police Custody and Pre-Trial Detention in Africa** refer to the decisional body as a "judicial authority".

Both the **African Charter (article 26 and article 7)** and the **ICCPR (article 14)** as well as **article 10 of the UDHR** expressly include the obligation of States to ensure the independence and impartiality of the judiciary and officials and bodies exercising judicial powers. The independence and impartiality of the judiciary is a pillar on which the rule of law and the protection of human rights depends.

<sup>270</sup> Section M(5)(b) of the [Principles on the Right to Fair Trial in Africa](#).

<sup>271</sup> Principle 10, para 16 of the WGAD Principles and Guidelines on the right of anyone deprived of their liberty to bring proceedings before a court, UN Doc. [A/HRC/30/37](#) (2015).

<sup>272</sup> Other international standards that refer to the decisional body as a court include the [WGAD Principles and Guidelines on the right of anyone deprived of their liberty to bring proceedings before a court](#) and the [Principles and Guidelines on Human and Peoples' Rights while Countering Terrorism in Africa](#) (Part 3(B)(v)).

In short, the principle of an independent judiciary requires that courts and the individual judges to be structurally and practically independent of influence from the executive and legislative branches of government in the exercise of their judicial functions.<sup>273</sup> The requirement of independence demands that judges be appointed and promoted on the basis of their training, legal expertise and integrity. To safeguard judicial independence judges must have secure tenure in office and adequate salaries and conditions of service. They must be subject to discipline only for failure to meet established standards of judicial conduct, following a fair proceeding.<sup>274</sup>

Furthermore, to meet the requirements of independence, only civilian courts should be competent to review the lawfulness of detention of civilians; military courts should not be competent in such cases.<sup>275</sup>

The requirement of impartiality imposes a duty to ensure that judges decide matters before them on the basis of law, without interference, pressure or influence from other branches of government or others. It demands that judges must not allow their judgment to be influenced by bias or prejudice, nor may they harbour preconceptions about cases before them or improperly promote the interests of one of the parties to a case to the detriment of the other. To satisfy the requirement of impartiality judges and those authorized to exercise judicial powers must not only be impartial in fact but also appear to be impartial.<sup>276</sup>

To meet the requirements of impartiality, the court that reviews the legality of detention must, among other things, be a different body from the one that has ordered the detention.<sup>277</sup>

## 7.2.2 NATURE OF PROCEEDINGS

The judge or judicial authority considering the challenge must have the power to order the detainee to be brought before the court,<sup>278</sup> and to release the detainee, if it finds the detention to be unlawful under national or international law.<sup>279</sup>

The proceedings themselves should be simple; informal in the sense that they do not require forms to be filled out or specific papers to be filed with the court; expeditious and free of charge.<sup>280</sup>

The Human Rights Committee found that a delay of 10 days in a Prosecutor's referral of a challenge to the legality of detention to a court violated the requirement of expedition.<sup>281</sup>

<sup>273</sup> HRC [General Comment 32](#), UN Doc. CCPR/C/GC/32 (2007) para 19; Section A(4) (in particular paras a-c, and g) of the [Principles on the Right to Fair Trial in Africa](#).

<sup>274</sup> HRC [General Comment 32](#), UN Doc. CCPR/C/GC/32 (2007) paras 19-20; UN [Basic Principles on the Independence of the Judiciary](#); Section A(4) (in particular paras a-c, and g-v) of the [Principles on the Right to Fair Trial in Africa](#). For further information on the independence of the judiciary see: ICJ, [Trial Observation Manual for Criminal Proceedings, Practitioners Guide No. 5](#) (2009), Chapter iv (1-5); ICJ, [International Principles on the Independence and Accountability of Judges, Lawyers and Prosecutors, Practitioners Guide 1](#) (2007); ICJ [Legal Commentary to the Berlin Declaration, Counter-Terrorism, Human Rights and the Rule of Law](#), pp 59-68.

<sup>275</sup> Section L(c) of the [Principles on the Right to Fair Trial in Africa](#); Part 4(B) of the [Principles and Guidelines on Human and Peoples' Rights while Countering Terrorism in Africa](#); Guideline 4, para 55 of the WGAD Principles and Guidelines on the right of anyone deprived of their liberty to bring proceedings before a court, UN Doc. [A/HRC/30/37](#) (2015); See HRC [General Comment 32](#), UN Doc. CCPR/C/GC/32 (2007) para 22.

<sup>276</sup> HRC [General Comment 32](#), UN Doc. CCPR/C/GC/32 (2007) para 21; Principle 2 of the UN [Basic Principles on the Independence of the Judiciary](#); Section A(5) of the [Principles on the Right to Fair Trial in Africa](#).

<sup>277</sup> Guideline 4, para 51 of the WGAD Principles and Guidelines on the right of anyone deprived of their liberty to bring proceedings before a court, UN Doc. [A/HRC/30/37](#) (2015).

<sup>278</sup> HRC General Comment 35, UN Doc. [CCPR/C/GC/35](#) (2014) para 42.

<sup>279</sup> HRC General Comment 35, UN Doc. [CCPR/C/GC/35](#) (2014) para 41; see Part 3(B)(v) of the [Principles and Guidelines on Human and Peoples' Rights while Countering Terrorism in Africa](#).

<sup>280</sup> Guideline 9, para 74 of the WGAD Principles and Guidelines on the right of anyone deprived of their liberty to bring proceedings before a court, UN Doc. [A/HRC/30/37](#) (2015); WGAD, UN Doc. [A/HRC/19/57](#) (2011) para 63.

The State bears the burden of proving the lawfulness, necessity and reasonableness of the detention.<sup>282</sup>

As discussed in **Chapter 1**, to be lawful, an arrest or detention must be on grounds and in accordance with procedures that are set out in law, which are consistent with international law.<sup>283</sup> Detention following arrest must be necessary, reasonable and proportionate to the risk of flight, interference with the administration of justice, harm to others or serious crime. (See **Chapters 5** and **6**.)

The proceedings must be fair and ensure equality of arms between the parties. They must afford each of the parties the opportunity to present its case and challenge the evidence and arguments of the opposing party.<sup>284</sup>

In the course of the proceedings, the detained individual has the right to:

- be present before the court;<sup>285</sup>
- the assistance of a lawyer, including appointed counsel, free of charge to those without sufficient means to pay;<sup>286</sup> (see **Chapter 3**)
- access to all relevant information about the alleged factual and legal basis for the detention and relevant documents, as well as exculpatory evidence, and adequate time and facilities to prepare;<sup>287</sup>
- the right to be heard, and the right to equality of arms.<sup>288</sup>

With a view to protecting the individual against reprisals or other undue adverse consequences, the detained individual should be provided with the opportunity to address the court outside of the presence of any official involved in his or her deprivation of liberty.<sup>289</sup>

The court must consider all available evidence that has a bearing on whether the detention is lawful and not arbitrary.<sup>290</sup>

The court must deliver a reasoned and particularized decision on the challenge without delay.<sup>291</sup> If the court does not find the detention unlawful and does not order the release the individual from custody on other grounds, it should nonetheless provide reasons why it

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<sup>281</sup> *Timoshenko v Belarus*, HRC, UN Doc. [CCPR/C/114/D/1950/2010](#) (2015) para 7.3.

<sup>282</sup> Guideline 11(g) of the Guidelines on Arrest, Police Custody and Pre-Trial Detention in Africa; [Principle 13](#) and Guideline 14 of the WGAD Principles and Guidelines on the right of anyone deprived of their liberty to bring proceedings before a court, UN Doc. [A/HRC/30/37](#) (2015).

<sup>283</sup> HRC General Comment 35, UN Doc. [CCPR/C/GC/35](#) (2014), paras 11-12, 22, 44; *Griffiths v Australia*, UN Doc. [CCPR/C/112/D/1973/2010](#) (2014) para 7.4-7.5.

<sup>284</sup> Principle 12 of the WGAD Principles and Guidelines on the right of anyone deprived of their liberty to bring proceedings before a court, UN Doc. [A/HRC/30/37](#) (2015).

<sup>285</sup> Guideline 11(f) of the Guidelines on Arrest, Police Custody and Pre-Trial Detention in Africa; HRC General Comment 35, UN Doc. [CCPR/C/GC/35](#) (2014) para 68; Principle 11, Guideline 10 of the WGAD Principles and Guidelines on the right of anyone deprived of their liberty to bring proceedings before a court, UN Doc. [A/HRC/30/37](#) (2015).

<sup>286</sup> Guideline 11(f) of the Guidelines on Arrest, Police Custody and Pre-Trial Detention in Africa; Principle 9 of the WGAD Principles and Guidelines on the right of anyone deprived of their liberty to bring proceedings before a court, UN Doc. [A/HRC/30/37](#) (2015); see HRC General Comment 35, UN Doc. [CCPR/C/GC/35](#) (2014), para 46.

<sup>287</sup> Guidelines 8(d)(iv) and 11(f) of the Guidelines on Arrest, Police Custody and Pre-Trial Detention in Africa; Principle 9, para 14, Guideline 5 of the WGAD Principles and Guidelines on the right of anyone deprived of their liberty to bring proceedings before a court, UN Doc. [A/HRC/30/37](#) (2015).

<sup>288</sup> Guideline 11(f) of the Guidelines on Arrest, Police Custody and Pre-Trial Detention in Africa. Related to children: Guideline 31(e) of the Guidelines on Arrest, Police Custody and Pre-Trial Detention in Africa; [CRC General Comment 10](#), UN Doc. CRC/C/GC/10 (2007) paras 43-45; HRC General Comment 35, UN Doc. [CCPR/C/GC/35](#) (2014), para 62.

<sup>289</sup> Guideline 10, para 75(b) of the WGAD Principles and Guidelines on the right of anyone deprived of their liberty to bring proceedings before a court, UN Doc. [A/HRC/30/37](#) (2015).

<sup>290</sup> Principle 14, para 23 of the WGAD Principles and Guidelines on the right of anyone deprived of their liberty to bring proceedings before a court, UN Doc. [A/HRC/30/37](#) (2015).

<sup>291</sup> HRC General Comment 35, UN Doc. [CCPR/C/GC/35](#) (2014), para 47.

considers that continuing detention remains justified, including by addressing both necessary and proportionate to a legitimate purpose.<sup>292</sup>

The Committee on the Rights of the Child has clarified that a decision on the challenge to the legality of the detention of a child should be rendered not later than two weeks after the challenge is made.

The failure of the detaining or other authorities to respect a court order to release an individual would not only constitute arbitrary detention but also be a breach of the obligation to respect the independence of the judiciary.<sup>293</sup>

If the lawfulness of the detention is upheld, the individual may nonetheless bring subsequent petitions again challenging its lawfulness. This is because a detention that may have been lawful at its outset may become unlawful or arbitrary, given the passage of time or other changed circumstances.<sup>294</sup> (See **Chapter 1.2.1 and 1.3**, authority to arrest and prohibition of arbitrary arrest and detention; **Chapter 6.2.4** permissible reasons for ordering detention, **Chapter 6.3** right to regular periodic review of detention and **Chapter 8** on trial within a reasonable time or release.)

Furthermore, if the individual's detention is continued, he or she has the right to regular periodic reviews of the detention. (See **Chapter 6.3** on the right to regular periodic review of detention.)

### 7.3 RIGHT TO COMPENSATION FOR UNLAWFUL ARREST OR DETENTION

Every person who has been a victim of unlawful arrest or detention has an enforceable right to an effective remedy and reparation, including compensation.

The duty of States to provide an effective remedy and reparation for unlawful arrest or detention is found in a range of standards.

This duty is part of the obligation of States to ensure a remedy and reparation for violations of human rights enshrined in the African Charter and the ICCPR, under **articles 7(1) of the African Charter**<sup>295</sup> and Guideline 38 of the **of the Guidelines on Arrest, Police Custody and Pre-Trial Detention in Africa** and **article 2(3) of the ICCPR**<sup>296</sup>, respectively.

In addition the particular duty of States to ensure a remedy and reparation for unlawful arrest or detention in particular is expressly set out in **article 9(5) of the ICCPR** and **Section M(1)(h) of the Principles on the Right to Fair Trial in Africa**, among others.<sup>297</sup>

<sup>292</sup> Guideline 4 para 53(d) of the WGAD Principles and Guidelines on the right of anyone deprived of their liberty to bring proceedings before a court, UN Doc. [A/HRC/30/37](#) (2015).

<sup>293</sup> HRC General Comment 35, UN Doc. [CCPR/C/GC/35](#) (2014) para 41; *Constitutional Project and Civil Liberties Organization v Nigeria* (143/95 and 150/96), ACHPR, 13<sup>th</sup> Annual Report (1999) para 30; Part 3(C) of the [Principles and Guidelines on Human and Peoples' Rights while Countering Terrorism in Africa](#); *Katabazi & 21 Others v Secretary General of the EAC & another*, (1 of 2007), East African Court of Justice (2007) pp 20-23.

<sup>294</sup> HRC General Comment 35, UN Doc. [CCPR/C/GC/35](#) (2014) para 43; Guideline 7, paras 62-65 of the WGAD Principles and Guidelines on the right of anyone deprived of their liberty to bring proceedings before a court, UN Doc. [A/HRC/30/37](#) (2015).

<sup>295</sup> *Interights, ASADHO and Madam O. Disu v Democratic Republic of Congo*, (274/03 and 282/03), ACHPR (2013) para 72.

<sup>296</sup> HRC [General Comment 31](#), UN Doc. [CCPR/C/21/Rev.1/Add.13](#) (2004) paras 15 and 16, clarifies that the right to a remedy for violations of rights enshrined in the ICCPR requires the establishment of appropriate and accessible independent and impartial mechanisms and the prompt and thorough investigation of claims of violations of ICCPR rights and reparation to individuals whose rights under the ICCPR have been violated.

<sup>297</sup> Other standards enshrining this right include article 16(9) of the [Convention on Migrant Workers](#) and article 24(4) of the [Convention on Enforced Disappearance](#). While some of the standards, including the English version of the [ICCPR](#), refer to [compensation](#) alone, others, including the [French](#) and [Spanish](#) versions of the article 9(5) ICCPR, the [Guidelines on Arrest, Police Custody and Pre-Trial Detention in Africa](#) (Part 8), and Principle 15, Guideline 16 of the [WGAD Principles and Guidelines on the right of anyone deprived of their liberty to bring proceedings before a court](#) enshrine the right to

### **Article 7(1)(a) of the African Charter**

1. Every individual shall have the right to have his cause heard. This comprises:  
(a) the right to an appeal to competent national organs against acts of violating his fundamental rights as recognized and guaranteed by conventions, laws, regulations and customs in force;

...

### **Article 9(5) of the ICCPR:**

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

### **Section M(1)(h) of the Principles on the Right to Fair Trial in Africa:**

States shall ensure, including by the enactment of legal provisions and adoption of procedures, that anyone who has been the victim of unlawful arrest or detention is enabled to claim compensation.

### **Guideline 38 of the Guidelines on Arrest, Police Custody and Pre-Trial Detention in Africa:**

All persons who are victims of illegal or arbitrary arrest and detention, or torture and ill-treatment during police custody or pre-trial detention have the right to seek and obtain effective remedies for the violation of their rights.

This right extends to immediate family or dependents of the direct victim. Remedies include, but are not limited to:

- a. Restitution to restore the victim to the situation that would have existed had the violation of their right not happened.
- b. Compensation, including any quantifiable damages resulting from the right violation and any physical or mental harm (such as physical or mental harm, pain, suffering and emotional distress, lost opportunities including education, material damage and loss of actual or potential earnings, harm to reputation or dignity, and costs required for legal services or expert assistance, medicines, medical services, and psychological and social services).
- c. Rehabilitation, including medical and psychological care as well as legal and social services.
- d. Satisfaction and guarantees of non-repetition.

In accordance with these standards, states must establish a legal framework to compensate people who have been unlawfully arrested or detained. The UN Human Rights Committee has clarified that this means that people must be afforded such compensation as a right, not as a matter of grace or discretion. Whatever form the procedure for such compensation takes, the remedy must operate effectively. Payment of compensation, which should cover financial and non-pecuniary harm (such as damage to reputation), must be made within a reasonable period of time.<sup>298</sup>

The right to compensation applies to people whose arrest or detention has violated national laws or procedures or international standards. (See **Chapter 1**.) The issue in such cases is whether or not the arrest or detention itself was unlawful. (Whether or not the individual was subsequently acquitted of the criminal offence does not determine the legality of the arrest or detention.)<sup>299</sup>

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reparation for unlawful arrest or detention. Compensation is one form of reparation, the others include restitution, rehabilitation, satisfaction and guarantees of non-repetition.

<sup>298</sup> HRC General Comment 35, UN Doc. [CCPR/C/GC/35](#) (2014) paras 50, 52; Guideline 16 para 91 of the WGAD Principles and Guidelines on the right of anyone deprived of their liberty to bring proceedings before a court, UN Doc. [A/HRC/30/37](#) (2015); see, HRC Concluding Observations: Benin, UN Doc. [CCPR/C/BEN/CO/2](#) (2015), paras 24-25.

<sup>299</sup> HRC General Comment 35, UN Doc. [CCPR/C/GC/35](#) (2014) para 51.  
see, [W.B.E. v The Netherlands](#), HRC, UN Doc. CCPR/C/46/D/432/1990 (1992) para 6.5.

The right to compensation (under **article 9(5)** of the **ICCPR** and **Section M(1)(h)** of the **Principles on the Right to Fair Trial in Africa**) and the right to *habeas corpus*-type proceedings which provide the remedy of release (as described above in **Section 6.1-6.2**) are two specific and distinct avenues of remedy for unlawful detention.<sup>300</sup>

Both of these specific remedies are in addition to, but do not replace, other remedies that may be required to ensure adequate reparation for unlawful arrest or detention, guaranteed under **article 7(1)** of the **African Charter** and **article 2(3)** of the **ICCPR**.<sup>301</sup> **Guideline 38** of the **Guidelines on Arrest, Police Custody and Pre-Trial Detention in Africa**, and **Principle 15** of the **WGAD Principles and Guidelines on the right of anyone deprived of their liberty to bring proceedings before a court** set out the broad right to reparation for unlawful or arbitrary arrest or detention, which includes rehabilitation and restitution, guarantees of satisfaction and non-repetition, as well as compensation.

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<sup>300</sup> HRC General Comment 35, UN Doc. [CCPR/C/GC/35](#) (2014) para 49.

<sup>301</sup> HRC General Comment 35, UN Doc. [CCPR/C/GC/35](#) (2014) para 49.



## 8. RIGHT OF DETAINEES TO TRIAL WITHIN A REASONABLE TIME OR RELEASE

### 8.1 RIGHT TO TRIAL WITHIN A REASONABLE TIME

All people charged with a criminal offence, whether or not they are detained, have the right to a trial without undue delay.

This right is guaranteed under **article 7(1)(d)** of the **African Charter** and **article 14(3)** of the **ICCPR**. It is based on the presumption of innocence and the interests of justice.

The African Court on Human and Peoples' Rights has emphasized that holding criminal proceedings without delay is in the interest of justice. It stated:

*"Justice delayed is justice denied, is a maxim that is often used in this regard. If society sees that judicial settlement of disputes is too slow, it may lose confidence in the judicial institutions and in the peaceful settlement of disputes. In criminal matters, the deterrence of criminal law will only be effective if society sees that perpetrators are tried, and if found guilty, sentenced within a reasonable time, while innocent suspects, undeniably have huge interest in a speedy determination of their innocence."*<sup>302</sup>

Moreover, in accordance with international standards and jurisprudence, people who are detained in custody pending a criminal trial have the right to be tried with particular expedition. The right to liberty requires that detention should last no longer than is necessary and proportionate in a particular case.

**Article 9(3)** of the **ICCPR** and **Principle 38** of the **UN Body of Principles on the Protection of All Persons under Any Form of Detention or Imprisonment** specifically guarantee to anyone detained on a criminal charge the right to trial within a reasonable time or to release.

The Human Rights Committee has clarified that this requirement under **article 9(3)** of the **ICCPR** means that: "[p]ersons who are not released pending trial must be tried as expeditiously as possible, to the extent consistent with their rights of defence."<sup>303</sup>

The obligation of states under **article 7(1)(d)** of the **African Charter** to ensure that trials are held within a reasonable time has been interpreted by the African Commission to require criminal trials to be held with particular expedition in cases in which the accused individual is detained. It has stated that: "[i]n keeping with the spirit of article 7(1)(d) of the African Charter, an accused person in detention is entitled to have his case given priority and expedited by the proper authorities."<sup>304</sup>

The right of detainees accused of a criminal offence to be tried within a reasonable time is also contained in standards established by the African Commission. In particular, **Section M(3)(a)** of the **Principles on the Right to Fair Trial in Africa** sets out the right in language which is almost identical to that in article 9(3) of the ICCPR. **Guideline 13** of the **Guidelines on Arrest, Police Custody and Pre-trial Detention in Africa** also sets out the right of people arrested and detained to trial within a reasonable time. This Guideline expressly posits release as one of the orders a judge may make in order to eliminate or prevent further delay and prejudice arising from the delay, while the other standards mentioned contain no such express reference.

#### **Section M(3)(a) of the Principles on the Right to Fair Trial in Africa:**

Anyone who is arrested or detained on a criminal charge shall be brought before a judicial officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release.

<sup>302</sup> *Onyango Nganyi & 9 Others v United Republic of Tanzania*, (006/2013) African Court on Human and Peoples' Rights (18 March 2016) para 127.

<sup>303</sup> HRC General Comment 35, UN Doc. [CCPR/C/GC/35](#) (2014) para 37.

<sup>304</sup> For example, *Haregewoin Gebre-Sellasie & IHRDA (on behalf of former Dergue officials) v Ethiopia* (301/05) ACHPR (2013) para 234.

**Article 7(1)(d) of the African Charter:**

7.1 Every individual shall have the right to have his cause heard. This comprises:

....

(d) The right to be tried within a reasonable time by an impartial court or tribunal.

**Article 9(3) of the ICCPR:**

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

While this right entitles a detainee to have his or her case heard with expedition, courts must schedule the proceedings in a timeframe that also respects the right of the accused to adequate time and facilities to prepare (and present) their defence.<sup>305</sup> (See **Chapter 9**, on the right to adequate time and facilities to prepare a defence.)

The periodic reviews that must be held in all cases in which an individual is deprived of their liberty, described in **Chapter 6.3**, should assist the courts and prosecuting authorities to identify cases which risk falling foul of the right to trial within a reasonable time. So too should case tracking systems.

In order to ensure compliance with this right, States must ensure that there are sufficient numbers of prosecutors, judges, and courts throughout the country and that they have adequate resources to carry out their functions.<sup>306</sup> Furthermore, the judiciary must ensure the effective management of its caseload.

Both prolonged pre-trial detention without trial and prolonged detention awaiting a trial that is not held within a reasonable time are inconsistent with the right to liberty, and constitute arbitrary detention.

Chronic and systemic failures to respect the right of detainees to trial within a reasonable time have resulted in overcrowding of detention facilities;<sup>307</sup> this in turn can render detention conditions inhumane. Undue delays in proceedings may also mean that victims of crime are denied access to justice.

In accordance with **article 9(3)** of the **ICCPR**, **Section M(3)(a)** of the **Principles on the Right to Fair Trial in Africa**, and **Principle 38 of the UN Body of Principles for the Protection of All Persons Under any Form of Detention or Imprisonment**, if the proceedings are not held within a reasonable time, the individual should be released from detention.<sup>308</sup> The detainee's release at this phase of the proceedings may be subject to such conditions as are necessary and proportionate given his or her particular circumstances and that of the case as a whole,<sup>309</sup> as described in **Chapter 6.2.3-6.2.4**. Release, however, does not necessarily require that the criminal proceedings be terminated.

In addition to release, the African Commission and the UN Human Rights Committee have affirmed that people whose detention has been prolonged due to undue delay in bringing them to trial should receive reparation of financial compensation.<sup>310</sup>

<sup>305</sup> HRC General Comment 35, UN Doc. [CCPR/C/GC/35](#) (2014) para 37.

<sup>306</sup> See, CAT Concluding Observations: Sierra Leone, UN Doc. [CAT/C/SLE//CO/1](#) (2014) para 18 recommendation (a); HRC Concluding Observations: Benin, UN Doc. [CCPR/C/BEN/CO/2](#) (2015) paras 24-25; ACHPR Concluding Observations: [Cameroon](#), (2014) paras 55-56.

<sup>307</sup> See ACHPR Concluding Observations: [Cameroon](#), (2014) paras 55-56 and Recommendations (v-vii); [Nigeria](#), (2014) paras 72, 68, 107.

<sup>308</sup> Guideline 13(c) of the [Guidelines on Arrest, Police Custody and Pre-trial Detention in Africa](#)

<sup>309</sup> See Guideline 13(c) of the [Guidelines on Arrest, Police Custody and Pre-trial Detention in Africa](#).

<sup>310</sup> ACHPR Concluding Observations: [Nigeria](#), (2014) para 107; HRC Concluding Observations: Benin, UN Doc. [CCPR/C/BEN/CO/2](#) (2015) paras 24-25.



## 8.2 IS THE DELAY REASONABLE?

The assessment of whether a detainee has been tried within a reasonable time must be carried out on a case-by-case basis, and depends on the circumstances of the case.<sup>311</sup>

The Human Rights Committee has clarified that for purposes of assessing compliance with a detainee's right to trial within a reasonable time or to release, the time starts to run from the time of arrest and ends with the first instance (trial court) judgment.<sup>312</sup>

Among the issues taken into account when assessing the reasonableness of delay is the complexity of the case.<sup>313</sup> The following factors may be relevant to evaluating the complexity of the case: the nature of the facts to be established; the number of accused; the number of witnesses; and whether there are any international elements to the case.

The African Court on Human and Peoples' Rights has noted that while a more complex case may justify longer proceedings, unreasonable delays may still occur in very complex cases.<sup>314</sup>

The African Court on Human and Peoples' Rights concluded that a delay of almost two years between an arrest and the presentation of the first witness in a trial of several accused on charges of conspiracy and armed robbery was not justified. It considered that the state's claim – that the authorities were awaiting the extradition of other co-accused from another country, and that the investigation was continuing – did not justify putting the case on ice for almost two years.<sup>315</sup>

The African Commission, examining the conduct of proceedings before a military court against 135 people accused of involvement in the killing of the President of the Democratic Republic of the Congo, held that the seriousness of the alleged acts alone was not a justification for failure to complete proceedings against detainees within a reasonable time.<sup>316</sup>

Another factor taken into account when assessing delays is the conduct of the accused during the proceedings. However, unless the defence has failed to exercise due diligence or it is shown that the defence has engaged in deliberate delaying tactics, claims that the defence has been responsible for delay by the pursuit of available procedural avenues of defence should be dismissed.<sup>317</sup>

Also relevant to the assessment are the manner and time frames within which the state, including investigatory, prosecutorial and judicial authorities, has handled the case.

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<sup>311</sup> HRC General Comment 35, UN Doc. [CCPR/C/GC/35](#) (2014), para 37; [Onyango Nganyi & 9 Others v United Republic of Tanzania](#), (006/2013) African Court on Human and Peoples' Rights (18 March 2016) para 135.

<sup>312</sup> HRC General Comment 35, UN Doc. [CCPR/C/GC/35](#) (2014), para 37. In contrast however, the relevant period under article 14(3)(d) of the ICCPR (the right of everyone, whether or not detained, to trial within a reasonable time) relates not only to the time between the formal charging of the accused and the time by which a trial should commence, but also extends to the time of the final judgment on appeal, [HRC General Comment 32](#), UN Doc. [CCPR/C/GC/32](#) (2007) para 35.

<sup>313</sup> HRC General Comment 35, UN Doc. [CCPR/C/GC/35](#) (2014), para 37; [Onyango Nganyi & 9 Others v United Republic of Tanzania](#), (006/2013) African Court on Human and Peoples' Rights (18 March 2016) para 136. For further information see, ICJ [Trial Observation Manual for Criminal Proceedings, Practitioners Guide No. 5](#) (2009), Chapter V(9); [Amnesty International Fair Trial Manual, 2<sup>nd</sup> edition](#), Chapter 7.

<sup>314</sup> [Onyango Nganyi & 9 Others v United Republic of Tanzania](#), (006/2013) African Court on Human and Peoples' Rights (18 March 2016) para 139.

<sup>315</sup> [Onyango Nganyi & 9 Others v United Republic of Tanzania](#), (006/2013) African Court on Human and Peoples' Rights (18 March 2016) paras 144 and 155.

<sup>316</sup> [Interights, ASADHO and Madam O. Disu v. Democratic Republic of Congo](#), (274/03 and 282/03), ACPHR (2013) para 76.

<sup>317</sup> [Onyango Nganyi & 9 Others v United Republic of Tanzania](#), (006/2013) African Court on Human and Peoples' Rights (18 March 2016) paras 147-149.

Some States have set maximum time frames for pre-trial detention, and it will be critical that the time of such detention never exceeds these upper limits. However, the fact that the length of a person's pre-trial detention complies with the time allowed in national law may be relevant, but should not be decisive in and of itself in determining its reasonableness under international human rights law. When such laws set the maximum period of detention in relation to the possible penalty for the alleged offence, they are inconsistent with the rights to liberty and presumption of innocence. These laws focus on the potential penalty rather than the need to protect legitimate interests, to limit the length of pre-trial detention and to bring the detainee before the courts promptly.

## 9. RIGHT TO ADEQUATE TIME AND FACILITIES TO PREPARE A DEFENCE

### 9.1 RIGHT TO ADEQUATE TIME AND FACILITIES TO PREPARE A DEFENCE

As part of the right of defence, everyone suspected or charged with a criminal offence has the right to adequate time and facilities to prepare and present a defence.

This right is guaranteed in:

- **article 7(1)(c)** of the **African Charter** while not explicit, it is widely understood as part of the rights of defense
- It is expressly and extensively set out in **Section N(3)** of the **Principles on Fair Trial in Africa**, and other standards established by the African Commission.<sup>318</sup>

It is also guaranteed in

- **article 14(3)(b)** of the **ICCPR**;
- **article 18(3)(b)** of the **Migrant Workers Convention**;
- **Guideline 4, para 44(g)**, (pre-trial), **Guideline 5, para 45(b)** (during court proceedings) and **Guideline 12, para 62** of the **UN Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems**.

The right to adequate time and facilities is also an aspect of the principle of equality of arms, which is an essential element of the right to a fair trial.<sup>319</sup> In accordance with this principle, in criminal cases, the defence and the prosecution must be treated in a manner that ensures that both have an equal opportunity to prepare and present their case.

This right is engaged, no matter the offence, throughout criminal proceedings, including throughout the pre-trial phase.<sup>320</sup> Indeed, the **Guidelines on Arrest, Police Custody and Pre-Trial Detention in Africa** contain specific provisions guaranteeing the right to people detained in police custody (before their first appearance before a court) as well as to people held in pre-trial detention on the order of a judicial authority.<sup>321</sup>

The right to adequate time and facilities to prepare a defence includes the right to adequate time and facilities to communicate in confidence with and receive the assistance of counsel.<sup>322</sup> This right applies equally to people who are being represented by counsel of choice and people with appointed counsel.

The UN Human Rights Committee concluded that the failure of the authorities to grant the accused access to counsel while in detention and during questioning before trial violated their right to adequate time and facilities to prepare a defence.<sup>323</sup>

For people detained pending trial, the right to adequate time to communicate confidentially with their lawyer is indispensable and places particular obligations on the authorities.

<sup>318</sup> Guideline 8(d)(iv) (regarding people in police custody), Guideline 14(c) (regarding people ordered to be detained pre-trial by a judicial authority) [of the Guidelines on Arrest, Police Custody and Pre-Trial Detention in Africa](#); Part 4(c)(ii) of the [Principles and Guidelines on Human and Peoples' Rights while Countering Terrorism in Africa](#).

<sup>319</sup> HRC [General Comment 32](#), UN Doc. CCPR/C/GC/32 (2007) para 32; see, Section A(2)(a) of the [Principles on the Right to Fair Trial in Africa](#).

<sup>320</sup> Guideline 8(d)(iv) (regarding people in police custody) Guideline 14(c) (regarding people ordered to be detained pre-trial by a judicial authority) [of the Guidelines on Arrest, Police Custody and Pre-Trial Detention in Africa](#); HRC [General Comment 32](#), UN Doc. CCPR/C/GC/32 (2007) para 32.

<sup>321</sup> Guideline 8(d)(iv) [of the Guidelines on Arrest, Police Custody and Pre-Trial Detention in Africa](#) sets out the right with respect to people in police custody and Guideline 14(c) enshrines the right with regard to people ordered to be detained pre-trial by a judicial authority.

<sup>322</sup> Article 14(3)(b) of the [ICCPR](#); Article 18(3)(b) of the [Convention on Migrant Workers](#); Section N(3)(d-e) of the [Principles on the Right to Fair Trial in Africa](#); Guideline 8(d)(iv) and Guideline 14(c) [of the Guidelines on Arrest, Police Custody and Pre-Trial Detention in Africa](#). See also [article 7\(1\)\(c\) of the African Charter](#).

<sup>323</sup> *N.S. Nenova et al v Libya*, HRC, UN Doc. [CCPR/C/104/D/1880/2009](#), paras 7.9-7.10.

According to the **Principles on the Right to Fair Trial in Africa** and other international standards, the authorities must ensure that people held in police custody and pre-trial detention have adequate opportunity to communicate with and meet their lawyer. The authorities must ensure that such communications and visits are permitted without delay, interception or censorship, and in full confidentiality, including in police stations and places of detention.<sup>324</sup> Rules and practices must not serve to unduly restrict such contact, for example by placing time limits or delaying access.

This means there must be facilities such as telephones and rooms in which the detainee and their counsel can meet and communicate in full confidentiality (out of hearing of others) in all police stations and any place of detention. The authorities must respect the confidentiality of the oral, written and electronic communications between detainees and their lawyers, within the bounds of the professional relationship; and the law must prohibit the use of such communications, including their admissibility as evidence. Furthermore, the authorities must ensure that counsel (whether counsel of choice or appointed) can advise and assist the detainee independently, without interference, pressure or harassment. (See **Chapter 3.4-3.5.**)

The accused and his or her counsel should be informed of the date of the trial sufficiently in advance so as to allow them adequate time to prepare the defence.<sup>325</sup>

As described below, the right to adequate facilities to prepare the defence includes the right to obtain relevant information at the earliest possible time.<sup>326</sup>

The accused has the right to consult legal and other materials reasonably necessary for the preparation of the defence.<sup>327</sup> In addition, people deprived of their liberty must be permitted to keep documents pertaining to their case in their possession and hold them confidentially.<sup>328</sup>

The defence must have the right to obtain the advice and opinion of relevant independent experts in the course of preparing (and presenting) the defence.

In order to respect these rights without discrimination, the State's legal aid budget must be sufficient to cover the full range of legal services to people suspected or accused of a criminal offence who are entitled to the free assistance of legal counsel, and to defence expenses such as copying files and documents, obtaining information and evidence, and paying expenses for travel and experts.<sup>329</sup>

## 9.2 WHAT IS ADEQUATE TIME?

The length of time adequate for the preparation of the defence must be determined on a case-by-case basis. It will depend on the nature of the proceedings (such as pre-trial, preliminary, trial or appeal) and on the particular circumstances of each case.<sup>330</sup>

Factors that may influence the length of time deemed adequate for the preparation of the defence include: the complexity of the case, an accused's access to information and evidence, the extent of such information and evidence and the accused's access to his or her counsel.<sup>331</sup> Although time limits set in national law for the preparation of a case may be relevant, these alone are not decisive as to whether, in a particular case, the time is adequate.

<sup>324</sup> Section N(3)(e) of the [Principles on the Right to Fair Trial in Africa](#).

<sup>325</sup> Section N(3)(b) of the [Principles on the Right to Fair Trial in Africa](#).

<sup>326</sup> Section N(3)(e)(iv) of the [Principles on the Right to Fair Trial in Africa](#).

<sup>327</sup> Section N(3)(e)(v) of the [Principles on the Right to Fair Trial in Africa](#).

<sup>328</sup> Rule 53 of the [Nelson Mandela Rules](#).

<sup>329</sup> Guideline 12 para 62 of the [UN Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems](#).

<sup>330</sup> Section N(3)(c) of the [Principles on the Right to Fair Trial in Africa](#); HRC [General Comment 32](#), UN Doc. CCPR/C/GC/32 (2007) para 32.

<sup>331</sup> Section N(3)(c) of the [Principles on the Right to Fair Trial in Africa](#); see [Zhirnov v Russian Federation](#), HRC, UN Doc. CCPR/C/109/D/1795/2008 (2013) paras 10.2-10.4.

**Section N (3)(c) of the Principles on the Right to Fair Trial in Africa**

c) The accused has a right to adequate time for the preparation of a defence appropriate to the nature of the proceedings and the factual circumstances of the case. Factors which may affect the adequacy of time for preparation of a defence include the complexity of the case, the defendant's access to evidence, the length of time provided by rules of procedure prior to particular proceedings, and prejudice to the defence.

As noted in **Chapter 8.1**, a detainee's right to trial within a reasonable time must be considered in the light of the right to adequate time and facilities to prepare the defence.

The UN Human Rights Committee has clarified that if the defence considers that they require additional time to prepare for a proceeding, they should request an adjournment. Reasonable requests for an adjournment should be granted, for a period of time that will allow the defence sufficient time to prepare.<sup>332</sup>

**9.3 RIGHT TO INFORMATION ABOUT CHARGES**

The right to time and facilities to prepare a defence is necessarily interlinked with the obligation of the State to ensure that anyone charged with a criminal offence is informed promptly of the nature and cause of the charges against them.

Some international standards, such as the **ICCPR** and the **Principles on the Right to Fair Trial in Africa**, include two provisions enshrining the right to be notified promptly of the charges. These different provisions serve different purposes and apply at different times. For example, **article 9(2)** of the **ICCPR** and **Section M(2)(a)** of the **Principles on the Right to Fair Trial in Africa** apply to people arrested or detained just after arrest. As described in **Chapter 2.1**, they require the authorities to provide sufficient information about the charges to enable a person deprived of their liberty to challenge the legality of the arrest or detention.

In this respect, **article 14(3)(a)** of the **ICCPR** and **Section N(1)(a-c)** of the **Principles on the Right to Fair Trial in Africa** apply at the time charges are formally laid (typically in the form of an indictment) or when the individual is publicly named as charged. In many cases charge will be subsequent to arrest. These provisions apply to all people charged with a criminal offence, whether or not they are detained. They require the authorities to provide detailed information both about the "nature of the charge" – the law under which they have been charged – and "the cause of the charge" – the material facts underlying the charge. The information provided must be detailed enough and provided in such a manner that the accused is made aware of the substance of the complaint and is enabled to prepare the defence.<sup>333</sup> The information must be provided in a language that the accused understands.<sup>334</sup> The UN Human Rights Committee also clarified that the information should be provided to the accused in writing; if provided initially orally, then it should be confirmed in writing.<sup>335</sup>

The African Commission stressed that the wording and form of the charges must be clear so that the accused and their counsel can fully understand them.<sup>336</sup>

The State must ensure the availability of and provide the services of an independent interpreter and translations of the written charging document, free of charge, for those who do not speak or understand the language used.<sup>337</sup> If the accused is a child or a person

<sup>332</sup> HRC [General Comment 32](#), UN Doc. CCPR/C/GC/32 (2007) para 32.

<sup>333</sup> Section N(1)(a-c) of the [Principles on the Right to Fair Trial in Africa](#); HRC [General Comment 32](#), UN Doc. CCPR/C/GC/32 (2007) para 31.

<sup>334</sup> Article 14(3)(a) of the [ICCPR](#); article 18(3)(a) of the [Convention on Migrant Workers](#); Section N(1)(a) of the [Principles on the Right to Fair Trial in Africa](#).

<sup>335</sup> HRC [General Comment 32](#), UN Doc. CCPR/C/GC/32 (2007) para 31.

<sup>336</sup> [Haregewoin Gabre-Selassie & IHRDA \(on behalf of former Derge officials\) v Ethiopia](#) (301/05) ACHPR (2013) para 231.

<sup>337</sup> Guideline 3, para 43(f) of the [UN Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems](#).

with a disability, the state is required make the information available in formats and manners that are accessible to them.<sup>338</sup>

## 9.4 DISCLOSURE

In addition to providing the accused information about the charges, in order to meet its obligation to respect the right of an accused person to adequate time and facilities to prepare the defence, the authorities must give the accused timely access to relevant information.

The authorities have a duty to disclose information, files, documents and evidence that the prosecution intends to rely on in making the case and a list of witnesses.<sup>339</sup> The duty to disclose entails the requirement that all relevant information held by the prosecution or other public authorities that could tend to exonerate the accused or cast doubt on evidence or the case presented by the State or otherwise assist the defence must be provided. This includes information that may indicate that a statement made by the accused was not voluntary.<sup>340</sup>

This information must be provided at the earliest appropriate time so as to afford the accused and his or his lawyer adequate time to prepare a defence.<sup>341</sup>

The duty of disclosure is thus broad in scope, although not absolute, and it applies throughout the proceedings. Any restrictions that may be placed on disclosure must not serve to render the proceedings unfair. If necessary to ensure fairness, in the face of restrictions or withholding of information, charges may have to be dropped.

Decisions on withholding relevant information from disclosure must be made by a judge, in the course of a fair adversarial procedure, on grounds of necessity to protect the rights of another or to safeguard an important public interest (including national security or the effectiveness of lawful police investigations). The court must ensure that difficulties occasioned to the defence as a result of such restrictions are sufficiently counter-balanced to ensure fairness. Furthermore, the judge must keep the appropriateness of the non-disclosure, its impact on the defence and its significance to fairness of the case as a whole, under review throughout the proceedings.<sup>342</sup>

The right to adequate time and facilities to prepare a defence and ultimately the right to a fair trial demand that an accused may not be convicted on the basis of information that has not been fully disclosed to the defence, and the defence therefore has not had an opportunity to challenge.<sup>343</sup> The **Principles on the Right to Fair Trial in Africa** and the **Principles and Guidelines on Human and Peoples' Rights while Countering Terrorism in Africa** provide that before judgment or sentence is rendered, the accused and his or her defence counsel have the right to know and challenge all the evidence which may be used to support the decision.<sup>344</sup>

<sup>338</sup> Guidelines (4)(h),5 and 33 (d) (i) and (iii) of the [of the Guidelines on Arrest, Police Custody and Pre-Trial Detention in Africa](#),

<sup>339</sup> Section N(3)(e)(iii-v) of the [Principles on the Right to Fair Trial in Africa](#); HRC [General Comment 32](#), UN Doc. CCPR/C/GC/32 (2007) para 33; Principle 21 of the UN [Basic Principles on the Role of Lawyers](#).

<sup>340</sup> HRC [General Comment 32](#), UN Doc. CCPR/C/GC/32 (2007) para 33; Part 4(c) (ii) of the [Principles and Guidelines on Human and Peoples' Rights while Countering Terrorism in Africa](#).

<sup>341</sup> Section N(3)(e) of the [Principles on the Right to Fair Trial in Africa](#).

<sup>342</sup> Chapter 8.4 of [Amnesty International Fair Trial Manual, 2<sup>nd</sup> edition](#) (2014), sets out a range of authorities for these standards.

<sup>343</sup> *Onoufriou v Republic of Cyprus*, HRC (1636/2007), UN Doc. [CCPR/C/100/D/1636/2007](#) (2010) para 6.11.

<sup>344</sup> Section N(3)(e)(vi) of the [Principles on the Right to Fair Trial in Africa](#); Part 4(C)(ii) of the [Principles and Guidelines on Human and Peoples' Rights while Countering Terrorism in Africa](#).

## 10. RIGHTS AND SAFEGUARDS DURING INVESTIGATION AND QUESTIONING

All individuals suspected or accused of a criminal offence have the right to be presumed innocent, not to be compelled to incriminate themselves, to remain silent and to the presence and assistance of a lawyer in the course of the investigation, including during questioning. Like all persons, they also enjoy the right not to be subjected to torture or other ill-treatment

If the suspect or accused does not speak or understand the language used by the investigating authorities, he or she has the right to the free assistance of an interpreter during the investigation, including during questioning, consultations with counsel and the authorities, as well as throughout the proceedings.<sup>345</sup>

Special measures should be taken to ensure the rights of women and children subject to investigation and to ensure that they are protected from torture and other ill-treatment, including sexual violence. For example, women should be interviewed by women police or judicial officials.<sup>346</sup> Law enforcement officials and the judiciary must ensure that in all contacts with children they respect the child's rights and legal status, avoid harm and consider the child's best interests. Officials who come into contact with children in the context of the criminal justice system should receive special training to deal sensitively and appropriately with them.<sup>347</sup>

Rules consistent with international standards for the conduct of interrogations must be adopted, applied consistently by all interrogating authorities and publicly available.<sup>348</sup> They must be regularly reviewed and the authorities must monitor interrogation methods and practices.<sup>349</sup> Those carrying out questioning must be trained in relevant human rights standards, as well as in the rules themselves.<sup>350</sup> The law must penalize and the authorities must bring to justice anyone responsible for torture and other ill-treatment, the unlawful use of force or coercion to extract a confession, or other violations of interrogation rules.<sup>351</sup>

Additional safeguards have been established in order to protect people from abuse during the investigation stage, when individuals suspected or accused of crimes are particularly vulnerable to violations at the hands of the authorities.

These rights and safeguards apply to everyone, no matter how serious the crime with which they are charged. They also apply during questioning by all State agents, whether civilian or military or intelligence officers, and even when an individual is questioned in another country.

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<sup>345</sup> Guideline 9(a)(iv) of the [Guidelines on Arrest, Police Custody and Pre-Trial Detention in Africa](#); [article 14\(3\)\(f\) of the ICCPR](#). For further information on the right to an interpreter see, ICJ [Trial Observation Manual for Criminal Proceedings, Practitioners Guide No. 5](#) (2009) [Chapter vi \(6\)](#); [Amnesty International Fair Trial Manual, 2<sup>nd</sup> edition](#), Chapter 23.

<sup>346</sup> For example, Section M(7)(b) the [Principles on the Right to Fair Trial in Africa](#).

<sup>347</sup> For example see Section O of the [Principles on the Right to Fair Trial in Africa](#). For a summary of the rights of children suspected or accused of infringing the penal law, see ICJ [Trial Observation Manual for Criminal Proceedings, Practitioners Guide No. 5](#) (2009), Chapter VII(A) and [Amnesty International Fair Trial Manual, 2<sup>nd</sup> edition](#), Chapter 27.

<sup>348</sup> See, CAT Concluding Observations: [Latvia](#), UN Doc: CAT/C/CR/31/3 (2003) para 7(h); [Kazakhstan](#), UN Doc. CAT/C/KAZ/CO/2 (2008) para 11; [USA](#), UN Doc. CAT/C/USA/CO/2 (2006) paras 9, 24.

<sup>349</sup> Article 11 of the [Convention against Torture](#); UN Special Rapporteur on torture: Follow-up report on follow-up visit to Ghana, UN Doc. [A/HRC/31/57/Add.2](#) (2015) para 15.

<sup>350</sup> Article 10 of the [Convention against Torture](#); UN Special Rapporteur on torture: Follow-up report on follow-up visit to Ghana, UN Doc. [A/HRC/31/57/Add.2](#) (2015) para 15.

<sup>351</sup> Articles 4-7 of the [Convention against Torture](#); Section M(7)(i) of the [Principles on the Right to Fair Trial in Africa](#); CAT Concluding Observations: Rwanda, UN Doc. [CAT/C/RWA/CO/1](#) (2012) para 23; Japan, UN Doc. [CAT/C/JPN/CO/1](#) (2007) para 16.



## 10.1 PRESUMPTION OF INNOCENCE

Everyone suspected of or charged with a criminal offence has the right to be presumed innocent unless or until convicted, according to law, by a competent, independent and impartial court following proceedings which meet international standards of fairness.<sup>352</sup>

The right to be presumed innocent applies throughout criminal proceedings, including during the investigation and pre-trial phases.

In accordance with the presumption of innocence:

- The State bears the burden of proving the guilt of an individual beyond a reasonable doubt and the individual is to be presumed innocent, and treated in accordance with this presumption, from the time suspicion is first aimed at them, during and following arrest, and throughout the investigation and pre-trial phases and during trial.
- All public officials must refrain from prejudging the outcome of a case, including in public statements, or through the media. Denial of bail must not be taken as an indication of guilt; all decisions to detain a person pending trial and the length of such detention must be consistent with the presumption of innocence – and should be preventive not punitive.<sup>353</sup> (See **Chapters 5 and 6.**)
- As highlighted further below, accused individuals have the right to silence and may not be compelled to testify against themselves or confess guilt.

## 10.2. NOTICE OF RIGHTS BEFORE QUESTIONING

Before being questioned by the police or other officials, individuals should be informed of their rights, including their rights to counsel, to a medical examination, to an interpreter, to silence and to other procedural safeguards, as well as the consequences of waiving those rights.<sup>354</sup>

This information should be provided in a language and a manner that the individual understands.

## 10.3. RIGHT TO COUNSEL

People subject to questioning by the police, whether or not they are detained, have the right to have their lawyer (or other legal assistance provider) present and to be assisted by counsel during questioning.<sup>355</sup> The right to counsel includes the right to speak with the lawyer confidentially. (See **Chapter 3.**) Everyone subject to police questioning should be informed of this right before each questioning session.<sup>356</sup>

The right to counsel applies to everyone, no matter how serious the offence being investigated.

The UN Human Rights Committee has clarified that there should be no restrictions placed on the right to assistance of counsel during questioning.<sup>357</sup>

In order to ensure this right for people who do not have counsel of choice, and to protect against discrimination against people who do not have sufficient resources to pay for counsel, States must ensure adequate financial and human resources for legal aid, so that

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<sup>352</sup> Article 7(1)(b) of the [African Charter](#); Article 14(2) of the ICCPR; HRC [General Comment 32](#), UN Doc. CCPR/C/GC/32 (2007) para 30; article 11 of [the UDHR](#). For further information on the right to the presumption of innocence, see ICJ [Trial Observation Manual for Criminal Proceedings, Practitioners Guide No. 5](#) (2009), Chapters v(1) and vi(3) and [Amnesty International Fair Trial Manual, 2<sup>nd</sup> edition](#), Chapter 15.

<sup>353</sup> HRC [General Comment 32](#), UN Doc. CCPR/C/GC/32 (2007) para 30.

<sup>354</sup> Part 3(B)(i) of the [Principles and Guidelines on Human and Peoples' Rights while Countering Terrorism in Africa](#); Principle 8, para 29 of the [UN Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems](#).

<sup>355</sup> Guideline 9(a)(ii) [of the Guidelines on Arrest, Police Custody and Pre-Trial Detention in Africa](#).

<sup>356</sup> Guideline 9(a)(i) [of the Guidelines on Arrest, Police Custody and Pre-Trial Detention in Africa](#).

<sup>357</sup> HRC Concluding Observations: Republic of Korea, UN Doc. [CCPR/C/KOR/CO/4](#) (2015) paras 32-33.



there are a sufficient number of independent and qualified lawyers to provide legal assistance to people throughout the country, including during questioning.<sup>358</sup>

States should generally prohibit suspects from being interviewed in the absence of their lawyer, unless the individual has made an informed and voluntary waiver of his or her right to counsel.<sup>359</sup>

The interviewing of people under the age of 18 in the absence of a lawyer, and a parent (if it is in the best interest of the child) or guardian, should be prohibited in all cases.<sup>360</sup>

If the suspect or accused does not speak or understand the language used by the authorities, the services of a competent and independent interpreter should be provided free of charge.<sup>361</sup>

#### 10.4 RIGHT TO A MEDICAL EXAMINATION

In accordance with the **Guidelines on Arrest, Police Custody and Pre-Trial Detention in Africa**, prior to each questioning session, individuals subject to questioning by police have the right to a medical examination.<sup>362</sup>

The suspect or accused should be informed of this right before questioning starts.<sup>363</sup>

Any such examination should be carried out with due respect for medical confidentiality, and in accordance with the standards set out in **Chapter 4.4**. The results should be recorded in a separate medical file, access to which should be governed by rules of medical confidentiality.<sup>364</sup>

#### 10.5 RIGHT TO REMAIN SILENT

Everyone suspected or accused of a criminal offence has the right to remain silent when questioned.

Although not expressly set out in either the **ICCPR** or the **African Charter**, the right to remain silent is inherent in the presumption of innocence (see **Section 10.1** above) and a safeguard of the right not to be compelled to testify against oneself or confess guilt. The right is expressly set out in standards established by the African Commission including **Guidelines 4(c)** and **9(b)** of the **Guidelines on Arrest, Police Custody and Pre-Trial Detention in Africa**, as well as the **Principles on the Right to Fair Trial in Africa** and the **Principles and Guidelines on Human and Peoples' Rights while Countering Terrorism in Africa**.<sup>365</sup>

Furthermore, the UN Human Rights Committee has affirmed that: "anyone arrested on a criminal charge should be informed of the right to remain silent during police questioning, in accordance with Article 14, paragraph 3(g), of the Covenant [the ICCPR]."<sup>366</sup> It has

<sup>358</sup> UN Special Rapporteur on torture, Report on Mission to Gambia, UN Doc. [A/HRC/28/68/Add.4](#) (2015) para 108(d).

<sup>359</sup> Guideline 3, para 43(b) of the [UN Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems](#).

<sup>360</sup> Guideline 10, para 53(b) of the [UN Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems](#); Guideline 18, para 100(c) of the WGAD Principles and Guidelines on the right of anyone deprived of their liberty to bring proceedings before a court, UN Doc. [A/HRC/30/37](#) (2015).

<sup>361</sup> Guideline 9(a)(iv) [of the Guidelines on Arrest, Police Custody and Pre-Trial Detention in Africa](#).

<sup>362</sup> Guideline 9(a)(iii) [of the Guidelines on Arrest, Police Custody and Pre-Trial Detention in Africa](#).

<sup>363</sup> Part 3(B)(i) of the [Principles and Guidelines on Human and Peoples' Rights while Countering Terrorism in Africa](#); Principle 8, para 29 of the [UN Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems](#);

<sup>364</sup> Guideline 9(a)(iii) [of the Guidelines on Arrest, Police Custody and Pre-Trial Detention in Africa](#).

<sup>365</sup> Part 3(B)(iv) of the [Principles and Guidelines on Human and Peoples' Rights while Countering Terrorism in Africa](#); Section N(6)(d)(ii) of the [Principles on the Right to Fair Trial in Africa](#).

<sup>366</sup> HRC Concluding Observations: France, UN Doc. [CCPR/C/FRA/CO/4](#) (2008) para 14.

called on states to establish the right to silence in law and to ensure it is respected in practice.<sup>367</sup>

People should be informed of their right to silence on arrest and, to ensure the effectiveness of the right, also before questioning.<sup>368</sup>

The **Principles and Guidelines on the Right to Fair Trial in Africa** specify that: "Silence by the accused may not be used as evidence to prove guilt and no adverse consequences may be drawn from the exercise of the right to remain silent."<sup>369</sup>

**Guidelines on Arrest, Police Custody and Pre-trial Detention in Africa:**

4. The following rights shall be afforded to all persons under arrest:

....

(c) The right to silence and freedom from self-incrimination.

9(b). The right of persons undergoing questioning to remain silent shall be respected at all times. It shall be prohibited to take undue advantage of the situation of a detained person for the purpose of compelling or inducing him or her to confess, to incriminate himself or herself, or to testify against another person.

## 10.6 PROHIBITION OF COERCION

No one suspected or accused of a criminal offence may be compelled to confess guilt or testify against him or herself.<sup>370</sup>

The prohibition of coercion bars the use of treatment that amounts to torture or other cruel, inhuman or degrading treatment or punishment, with a view to obtaining a statement or "confession",<sup>371</sup> but is not limited to this. The UN Human Rights Committee has explained and the **Guidelines on Arrest, Police Custody and Pre-Trial Detention in Africa** state that the prohibition of coerced confessions means that there should be no direct or indirect physical or mental pressure placed on the accused by the authorities with a view to obtaining a confession of guilt.<sup>372</sup>

Furthermore, the authorities are prohibited from taking undue advantage of the situation of detainees for the purpose of compelling them to incriminate themselves or to confess guilt.<sup>373</sup>

The **Principles on the Right to Fair Trial in Africa**, the **Guidelines on Arrest, Police Custody and Pre-Trial Detention** and the **Principles and Guidelines on Human and Peoples' Rights while Countering Terrorism in Africa** expand further on this standard, expressly, prohibiting the authorities from taking undue advantage of the

<sup>367</sup> HRC Concluding Observations: Algeria, UN Doc. [CCPR/C/DZA/CO/3](#) (2007) para 18; HRC Concluding Observations: Nepal, UN Doc [CCPR/C/NPL/CO/2](#) (2014) para 16.

<sup>368</sup> Guideline 5 [of the Guidelines on Arrest, Police Custody and Pre-Trial Detention in Africa](#); see [Principle 8, paragraph 29 of the UN Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems](#).

<sup>369</sup> Section N(6)(d)(ii) of the [Principles on the Right to Fair Trial in Africa](#).

<sup>370</sup> Article 14(3)(g) of the [ICCPR](#); article 40(2)(b)(iv) of the [Convention on the Rights of the Child](#); [article 18\(3\)\(g\) of the Convention on Migrant Workers](#); Principle N(6)(d) the [Principles on the Right to Fair Trial in Africa](#). See, Guideline 9(b) [of the Guidelines on Arrest, Police Custody and Pre-Trial Detention in Africa](#); Part 3(B)(iv) of the [Principles and Guidelines on Human and Peoples' Rights while Countering Terrorism in Africa](#); Principle 21 of the UN [Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment](#).

<sup>371</sup> The prohibition of torture and other cruel, inhuman or degrading treatment or punishment is guaranteed under article 5 of the [African Charter](#) and article 7 of the [ICCPR](#), among other standards. See Guideline 9(c) of the [Guidelines on Arrest, Police Custody and Pre-Trial Detention in Africa](#), [prohibiting the torture or other ill-treatment of detainees being questioned](#).

<sup>372</sup> HRC [General Comment 32](#), UN Doc. CCPR/C/GC/32 (2007) para 41; [Chiti v Zambia](#), HRC, UN Doc. CCPR/C/105/D/1303/2004 (2012) para 12.6.

<sup>373</sup> Guideline 9(b) [of the Guidelines on Arrest, Police Custody and Pre-Trial Detention in Africa](#); Part 3(B)(iv) of the [Principles and Guidelines on Human and Peoples' Rights while Countering Terrorism in Africa](#); Principle 21 of the UN [Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment](#).

situation of a detained person for the purpose of compelling him or her to testify against another person.<sup>374</sup>

**Guideline 9(c)** of the **Guidelines on Arrest, Police Custody and Pre-Trial Detention in Africa** specifies that prohibited treatment includes: “violence, threats, intimidation, and methods of questioning that impair his or her capacity of decision or his or her judgment.”

The particular methodologies and techniques that would constitute proscribed forms of unlawful torture or other ill-treatment or coercion are virtually unlimited and any listing is necessarily far from exhaustive. However, the following techniques are illustrative of those that are prohibited: prolonged stress positions, isolation, sensory deprivation (such as the use of goggles, blindfolds and earmuffs), hooding, exposure to cold or heat, sleep and dietary adjustments, exploitation of detainees’ individual phobias, severe beatings, suspending prisoners in humiliating and painful ways, electric shocks, exposure to very loud music, sleep deprivation, threats of death, rape or other forms of sexual violence, “water-boarding” or simulated execution and the use of “short shackling”.<sup>375</sup> In addition, beatings, blows – including with a cane, baton, wire, and stick – punches, and slaps of detainees, in the hours and days following arrest and during questioning, are prohibited.<sup>376</sup> Other forms of coercive techniques include interrogation techniques designed to offend personal, cultural or religious sensitivities.<sup>377</sup>

Coercive pressure can be exerted through detention conditions. Prolonged incommunicado detention and secret detention violate the prohibition of torture and other ill-treatment and therefore are forms of prohibited coercion.<sup>378</sup> Statements or other information gained as a result of such treatment should be inadmissible in proceedings against the individual subjected to it.

**Section N(6)(d)(i)** of the **Principles on the Right to Fair Trial in Africa** states that “any confession or admission obtained during incommunicado detention shall be considered to have been obtained by coercion” and is therefore inadmissible as evidence and may not be considered probative of any fact at trial or sentencing.

Additionally, the UN Special Rapporteur on torture has concluded that holding a person in solitary confinement before trial may be considered a form of coercion and when used intentionally to obtain information or a confession amounts to torture or other ill-treatment.<sup>379</sup>

The UN Human Rights Committee recommended that legal safeguards be put in place to prevent interrogations and other procedural actions while a person is suffering from withdrawal from drugs.<sup>380</sup>

The Committee on the Rights of the Child has clarified that in cases involving people under the age of 18 at the time of the alleged crime:

“The term ‘compelled’ should be interpreted in a broad manner and not be limited to physical force or other clear violations of human rights. The age of the child, the child’s development, the length of the interrogation, the child’s lack of understanding, the fear of unknown consequences or of a suggested possibility of

<sup>374</sup> Section M(7)(d) of [the Principles on the Right to Fair trial in Africa](#); Guideline 9(b) of [the Guidelines on Arrest, Police Custody and Pre-Trial Detention in Africa](#); Part 3(B)(iv) of the [Principles and Guidelines on Human and Peoples’ Rights while Countering Terrorism in Africa](#).

<sup>375</sup> HRC Concluding Observations: United States of America, UN Doc. [CCPR/C/USA/CO/3/Rev.1](#) (2006) para 13; CAT Concluding Observations: United States of America, [CAT/C/USA/CO/2](#) (2006), para 24 and UN Doc. [CAT/C/USA/CO/3-5](#) (2015) para 17; Kazakhstan, UN Doc. [CAT/C/KAZ/CO/3](#) (2014), para 7; Rwanda, UN Doc. [CAT/C/RWA/CO/1](#) (2012) para 10; [Inter-American Commission on Human Rights, Report on Terrorism and Human Rights](#), OEA/Ser.L/V/II.116 Doc. 5 rev. 1 corr (2002) paras 211 and 213.

<sup>376</sup> UN Special Rapporteur on torture: Follow-up report on follow-up visit to Ghana, UN Doc. [A/HRC/31/57/Add.2](#) (2015) paras 12, 15, 76.

<sup>377</sup> UN Special Mechanisms Joint Report on the situation of detainees at Guantánamo Bay, UN Doc. [E/CN.4/2006/120](#) (2006), para 60.

<sup>378</sup> For example, [UN Special Mechanisms Joint Study on secret detention](#), UN Doc. [A/HRC/13/42](#) (2010), paras 27, 292(f); UN Special Rapporteur on torture, UN Doc. [A/61/259](#) (2006), para 56.

<sup>379</sup> UN Special Rapporteur on torture, UN Doc. [A/66/268](#) (2011), paras 73, 85.

<sup>380</sup> HRC Concluding Observations: Russian Federation, UN Doc. [CCPR/C/RUS/CO/7](#) (2015) para 16.

imprisonment may lead him/her to a confession that is not true. That may become even more likely if rewards are promised such as: 'You can go home as soon as you have given us the true story', or lighter sanctions or release are promised."<sup>381</sup>

As a safeguard against coercion and aiming to ensure that statements, including admissions of guilt are only made voluntarily, the **Guidelines on Arrest, Police Custody and Pre-Trial Detention in Africa** state that: "Confessions should only be taken in the presence of a judicial officer or other officer of the court who is independent of the investigating authority ... Confessions by children are to be recorded in the presence of a judicial officer, and their parent, guardian or independent advocate, lawyer or other legal services provider."<sup>382</sup>

#### 10.6.1 ALLEGATIONS OF COMPULSION AND THE EXCLUSIONARY RULE

If an accused person alleges that he or she has been compelled to make a statement or admit guilt, a judge must have the authority to consider the allegations at any stage of the proceedings.

In reference to allegations of torture or other ill-treatment, the authorities have an obligation to ensure that a prompt, thorough, independent and impartial investigation is carried out. Furthermore, those responsible must be brought to justice and victims must receive reparation.<sup>383</sup>

Consistent with the presumption of innocence, the burden of proof lies with the prosecution to show that statements by the accused have been made voluntarily.<sup>384</sup>

In light of this burden and the prohibition of coerced confessions, the **Guidelines on Arrest, Police Custody and Pre-Trial Detention in Africa** specify: "...The burden of proof lies with the prosecution to prove that confessions were obtained without duress, intimidation or inducements."<sup>385</sup>

When coercion takes the form of torture or other cruel, inhuman or degrading treatment, the right not to be compelled to incriminate oneself or confess guilt intersects with the separate rule of international law that prohibits the use of such statements as evidence, except in proceedings against those alleged to be responsible for the abuse.<sup>386</sup>

**Article 15** of the **Convention against Torture** provides: "...any statement which is established to have been made as a result of torture shall not be invoked as evidence in any proceedings, except against a person accused of torture as evidence that the statement was made."

The UN Human Rights Committee and the standards adopted by the African Commission extend the exclusionary rule beyond "confessions" and statements made as a result of torture or other ill-treatment. The UN Human Rights Committee has stated that the exclusionary rule also applies in principle to all evidence elicited as a result of torture or other ill-treatment, at all times.<sup>387</sup>

The **Principles on the Right to Fair Trial in Africa** extend this prohibition not only to confessions but also to other evidence or information obtained by any form of coercion.

<sup>381</sup> [CRC General Comment 10](#), UN Doc. CRC/C/GC/10 (2007) para 57.

<sup>382</sup> Guideline 9(d) [of the Guidelines on Arrest, Police Custody and Pre-Trial Detention in Africa](#)

<sup>383</sup> Articles 12, 16, 4-7 and 14 of the Convention against Torture; [HRC General Comment 20](#), para 14; HRC General Comment 31, paras 8, 15, 18; Guideline 22(b) [of the Guidelines on Arrest, Police Custody and Pre-Trial Detention in Africa](#).

<sup>384</sup> HRC [General Comment 32](#), UN Doc. CCPR/C/GC/32 (2007) para 41; UN Special Rapporteur on Torture, UN Doc. [A/69/387](#) (2014) paras 26-28.

<sup>385</sup> Guideline 9(d) [of the Guidelines on Arrest, Police Custody and Pre-Trial Detention in Africa](#).

<sup>386</sup> Article 15 of the [Convention against Torture](#); [HRC General Comment 20](#), para 12; HRC [General Comment 32](#), UN Doc. CCPR/C/GC/32 (2007) para 41. See [Amnesty International Fair Trial Manual, 2<sup>nd</sup> edition](#), Chapter 16.3.

<sup>387</sup> HRC [General Comment 32](#), UN Doc. CCPR/C/GC/32 (2007) para 6.

They state: "Any confession or other evidence obtained by any form of coercion or force may not be admitted as evidence or considered as probative of any fact at trial or in sentencing. Any confession or admission obtained during incommunicado detention shall be considered to have been obtained by coercion."<sup>388</sup>

Moreover **the [Principles and Guidelines on Human and Peoples' Rights while Countering Terrorism in Africa](#)** include in the list covered by the exclusionary rule confessions, statements and evidence obtained as a result of the absence of basic procedural guarantees, or other serious violations of internationally protected human rights. Part 4(C)(i) provides:

Use of Evidence : Statements, confessions, or other evidence obtained by any form of coercion or force, in particular, through torture and cruel, inhuman, and degrading treatment or punishment, incommunicado detention, disappearance, the absence of basic procedural guarantees, or other serious violations of internationally protected human rights shall not be used as evidence in any proceedings, except when used as evidence against an individual accused of those above abuses. Such evidence may also not be considered as probative of any fact in a proceeding, including in sentencing.

## 10.7 RECORDS OF QUESTIONING

The authorities carrying out the questioning should make comprehensive records of each questioning session.<sup>389</sup>

The records should include the following information:

- The date, time and place of questioning;
- The place of detention, if any;
- The start and end times of every questioning session, and any rest or break periods;
- The intervals between questioning sessions;
- The identity of any officials who conducted the questioning and of any other persons present;
- Confirmation that the detained person:
  - was advised of and availed him or herself of the opportunity to seek legal services prior to the questioning;
  - had counsel present and the right to be assisted by legal counsel throughout the session;
  - was provided with a medical examination; and
  - had, if needed, access to an independent interpreter during questioning (including sign language for the hearing impaired) and any accommodations necessary to ensure the detainee's understanding of and participation in the process were made.
- Details of any statements provided by the detained person should also be recorded along with verification from the detained person that the record accurately reflected the statement he or she provided.

The UN Human Rights Committee, the Committee against Torture, and the UN Special Rapporteur on torture have each indicated that States should make audio or video recording of all interrogations mandatory, including those carried out in police stations and places of detention.<sup>390</sup>

Consistent with these prescriptions, the **Guidelines on Arrest, Police Custody and Pre-Trial Detention in Africa** provide that: "States shall make provision for the audio and audiovisual recording of questioning sessions and the provision of confessions."<sup>391</sup>

<sup>388</sup> Section N(6)(d)(i) of the [Principles on the Right to Fair Trial in Africa](#).

<sup>389</sup> Guideline 28 of [the Robben Island Guidelines](#); Guideline 9(e) [of the Guidelines on Arrest, Police Custody and Pre-Trial Detention in Africa](#); HRC General Comment 20, para 11; Principle 23 of the UN [Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment](#).

<sup>390</sup> For example, HRC Concluding Observations: Uzbekistan, UN Doc. [CCPR/C/UZB/CO/4](#) (2015) para 14; CAT Concluding Observations: Jordan, UN Doc. [CAT/C/JOR/CO/3](#) (2015) para 24(b); UN Special Rapporteur on torture: Gambia, UN Doc [A/HRC/28/68/Add.4](#) (2015) para 108(e).

<sup>391</sup> Guideline 9(g) [of the Guidelines on Arrest, Police Custody and Pre-Trial Detention in Africa](#).

The sessions must be recorded in their entirety.

The records and recordings should be kept in secure facilities under the responsibility of authorities with no hierarchical links with investigators. The recording (and a copy) should be made available to the individual questioned, his or her lawyer and the court. The recording should be retained for sufficient time for use as evidence in any relevant proceedings.<sup>392</sup>

Anyone responsible for withholding, manipulating or deleting records of questioning should be held accountable.<sup>393</sup>

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<sup>392</sup> CAT Concluding Observations: Jordan, UN Doc. [CAT/C/JOR/CO/3](#) (2015) para 24(b); China, [CAT/C/CHN/CO/5](#) (2015) para 35.

<sup>393</sup> CAT Concluding observations: China, [CAT/C/CHN/CO/5](#) (2015) para 35(d).

## 11. HUMANE CONDITIONS AND TREATMENT IN CUSTODY

### 11.1 RIGHT TO HUMANE TREATMENT AND RESPECT FOR RIGHTS

All people, including those deprived of their liberty, have the right to be free from torture and other ill-treatment. States must take measures to protect everyone in custody from such treatment.<sup>394</sup> Furthermore, States must treat all people deprived of their liberty humanely and with respect for their inherent human dignity.<sup>395</sup>

The human rights of detainees and prisoners must be respected and protected by the authorities. Only such proportionate limitations demonstrably necessary as a consequence of the deprivation of liberty itself may be placed on those rights which may be subject to limitation or restriction under international human rights law.<sup>396</sup>

States' obligations to respect and protect the rights of people deprived of their liberty apply to all detainees and prisoners within the jurisdiction of the State, including those within the effective control of State agents outside its territory.<sup>397</sup> States obligations to respect and protect the rights of detainees and prisoners also apply in privately run detention facilities and prisons.

The treatment of people under arrest, held in police custody or held in pre-trial detention must comply with international standards, and the laws governing their treatment must also conform to international standards.<sup>398</sup> Restrictions on fundamental freedoms, such as the rights to private and family life, to freedom of expression, association, religion or belief must be prescribed by law, and must be both necessary and proportionate to a legitimate aim that is recognized by international standards.<sup>399</sup>

People deprived of their liberty must not be subjected to and must be protected from all forms of discrimination, including on grounds such as race, colour, sex, gender, disability, sexual orientation, gender identity, religion, language, political or other opinion, national, ethnic or social origin, property, and birth or other status.<sup>400</sup>

The authorities must ensure that the custody regime respects the rights to family and private life and to freedom of religion; it must also take into account the cultural and religious practices of those deprived of their liberty.<sup>401</sup>

The authorities must take special measures to protect the rights of individuals who risk discrimination from officials or from other detainees or prisoners. This includes taking special measures to protect the rights and accommodate the special needs of women, children, people with disabilities, people with HIV/Aids, people with albinism, lesbian, gay, bisexual, transgender and intersex people and non-nationals. Among other things, such people must be protected from sexual and other forms of violence, abuse and

<sup>394</sup> The prohibition of torture in article 5 of the [African Charter](#), article 7 of the [ICCPR](#) and article 5 of the [UDHR](#), among other standards, applies to all people whether or not detained. The following standards, among others, enshrine this guarantee with respect to people deprived of their liberty: Section M(7)(b) of the [Principles on the Right to Fair Trial in Africa](#); Rule 1 of the [Nelson Mandela Rules](#).

<sup>395</sup> Article 5 of the [African Charter](#); Section M(7)(a) of the [Principles on the Right to Fair Trial in Africa](#); article 10 of the [ICCPR](#); article 17(1) of the [Convention on Migrant Workers](#); Rule 1 of the [Nelson Mandela Rules](#); Principle 1 of the [Basic Principles for the Treatment of Prisoners](#), Principle 1 of the UN [Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment](#).

<sup>396</sup> Guideline 23 of the [Guidelines on Arrest, Police Custody and Pre-Trial Detention in Africa](#), Principle 5 of the [Basic Principles for the Treatment of Prisoners](#).

<sup>397</sup> HRC General Comment 31, UN Doc. [CCPR/C/21/Rev.1/Add.13](#) (2004) para 10; CAT General Comment 2, UN Doc. [CAT/C/GC/2](#) (2008), para 16.

<sup>398</sup> E.G., Section M(7)(a) of the [Principles on the Right to Fair Trial in Africa](#); Guidelines 23-24 and 29(a) of the [Guidelines on Arrest, Police Custody and Pre-Trial Detention in Africa](#).

<sup>399</sup> See, articles 17, 19 and 18 of the [ICCPR](#).

<sup>400</sup> E.G., Article 2 of the [African Charter](#); articles 2 and 26 of the [ICCPR](#); articles 2 and 7 of the [UDHR](#); Rule 2 of the [Nelson Mandela Rules](#), Principle 5 of the UN [Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment](#), Principle 1 of the Bangkok Rules; see Rules 29-33 of the [Guidelines on Arrest, Police Custody and Pre-Trial Detention in Africa](#).

<sup>401</sup> CERD [General Recommendation XXXI](#), para 5(f).



victimization. Protective measures however, must not involve the imposition of more restrictive conditions than those of other detainees.<sup>402</sup>

States have a duty to investigate and bring to justice anyone responsible for abuse of detainees, including that motivated by discrimination, whether they be agents of the State or other detainees.<sup>403</sup> States are wholly responsible for the conduct of personnel of private security companies or of private prisons who are empowered to exercise elements of governmental authority, such as detaining powers, or who have acted on the instructions of or who are under the direction or control of the State. States remain accountable when privately security personnel act beyond the authority that has been delegated to them by the State or contravene its instructions.<sup>404</sup>

The **Guidelines on Arrest, Police Custody and Pre-Trial Detention in Africa** emphasize that conditions in detention, including police custody and pre-trial detention, must conform to applicable international law and standards.<sup>405</sup> These standards include, among others:

- The **African Charter**
- The **ICCPR**
- The **International Covenant on Economic Social and Cultural Rights**
- The **Convention against Torture**
- The **Convention on the Rights of the Child**
- The **UDHR**
- The **Guidelines on Arrest, Police Custody and Pre-Trial Detention in Africa**
- The **Robben Island Guidelines**
- The **Basic Principles for the Treatment of Prisoners**
- The **UN Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment**
- The **Nelson Mandela Rules**
- The **Bangkok Rules**.

Detention in police custody or pre-trial detention renders individuals vulnerable and dependent on the authorities and those holding them for their essential needs.

The authorities are required to protect physical and mental health, and make appropriate provisions for living accommodation taking into account climatic conditions and the need for heating and ventilation, minimum floor space, light and lighting, fresh air, personal hygiene, and the right to clean sanitary facilities that are accessible whenever needed and afford privacy. They must provide regular meals of wholesome food adequate to ensure the health and strength of the individual and suitable for his or her religious or other beliefs, clean and drinkable water, clean clothing, and a separate bed and clean bedding for every individual. They must ensure the availability of medical care necessary to ensure the right to health equivalent to that available in the community and educational and vocational training. They must allow and provide facilities necessary for religious observance and for regular exercise. They must allow contact with and access to family and others in the outside world.

<sup>402</sup> Guidelines 26, 29, 30, 31(d)-(j); 32 and 33 [of the Guidelines on Arrest, Police Custody and Pre-Trial Detention in Africa](#); [Guideline 18 \(para 98\) and Guideline 20\(para 106\) of the](#) WGAD Principles and Guidelines on the right of anyone deprived of their liberty to bring proceedings before a court, UN Doc. [A/HRC/30/37](#) (2015); UN Special Rapporteur on torture, UN Doc. [A/HRC/31/57](#) (2016) para 70 (d)-(y). See Rule 2(2) of the [Nelson Mandela Rules](#).

<sup>403</sup> See, e.g., UN Special Rapporteur on torture, UN Doc. [A/HRC/31/57](#) (2016), para 70 (v); CAT Concluding Observations: USA, UN Doc. [A/55/44](#) (2000), paras 179-180.

<sup>404</sup> CAT General Comment 2, UN Doc. [CAT/C/GC/2](#) (2008), para 17; HRC General Comment 35, UN Doc. [CCPR/C/GC/35](#) (2014) para 8; Articles 5 and 7 of [Articles on the Responsibility of States for Internationally Wrongful Acts](#), International Law Commission (2001) commended to governments by UN General Assembly [resolution 65/19](#); *Cabal and Pasini Bertran v Australia*, HRC, UN Doc. [CCPR/C/78/D/1020/2001](#) (2003) para 7.2, HRC Concluding Observations: New Zealand, UN Doc. [CCPR/C/NZL/CO/5](#) (2010) para 11.

<sup>405</sup> Guideline 24 [of the Guidelines on Arrest, Police Custody and Pre-Trial Detention in Africa](#); see HRC Concluding Observations: Cote d'Ivoire, UN Doc. [CCPR/C/CIV/CO/1](#) (2015) para 19; HRC Concluding Observations: Chad, UN Doc. [CCPR/C/TCD/CO/2](#) (2014) para 17.



Furthermore, the authorities must ensure conditions of detention and facilities that enable detainees to prepare and present their defence.

The duty to ensure humane treatment and conditions applies not only to people who have been imprisoned following conviction or those ordered by a judicial authority to be held in custody pending investigation and trial but also to people arrested and those held in police custody, which should be short-term (see **Chapters 5 and 6**). The **Guidelines on Arrest, Police Custody and Pre-Trial Detention in Africa** clarify that following arrest, people must be provided with adequate water, food, and sanitation.<sup>406</sup> If held overnight, they must be given a clean bed and bedding.

The Human Rights Committee concluded that holding a man in police custody for some 20 hours in crowded and unhealthy conditions, without food or water, and denying him medical treatment for injuries he suffered at the hands of the police violated his right to be treated with humanity and respect for the inherent dignity of the human person.<sup>407</sup>

Holding people in cramped, unhygienic accommodation is inconsistent with the rights to be treated with respect for the inherent dignity of the human person, to enjoy the highest attainable standard of health and to adequate housing and can amount to inhuman or degrading treatment. Overcrowding can increase risks to mental and physical health and may violate the right to humane treatment or the prohibition against torture or other cruel, inhuman or degrading treatment. The **Guidelines on Arrest, Police Custody and Pre-Trial Detention in Africa** clarify that states should have in place policies, practices and laws to reduce overcrowding in police custody and pre-trial detention, including through the use of alternatives to detention.<sup>408</sup>

The authorities must take all legislative, budgetary and other measures necessary to ensure humane treatment and conditions of detention which conform, at minimum, to the level required by international standards.<sup>409</sup>

All places of detention must be adequately staffed. The staff must have an adequate standard of education and possess integrity, humanity and the professional capacity and suitability to carry out their work. They must be provided with the means to carry out their duties in a professional manner. Staff must receive regular and periodic training on relevant laws and human rights standards, including those related to the prohibition, prevention, investigation of and redress for torture and other ill-treatment and the humane treatment of people deprived of their liberty.<sup>410</sup>

Furthermore, everyone deprived of their liberty must be provided with the rules of the facility and information about their rights and how to avail themselves of them. They must have the right to complain about their treatment and their conditions, including to independent mechanisms and monitors and access to such complaint mechanisms; they must be protected from reprisals as a result of having made complaints.

The authorities must ensure effective redress and adequate reparation to detainees whose rights have been violated. (See also Sections **11.7.6** and **11.8** below)

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<sup>406</sup> Guideline 4(e) [of the Guidelines on Arrest, Police Custody and Pre-Trial Detention in Africa](#).

<sup>407</sup> *A.S v Nepal*, UN Doc, [CCPR/C/115/D/2077/2011](#) (2015) para 8.4.

<sup>408</sup> Guideline 25(a) [of the Guidelines on Arrest, Police Custody and Pre-Trial Detention in Africa](#).

<sup>409</sup> Guidelines 25 (g), 4(e), 24, 27-28 [of the Guidelines on Arrest, Police Custody and Pre-Trial Detention in Africa](#); Part 3(D)(iv) [of the Principles and Guidelines on Human and Peoples' Rights while Countering Terrorism in Africa](#); Principles 19 and 28 of the UN [Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment](#); Rules 13-23 64-66 of the [Nelson Mandela Rules](#); Rules 5-6, 10-17, 26-28, 48, 54 of the [Bangkok Rules](#).

<sup>410</sup> Guideline 25(j) [of the Guidelines on Arrest, Police Custody and Pre-Trial Detention in Africa](#); [Rules 74-77 of the Nelson Mandela Rules](#); See, Concluding Observations on Sierra Leone UN Doc. [CAT/C/SLE/CO/1](#) (2014) para 23.

## 11.2 PLACE OF DETENTION

People arrested or detained must be held only in facilities that are officially acknowledged and gazetted places of detention. The names and places of detention, as well the officials responsible, must be kept in a centralized register readily available to detainees, their lawyers and relatives, and other relevant people.<sup>411</sup> (Other information to be contained in the register is described below in **Section 11.3**)

No one may be held in secret detention in any place, such as an official place of detention or other facility, a public or private location or a vehicle.<sup>412</sup> All detainees must have access to a court to challenge the lawfulness of their detention and to the outside world. (See **Chapter 7** on right to challenge legality of detention and **Chapter 4** on right to access to the outside world).

Pre-trial detainees should be held in detention facilities as close to their homes or communities as possible, to facilitate contact with their lawyers and family and any caretaking or other responsibilities.<sup>413</sup>

Although detainees may be transferred to other official gazetted places of detention, such transfer must be recorded in the central register and the individual's custody record. The legal representatives and family of the individual must be informed about the transfer.<sup>414</sup>

International standards require the separation of detainees in order to respect and protect their rights and safety. In particular:

- People suspected or accused of a crime who have not yet been tried should, in the absence of exceptional circumstances, be accommodated separately from and treated differently than people who are serving sentences following conviction.<sup>415</sup> This is required to preserve the presumption of innocence and consistent with the differing purposes of detention and needs of the individuals.
- People under the age of 18 should be held separately from adults, usually in separate institutions,<sup>416</sup> unless it is not in their best interest. The exception, however, should be narrowly construed. This rule takes account of the need for

<sup>411</sup> Guideline 10(f) of the [Guidelines on Arrest, Police Custody and Pre-Trial Detention in Africa](#); Section M(6) the [Principles on the Right to Fair Trial in Africa](#); articles 17(2)(c), 17(3) and 18 of the [Convention on Enforced Disappearance](#); HRC General Comment 35, UN Doc. [CCPR/C/GC/35](#) (2014), para 58; [HRC General Comment 20](#), para 11.

<sup>412</sup> Article 17(1) of the [Convention on Enforced Disappearance](#), Guideline 23 of the [Robben Island Guidelines](#); Part 3(D) (iii) of the [Principles and Guidelines on Human and Peoples' Rights while Countering Terrorism in Africa](#). See, CAT Concluding Observations: Guinea, UN Doc. [CAT/C/GIN/CO/1](#) (2014) para 15; Concluding Observations: Rwanda, UN Doc. [CAT/C/RWA/CO/1](#) (2012) para 11.

<sup>413</sup> Guideline 10(g) of the [Guidelines on Arrest, Police Custody and Pre-Trial Detention in Africa](#); Rule 59 of the [Nelson Mandela Rules](#); Principle 20 of the UN [Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment](#); Rule 4 of the [Bangkok Rules](#).

<sup>414</sup> Guideline 25(i) of the [Guidelines on Arrest, Police Custody and Pre-Trial Detention in Africa](#) (requiring notification prior to the transfer); see, Principle 16 of the UN [Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment](#) (requiring notice promptly after the transfer).

<sup>415</sup> Article 10(2)(a) of the [ICCPR](#); Rules 11(b) and 112 (1) of the [Nelson Mandela Rules](#); Guideline 26 of the [Guidelines on Arrest, Police Custody and Pre-Trial Detention in Africa](#); see, ACHPR Concluding Observations: [Gabon](#) (2014) paras 45 and 66(xi); HRC Concluding Observations: Djibouti, UN Doc. [CCPR/C/DJI/CO/1](#) (2013) para 16; HRC Concluding Observations: Sierra Leone, UN Doc. [CCPR/C/SLE/CO/1](#) (2014) para 20; HRC Concluding Observations: Cote d'Ivoire, UN Doc. [CCPR/C/CI/CO/1](#) (2015) para 19. Regarding different treatment regimes see, Principle 36(2) of the UN [Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment](#); Rule 111 of the [Nelson Mandela Rules](#).

<sup>416</sup> Article 10(2)(b) of the [ICCPR](#); Rules 11(d) and 112 (2) of the [Nelson Mandela Rules](#); [CRC General Comment 10](#), UN Doc. CRC/C/GC/10 (2007) para 85; Guideline 31 (d)(ii) of the [Guidelines on Arrest, Police Custody and Pre-Trial Detention in Africa](#); ACHPR Concluding Observations: [Nigeria](#) (2015) para 109; HRC Concluding Observations: Cape Verde, UN Doc. [CCPR/C/CPV/CO/1](#) (2012) para 14; HRC Concluding Observations: Kenya, UN Doc. [CCPR/C/KEN/CO/3](#) (2012) para 22; HRC Concluding Observations: Djibouti, UN Doc. [CCPR/C/DJI/CO/1](#) (2013), para 19.

distinct child-centered practices, policies, detention conditions and regimes, policies and staffing that are consistent with international standards and principles of juvenile justice.<sup>417</sup>

- Women should be accommodated separately from men, either in separate institutions or in a separate part of an institution under the authority of a woman staff member. They should be attended and supervised and subjected to physical searches only by women staff.<sup>418</sup> Male staff should not hold front line positions in places in which women are deprived of their liberty, and men should not enter the part of an institution that detains women, unless accompanied by a woman staff member.<sup>419</sup> The gender-specific needs of women detainees including related to hygiene and health, pre-natal and post-natal care, must be provided for.<sup>420</sup>

## 11.3 REGISTER AND RECORDS

The authorities should ensure that a detention register is kept centrally. The register should contain the names and locations of all places in which people may be deprived of their liberty and the name of the official responsible for each site. The register must record the name of each person detained, the reasons for the detention, the date of arrival, and the date of departure, including transfer to another facility.<sup>421</sup>

In addition to this information and the records of arrest and interrogation (described in **Chapters 1.2.3 and 10.7**, every detention facility must establish and maintain an up-to-date detention record on every individual detained there. The record should include at a minimum:

- precise information about the identify of the individual
- the grounds for his or her detention and the name of the authority who ordered the detention, and the day, time and place of arrest
- the authority supervising the detention
- the day and time of admission and release or transfer
- the name of the authority responsible at the place of detention
- the dates, places and reasons and authority responsible for any transfers
- any visible injuries or complaints of ill-treatment
- an inventory of personal property
- the names of family members, including children
- emergency contact details of a person of the detainee's choice.

In addition, throughout the period of detention, information should be entered into the file such as:

- information about the judicial process, including dates of court hearings and legal representation
- information about classification assessments and reports

<sup>417</sup> [CRC General Comment 10](#), UN Doc. CRC/C/GC/10 (2007) para 89; Guideline 18, para 98 of the WGAD Principles and Guidelines on the right of anyone deprived of their liberty to bring proceedings before a court, UN Doc. [A/HRC/30/37](#) (2015); see Guideline 31 [of the Guidelines on Arrest, Police Custody and Pre-Trial Detention in Africa](#). The UN Rules for the Protection of Juveniles Deprived of Liberty set out standards to guide states on the treatment of children deprived of their liberty. See also UN Special Rapporteur on torture, UN Doc. [A/HRC/28/68 \(2015\) paras 16-86, which sets out concerns and recommendations on the treatment of children deprived of liberty](#).

<sup>418</sup> Rules 11(a) and 81 of the [Nelson Mandela Rules](#); Rule 19 of [the Bangkok Rules](#); Guideline 32(b) [of the Guidelines on Arrest, Police Custody and Pre-Trial Detention in Africa](#); Section M(7)(c) of the [Principles on the Right to Fair Trial in Africa](#); Guideline 36 of [the Robben Island Guidelines](#); UN Special Rapporteur on torture, UN Doc. [A/HRC/31/57](#) (2016) paras 20 and 70(g); CAT Concluding Observations: Sierra Leone, [CAT/C/SLE/CO/1](#) (2014) para 26 (f) (of recommendations). See also ACHPR Concluding Observations: [Togo](#) (2012) para 73(xvii).

<sup>419</sup> Rule 81 of the [Nelson Mandela Rules](#); see, UN Special Rapporteur on torture, UN Doc. [A/HRC/31/57](#) (2016) para 70(g).

<sup>420</sup> Rules 5-18, 33-35, 39, 40, 42, 48-51 of [the Bangkok Rules](#); Guideline 32(b)(v) [of the Guidelines on Arrest, Police Custody and Pre-Trial Detention in Africa](#), UN Special Rapporteur on torture, UN Doc. [A/HRC/31/57](#) (2016) para 70 (k-l).

<sup>421</sup> HRC General Comment 35, UN Doc. [CCPR/C/GC/35](#) (2014), para 58; Part 4 [of the Guidelines on Arrest, Police Custody and Pre-Trial Detention in Africa](#); Guideline 30 of the Robben Island Guidelines.

- information related to behaviour and discipline, including any disciplinary actions taken and sanctions imposed
- records of requests and complaints
- information about the circumstances and causes and nature of injuries or death.

These records should be made available to those whose professional responsibilities require access to them, and to the detainee and his or her counsel, and others with a legitimate interest, including courts and competent independent monitoring bodies. Upon release the individual is entitled to an official copy of the record. Any redactions from the records must be authorized by law.<sup>422</sup>

Accurate and up-to-date medical records on every detainee should be kept separately by those in charge of provision of medical care and should be accessible to the detainee and those he or she authorizes; otherwise they must be held subject to the rules of medical confidentiality. If the detainee is transferred to another facility the medical records should be transferred to the medical service providers at that facility and remain subject to confidentiality.<sup>423</sup>

#### 11.4 RIGHT TO HEALTH

Everyone deprived of their liberty retains the right to the highest attainable standard of mental and physical health.<sup>424</sup>

In situations of detention, law enforcement and custody authorities, as agents of the State, are responsible for ensuring the protection of the physical integrity and welfare of people in their custody.<sup>425</sup>

People held in police custody and pre-trial detention must enjoy access to the same level and standards of health care as those who are not in custody. They have the right to receive necessary health care services free of charge, without discrimination on the basis of their legal status as suspected or accused persons.<sup>426</sup>

The failure to provide access to adequate health care and treatment has been held variously to violate the rights to health, to dignity and to be free from torture and other cruel, inhuman or degrading treatment.<sup>427</sup>

The **Mandela Rules** clarify that the health care services for people in custody should be organized in close relationship to those for the general public, "and in a way that ensures continuity of treatment and care, including for HIV/AIDs, tuberculosis and other infectious diseases and drug dependence".<sup>428</sup> Health care provided should at a minimum include

<sup>422</sup> Part 4 and Guideline 4(e) of the [Guidelines on Arrest, Police Custody and Pre-Trial Detention in Africa](#); Section M(6) (b)-(d) of the [Principles on the Right to Fair Trial in Africa](#); Articles 17(3) and 18 of the [Convention on Enforced Disappearance](#); Rules 7-9 of the [Nelson Mandela Rules](#); Guideline 8 of the WGAD Principles and Guidelines on the right of anyone deprived of their liberty to bring proceedings before a court, UN Doc. [A/HRC/30/37](#) (2015); Principle 12 of the UN [Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment](#).

<sup>423</sup> Rule 26 of the [Nelson Mandela Rules](#); see, Rule 9(e) of the [Guidelines on Arrest, Police Custody and Pre-Trial Detention in Africa](#).

<sup>424</sup> Article 16 of the [African Charter](#); article 12 of the [International Covenant on Economic, Social and Cultural Rights](#).

<sup>425</sup> [Monim Elgak, Osman Hummeida and Amir Suliman v Sudan](#) (379/09) ACHPR (2015) para 136; Part 3(D)(iv) of the [Principles and Guidelines on Human and Peoples' Rights while Countering Terrorism in Africa](#); Rules 1 and 24 of the [Nelson Mandela Rules](#); article 6 of the [Code of Conduct for Law Enforcement Officials](#). See Guideline 25(g) of the [Guidelines on Arrest, Police Custody and Pre-Trial Detention in Africa](#).

<sup>426</sup> Rule 24 of the [Nelson Mandela Rules](#); Principle 24 of the UN [Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment](#); Principle 9 of the [Basic Principles for the Treatment of Prisoners](#); [Monim Elgak, Osman Hummeida and Amir Suliman v Sudan](#) (379/09) ACHPR (2015) para 136; see, [Principles and Guidelines on the Implementation of Economic, Social and Cultural Rights in the African Charter on Human and People's Rights](#), para 67(a).

<sup>427</sup> [Monim Elgak, Osman Hummeida and Amir Suliman v Sudan](#) (379/09) ACHPR (2015) para 136; [Engo v Cameroon](#), (1397/2005), HRC, UN Doc. CCPR/C/96/D/1397/2005 (2009) para 7.5; [Guneththige and Guneththige v. Sri Lanka](#), UN Doc. CCPR/C/113/D/2087/2011 (2015) para 6.4.

<sup>428</sup> Rule 24 of the [Nelson Mandela Rules](#).

medical, psychiatric and dental care. It must also include gender-specific health services.<sup>429</sup>

Women have the right to be examined and treated by a woman health care professional on request where possible, except in situations requiring urgent treatment. A woman staff member must be present if a male health care practitioner examines a woman detainee against her wishes.<sup>430</sup>

The detainee must see and be examined by a doctor or suitably qualified medical professional as soon as possible following his or her admission to the place of detention. The initial examination should focus at identifying health care needs and ensuring treatment; identifying health risks, including those that may be triggered or exacerbated by deprivation of liberty such as suicide or self harm, or withdrawal from drugs or alcohol, and undertaking the appropriate measures for treatment; detecting and ensuring adequate treatment for infectious diseases; and identifying signs of ill-treatment that may have been inflicted prior to admission.<sup>431</sup>

All signs of torture or other ill-treatment must be documented in a manner consistent with the **Istanbul Protocol**, and cases reported to the competent medical or judicial authority, in a manner that does not expose the detainee to further risk of reprisal.<sup>432</sup> If at any time a detainee alleges that he or she was subjected to torture or ill-treatment, or there is reason to believe that such ill-treatment has occurred, the individual should have the right to be examined by an independent doctor. The examination should take place in accordance with **the Istanbul Protocol**.<sup>433</sup>

Following the initial examination, adequate care and necessary treatment must be provided throughout the period of deprivation of liberty. Medical professionals must have daily access to detainees who are sick, complain of physical or mental issues or injury and others to whom their attention is directed. People requiring specialist treatment or surgery must be transferred to specialist institutions or civilian hospitals. Clinical decisions should be taken only by health care professionals and may not be overruled or ignored by non-medical staff.<sup>434</sup>

People in police custody and pre-trial detention also have the right to be visited and treated by their own doctor or dentist, at their own expense.<sup>435</sup>

All medical examinations must take place in full confidentiality.<sup>436</sup>

The relationship between the health care providers and detainees must be governed by the same ethical and professional standards as pertain to people in the community. Health care providers have a duty to protect the individual's mental and physical health and to prevent and treat disease based solely on clinical grounds. The provision of health care must respect the principles of confidentiality and informed consent, including the right to refuse medical treatment.<sup>437</sup> Health care professionals must provide the same quality of care to detainees as they do to people in the community.<sup>438</sup> They must be independent of the police and prosecution.

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<sup>429</sup> Section M(7)(c) of the [Principles on the Right to Fair Trial in Africa](#); Rule 10(1) of [the Bangkok Rules](#).

<sup>430</sup> Guideline 32(b) (v) [of the Guidelines on Arrest, Police Custody and Pre-Trial Detention in Africa](#); Rule 10(2) of [the Bangkok Rules](#).

<sup>431</sup> Rule 30 of the [Nelson Mandela Rules](#); Principle 24 of the UN [Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment](#); [CRC General Comment 10](#), UN Doc. CRC/C/GC/10 (2007) para 89; see also Guideline 25(h) [of the Guidelines on Arrest, Police Custody and Pre-Trial Detention in Africa](#).

<sup>432</sup> Rule 34 of the [Nelson Mandela Rules](#).

<sup>433</sup> Guideline 19 of the Robben Island Guidelines; see [Egyptian Initiative for Personal Rights & INTERIGHTS v Egypt](#) (323/06) ACHPR (2011) para 203.

<sup>434</sup> Rules 31 and 27 of the [Nelson Mandela Rules](#).

<sup>435</sup> Rule 118 of the [Nelson Mandela Rules](#).

<sup>436</sup> Rule 31 of the [Nelson Mandela Rules](#).

<sup>437</sup> Rule 32 of the [Nelson Mandela Rules](#); Rule 8 of [the Bangkok Rules](#).

<sup>438</sup> Principle 1 of [the Principles on Medical Ethics](#).

Health care providers are prohibited from engaging in any acts that do not have a legitimate medical or therapeutic purpose with regard to the health needs of the patient, or that might constitute or assist torture or other ill-treatment or that might be detrimental to an individual's health.<sup>439</sup> This would extend to participating in the force-feeding of an individual on hunger-strike, a practice that will generally constitute proscribed ill-treatment.<sup>440</sup>

Furthermore, physicians must report to the authority responsible for the facility if they consider that an individual's physical or mental health will be harmed by continued detention or any condition of such detention.<sup>441</sup>

Health service providers must maintain accurate and up-to-date medical records. These must be kept and transferred to other institutions with the detainee in a manner that ensures their confidentiality. The detainee has the right to access his or her medical records and may authorize others to access them.<sup>442</sup>

States' duty to protect the right to health extends not only to ensuring timely and appropriate health care to detainees but also to ensuring underlying determinates of health, such as adequate nutritious food, adequate drinking water and sanitation, and also to protecting individuals' right to be free from torture and other ill-treatment.<sup>443</sup>

### 11.5 ADDITIONAL GUARANTEES IN POLICE CUSTODY AND PRE-TRIAL DETENTION

People who are arrested and detained pending trial must be treated in a manner that is consistent with the presumption of innocence and appropriate to their status as persons who have not been convicted of a crime. They may be subject only to such restrictions as are necessary and proportionate to the purpose of the detention, preventing hindrance to the investigation, the administration of justice or maintenance of security and order in the place of detention.<sup>444</sup>

As noted in **Section 11.2** above, unconvicted detainees should be held separately from people who have been convicted and sentenced.<sup>445</sup>

As a key safeguard of their rights and against ill-treatment, people arrested and not released (including on police bail) should be moved from police custody, in most cases within a maximum of 48 hours. This should ordinarily follow their initial hearing before a judge. If the judge orders them to be detained, they should be moved to a facility that is run by authorities independent from those carrying out the investigation.<sup>446</sup> (See also **Chapters 5.2** on police bail and **6.1 on the right to be brought promptly before a judge.**)

People who are arrested and detained pending trial must be guaranteed the right to:<sup>447</sup>

<sup>439</sup> Rule 32 of the [Nelson Mandela Rules](#); Principles 1-5 of the [Principles of Medical Ethics](#).

<sup>440</sup> CAT Concluding Observations: USA, UN Doc. [CAT/C/USA/CO/3-5](#) (2015) para 14; UN Press release, [UN experts urge Israel to halt legalization of force-feeding of hunger-strikers in detention](#); Press release of the World Health Association, [WMA condemns all forced feeding](#).

<sup>441</sup> Rule 33 of the [Nelson Mandela Rules](#).

<sup>442</sup> Rule 26 of the [Nelson Mandela Rules](#).

<sup>443</sup> [Principles and Guidelines on the Implementation of Economic, Social and Cultural Rights in the African Charter on Human and People's Rights](#), paras 61,63- 65; [Monim Elgak, Osman Hummeida and Amir Suliman v Sudan](#) (379/09) ACHPR (2015) para 134.

<sup>444</sup> Article 10(2)(a) of the [ICCPR](#); Principle 36(2) of the UN [Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment](#); Rule 111 of the [Nelson Mandela Rules](#).

<sup>445</sup> Article 10(2)(a) of the [ICCPR](#); Guideline 26 of the [Guidelines on Arrest, Police Custody and Pre-Trial Detention in Africa](#); Rules 11(b) and 112(1) of the [Nelson Mandela Rules](#).

<sup>446</sup> See Guideline 7(b)(ii) of the [Guidelines on Arrest, Police Custody and Pre-Trial Detention in Africa](#); WGAD, UN Doc. [E/CN.4/2005/6](#) (2004) para 79; UN Special Rapporteur on torture, UN Doc. [A/65/273](#) (2010) para 75.

<sup>447</sup> Rules 113-118 of the [Nelson Mandela Rules](#); Section N (3)(d)-(e) of the [Principles on the Right to Fair Trial in Africa](#); Guidelines 8(d), 26-28 of the [Guidelines on Arrest, Police Custody and Pre-Trial Detention in Africa](#).



- access facilities to communicate confidentially with their lawyer and facilities and materials and conditions which enable them to prepare their defence (see **Chapter 3** and **Chapter 9**)
- the assistance of an interpreter if necessary to communicate with the detention authorities or to prepare his or her case
- to be visited and treated by their own doctor or dentist, at least at their own expense, (in addition to the right to examination and treatment provided by the State, free of charge as described in **Chapter 4.4** and Section 11.4)
- be provided with appropriate facilities to communicate with and receive visits from family at regular intervals, subject only to reasonable restrictions and supervision as is necessary in the interests of security (beginning not later than a few days following their arrest or detention)
- within limits compatible with good order, procure their own food (in addition to or instead of that provided by the authorities)
- wear their own clothes if suitable and civilian clothes during court appearances; if they wear a uniform provided by the State, it must be different from those supplied to people who have been convicted
- sleep alone (unless there is a local custom related to climate), but not be separated or from other detainees in solitary confinement
- be offered the opportunity to work (and be paid for it) but not be required to work
- procure books, newspapers writing materials and other means of occupation that are compatible with the interests of the administration of justice and the order of the detention facility
- have access to recreation, rehabilitation and treatment services.

## 11.6 DISCIPLINE

Discipline and order within the detention facility should be maintained with no more restrictions than are necessary to ensure the safety of the detainees, good order and the secure operation of the facility.<sup>448</sup>

**The Nelson Mandela Rules** encourage the use of conflict prevention, mediation and alternative dispute resolution mechanisms to prevent disciplinary offences and resolve conflicts.<sup>449</sup>

People held in police custody and pre-trial detention facilities (whether run by the State or by private entities) may only be disciplined for conduct that is proscribed by law or regulations, following a fair procedure. The law or regulations must also set out the punishments that are permissible and their duration, as well as the authority competent to impose disciplinary punishment.<sup>450</sup> Such laws and regulations must be consistent with humane treatment and the inherent dignity of the human person and the use of force and be published.<sup>451</sup>

Alleged disciplinary offences must be reported promptly to the authority identified in the law or regulations as competent to impose disciplinary sanctions. The authority must investigate the allegation without undue delay.<sup>452</sup>

The individual concerned must be notified of the nature of accusations against them, without undue delay, in a language that they understand.<sup>453</sup>

If an allegation of a disciplinary offence is being treated as a criminal offence, the individual accused has the right to all due process guarantees applicable to criminal

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<sup>448</sup> Rule 36 of the [Nelson Mandela Rules](#).

<sup>449</sup> Rule 38 of the [Nelson Mandela Rules](#).

<sup>450</sup> Rules 39 and 37 of the [Nelson Mandela Rules](#); Principle 30(1) of the UN [Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment](#). See, Guideline 25(e) [of the Guidelines on Arrest, Police Custody and Pre-Trial Detention in Africa](#).

<sup>451</sup> Guideline 25(e) [of the Guidelines on Arrest, Police Custody and Pre-Trial Detention in Africa](#); Rule 30(1) of the UN [Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment](#).

<sup>452</sup> Rule 41 of the [Nelson Mandela Rules](#).

<sup>453</sup> Rule 41(2) of the [Nelson Mandela Rules](#).

offences, as prescribed under domestic law and international standards, and to be tried in an ordinary court.<sup>454</sup>

If the offence is not being prosecuted as a criminal offence, the individual still has a right to be heard in response to the allegations in a fair proceeding.<sup>455</sup> He or she must be afforded adequate time and facilities to prepare their defence. They may present their defence in person or through legal counsel, where the interests of justice require, including in reference to particularly serious charges of disciplinary infraction. If necessary, they are also entitled to an interpreter, free of charge.<sup>456</sup>

Before imposing disciplinary sanctions the competent authority must consider whether and how an individual's mental illness or developmental disability may have contributed to his or her conduct. Conduct that is a direct result of an individual's mental illness or developmental disability should not be punished.<sup>457</sup>

Any penalty that may be imposed for a disciplinary offence must be proportionate to the offence and consistent with international standards, including the prohibition of torture and other cruel, inhuman or degrading treatment or punishment and the prohibition of collective punishment.<sup>458</sup>

Disciplinary punishments of children must uphold the inherent dignity of the child and must not compromise the child's physical or mental health or well-being.<sup>459</sup>

Individuals subject to punishment have a right to review of the penalties by a higher authority, including judicial review.<sup>460</sup>

Prohibited punishments include:<sup>461</sup>

- any form of solitary confinement for children, pregnant women or people with mental disabilities (see **Section 11.7.5**)
- indefinite or prolonged solitary confinement for adults (see **Section 11.7.5**)
- placement in a dark or constantly lit cell
- corporal punishment
- reduction of food or drinking water
- withholding items necessary for maintaining human dignity
- prohibition of family visits or contact; restrictions on family contact are permissible only for a limited time and if strictly required to maintain security and good order
- close confinement or segregation for pregnant women or mothers of young children
- the use of instruments of restraint.

The use of any form of solitary confinement, isolation, segregation, or placement in special care unit or restricted housing must be prescribed by law or regulation, as must the review of such placement and procedures for admission and release. There must be provisions requiring that health professionals visit any detainee held in any such form of confinement daily and provide them with prompt medical assistance and treatment. The officials should report any adverse impact on the mental or physical health of the detainee to the director of the facility and recommend changes or termination of the segregation.<sup>462</sup>

<sup>454</sup> Rule 41(5) of the [Nelson Mandela Rules](#).

<sup>455</sup> Principle 30(2) of the UN [Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment](#); Rule 41 (3) of the [Nelson Mandela Rules](#).

<sup>456</sup> Rule 41(3) of the [Nelson Mandela Rules](#).

<sup>457</sup> Rule 39(3) of the [Nelson Mandela Rules](#); Guideline 33(a)(v) [of the Guidelines on Arrest, Police Custody and Pre-Trial Detention in Africa](#).

<sup>458</sup> Rules 39(2) and 43(1) of the [Nelson Mandela Rules](#); see Guideline 25(e) [of the Guidelines on Arrest, Police Custody and Pre-Trial Detention in Africa](#).

<sup>459</sup> [CRC General Comment 10](#), UN Doc. CRC/C/GC/10 (2007) para 89.

<sup>460</sup> Rule 41(4) the [Nelson Mandela Rules](#), Principle 30(2) of the UN [Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment](#).

<sup>461</sup> Rule 43 of the [Nelson Mandela Rules](#); Rules 22 and 23 of [the Bangkok Rules](#); Guideline 32(b)(iv) [of the Guidelines on Arrest, Police Custody and Pre-Trial Detention in Africa](#); Part 3(D)(iv) of the [Principles and Guidelines on Human and Peoples' Rights while Countering Terrorism in Africa](#); [CRC General Comment 10](#), UN Doc. CRC/C/GC/10 (2007) para 89.

<sup>462</sup> Rules 37(d) and 46 of the [Nelson Mandela Rules](#).



## 11.7 PROHIBITION OF TORTURE AND OTHER CRUEL, INHUMAN OR DEGRADING TREATMENT

Everyone has the right to physical and mental integrity, and to be treated with respect for their inherent human dignity. No one may be subjected to torture or other cruel, inhuman or degrading treatment or punishment.<sup>463</sup>

This prohibition is absolute. It is a rule of customary international law that applies to all States at all times. It is a peremptory norm of international law, meaning it supersedes other treaty and customary rules not having the same status. It may not be subject to restrictions, including during times of war or other public emergencies. No exceptional circumstances justify the use of torture or other cruel, inhuman or degrading treatment or punishment.<sup>464</sup>

The prohibition applies to all people, irrespective of the seriousness of the crime they are suspected of or charged with, including crimes under international law such as war crimes and crimes against humanity, involvement in terrorism-related offences, other threats to national security, or violent crimes including killing police officers.<sup>465</sup>

The African Commission has emphasized that: "Torture is considered as one of the most egregious and morally reprehensible human rights abuses and its prohibition is one of the most fundamental values of democratic societies. The prohibition is absolute and non-derogable and applies even in the most difficult of circumstances including public emergencies."<sup>466</sup>

All law enforcement officials and officials and others working in places of detention are prohibited from inflicting or participating, acquiescing to, or turning a blind to torture or other ill-treatment. Acting under orders of a superior is not a justification; there are no defences to torture.<sup>467</sup>

All police officers, officials and others who work with detainees, such as staff in privately run detention facilities, have a duty to treat people arrested, in police custody and in pre-trial detention humanely, with dignity and to protect them from torture and other ill-treatment.<sup>468</sup> They must also act with due diligence to protect detainees from inter-prisoner violence.<sup>469</sup>

Despite its prohibition, it is widely recognized that people deprived of their liberty are particularly vulnerable to torture and other ill-treatment, including during questioning.

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<sup>463</sup> Among others, article 5 of the African Charter; Guidelines 4(a), 9(c) and 24 of the [Guidelines on Arrest, Police Custody and Pre-Trial Detention in Africa](#); Sections M(7)(b), O(I)(vii) and Q(b)(ii) of the [Principles on the Right to Fair Trial in Africa](#); Part 3(D)(i) of the [Principles and Guidelines on Human and Peoples' Rights while Countering Terrorism in Africa](#); Article 7 of the ICCPR; Article 2 of the [Convention against Torture](#); Articles 37(a) and 19 of the [Convention on the Rights of the Child](#); Article 10 of the [Convention on Migrant Workers](#), article 5 of the UDHR.

<sup>464</sup> *Titanji Duga Ernest on behalf of Cheonumu Martin and Others v Cameroon*, (287/04) ACHPR (2014), para 53; Article 2(2) of the [Convention against Torture](#); CAT General Comment 2, UN Doc. [CAT/C/GC/2/CPR.1/Rev.4](#) (2007) para 1; Guidelines 9 and 10 of the Robben Island Guidelines; Principle 6 of the UN [Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment](#), UN General Assembly Resolution, 70/146, UN Doc. [A/RES/70/146](#) (December 2015) preambular paras 3-4; *Prosecutor v Furundzija*, (IT-95-171/T) International Tribunal for the former Yugoslavia, [judgment of the Trial Chamber](#) (10 December 1998), paras 144, 153-157.

<sup>465</sup> CAT General Comment 2, UN Doc. [CAT/C/GC/2/CPR.1/Rev.4](#) (2007) para 5; see, e.g. *Baruani v Democratic Republic of the Congo*, UN Doc. CCPR/C/110/D/1890/2009 (2014) para 6.4; *Abdel Hadi, Ali Radi & Others v Republic of Sudan*, (368/09) ACHPR (2013) para 69.

<sup>466</sup> *Abdel Hadi, Ali Radi & Others v Republic of Sudan*, (368/09) ACHPR (2013) para 69.

<sup>467</sup> Article 2(3) of the [Convention against Torture](#); Guideline 11 of the [Robben Island Guidelines](#); HRC Concluding Observations: United Kingdom, UN Doc. [CCPR/C/GBR/CO/7](#) (2015) para 18.

<sup>468</sup> Guideline 24 of the [Guidelines on Arrest, Police Custody and Pre-Trial Detention in Africa](#); Section M(7)(b) of the [Principles on the Right to Fair Trial in Africa](#).

<sup>469</sup> For example, CAT General Comment 2, UN Doc. [CAT/C/GC/2/CPR.1/Rev.4](#) (2007) para 18; HRC General Comment 31, UN Doc. [CCPR/C/21/Rev.1/Add.13](#) (2004) para 8; *Ernazarov v Kyrgyzstan*, HRC, UN Doc. [CCPR/C/113/D/2054/2011](#) (2015) para 9.3-9.5; HRC Concluding Observations: Cyprus, UN Doc. [CCPR/C/CYP/CO/4](#) (2015) para 15(b)-(c).

In accordance with its absolute prohibition, statements, as well as other information and evidence elicited as a result of torture or other ill-treatment must be excluded as evidence in all proceedings, except proceedings against persons accused of such treatment.<sup>470</sup>

All states must criminalize torture, as defined in article 1 of the Convention against Torture, as a distinct crime that is punishable with penalties commensurate with the gravity of the offence.<sup>471</sup>

States must ensure that everyone held in police custody or detained pre-trial, including people under arrest, has the right to complain to competent independent authorities about acts or threats of torture or other ill-treatment. The authorities must ensure prompt, independent impartial and thorough investigations whenever there are allegations of torture or other ill-treatment, or whenever there are reasonable grounds to believe that such an act has occurred. The investigation should be consistent with **the Istanbul Protocol**. Furthermore, those responsible must be brought to justice and punished in a manner that is consistent with the gravity of the crime. The state must also ensure that victims of torture or other ill-treatment receive adequate reparation.<sup>472</sup>

### 11.7.1 SEXUAL VIOLENCE

The right of people in detention to be free from torture and other ill-treatment includes the right not to be subjected to rape or other forms of sexual violence or abuse.

Rape<sup>473</sup> committed by an official, or with the consent or acquiescence of an official, constitutes torture.<sup>474</sup> Other forms of sexual violence committed by or with the consent or acquiescence of a State agent will generally violate the prohibition against torture and other ill-treatment.

Women must be protected from rape and all other forms of sexual violence, including invasive body searches conducted in a disproportionate, humiliating or discriminatory manner, “virginity tests”, forced sterilization and harassment or insults.<sup>475</sup>

States are obligated to protect women and men deprived of their liberty from sexual abuse by officials and other detainees.<sup>476</sup>

<sup>470</sup> Article 15 of the [Convention against Torture](#); CAT General Comment 2, UN Doc. [CAT/C/GC/2/CPR.1/Rev.4](#) (2007) para 6; Guideline 29 of [the Robben Island Guidelines](#), Section N(6)(d)(i) and N(6)(g) of the [Principles on the Right to Fair Trial in Africa](#).

<sup>471</sup> For example, Article 4 of the [Convention against Torture](#); Guidelines 4 and 12 of [the Robben Island Guidelines](#).

<sup>472</sup> Article 12-14 of the [Convention against Torture](#); Guidelines 17, 19 and 50 of [the Robben Island Guidelines](#); Guidelines 22, and 38 of [the Guidelines on Arrest, Police Custody and Pre-Trial Detention in Africa](#); Section M(7)(h)-(j) of the [Principles on the Right to Fair Trial in Africa](#); *Egyptian Initiative for Personal Rights & INTERIGHTS v Egypt* (323/06) ACHPR (2011) para 203; [Abdel Hadi, Ali Radi & Others v Republic of Sudan](#), (368/09) ACHPR (2013) para 76; HRC Concluding Observations: Mozambique, UN Doc. [CCPR/C/MOZ/CO/1](#) (2013) para 11; HRC Concluding Observations: Mauritania, UN Doc. [CCPR/C/MRT/CO/1](#) (2013) para 14; CAT Concluding Observations: Congo, UN Doc. [CAT/C/COG/CO/1](#) (2015) para 8.

<sup>473</sup> Rape is defined as defined as an “inva[sion of] the body—by conduct resulting in penetration, however slight, of any part of the body of the victim or of the perpetrator with a sexual organ, or of the anal or genital opening of the victim with any object or any other part of the body... by force, or by threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power, against such person or another person, or by taking advantage of a coercive environment, or when the invasion was committed against a person incapable of giving genuine consent” in International Criminal Court, “Elements of Crimes”, relating to Article 7(1)(g-1, Article 8(2)(b)(xxii)-1 and Article 8(2)(e)(vi)-1(2011)

<sup>474</sup> UN Special Rapporteur on torture: UN Docs. [E/CN.4/1986/15](#) (1986) para 119, [A/HRC/7/3](#) (2008) paras 34-36..

<sup>475</sup> For example, UN Special Rapporteur on torture, UN Doc. [A/HRC/31/57](#) (2016) para 23; *M. T. v Uzbekistan*, HRC, UN Doc. [CCPR/C/114/D/2234/2013](#) (2015) paras 7.4 and 7.6.

<sup>476</sup> CAT General Comment 2, UN Doc. [CAT/C/GC/2/CPR.1/Rev.4](#) (2007) para 18; HRC General Comment 31, UN Doc. [CCPR/C/21/Rev.1/Add.13](#) (2007) para 8; UN Special Rapporteur on torture, UN Doc. [A/HRC/31/57](#) (2016) para 19.

As described in **Section 11.2**, men and women deprived of their liberty should be accommodated separately. Women should be held under the authority of and be attended by female staff. Male staff should not enter a women's institution unless accompanied by a female officer.

Those responsible for sexual violence against detainees must be brought to justice.<sup>477</sup>

### 11.7.2 USE OF FORCE

Force may only be used on people in police custody or pre-trial detention if other means remain ineffective or are without promise, and only when strictly necessary for, and proportionate to, the need to maintain security and order in the place of detention, or when personal safety is threatened. The amount of force used must be the minimum necessary and proportionate to achieve the legitimate aim.<sup>478</sup> Firearms may be used only in self-defence or the defence of others against the imminent threat of death or serious injury, when less extreme means are insufficient.<sup>479</sup> As described in **Chapter 1.2.2**, intentional lethal force may only be used when strictly unavoidable to protect life.<sup>480</sup>

**Rule 82** of the **Nelson Mandela Rules** limits the use of force to the amount necessary in situations of self-defence, cases of attempted escape or active or passive physical resistance to an order based on law or regulations.

Those using force must minimize damage and injury. They must ensure that assistance and medical aid are rendered to anyone injured at the earliest opportunity. Family members or close friends should be notified of any injury.<sup>481</sup>

The use of force on a person in custody should be reported without delay to the officials responsible for the detention facility.<sup>482</sup>

Unnecessary or excessive use of force not genuinely necessary or proportionate to the conduct of the detainee may violate the prohibition of torture or other inhuman or degrading treatment.<sup>483</sup>

Allegations of unnecessary, excessive or otherwise unlawful use of force must be promptly, independently and impartially investigated. Those responsible for unnecessary or excessive use of force should be brought to justice.<sup>484</sup>

Law enforcement officials and staff in detention facilities must be trained in techniques and principles for the safe use of minimum force, consistent with these principles.

### 11.7.3 USE OF RESTRAINTS ON DETAINEES

The use of restraints on people deprived of their liberty to restrict their movement may, as a last resort, be necessary and proportionate and therefore lawful. However, their application may be abused, and may cause injury to an individual's mental or physical health, and even result in death. Unlawful, unnecessary or disproportionate use of

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<sup>477</sup> UN Special Rapporteur on torture, UN Doc. [A/HRC/31/57](#)(2016) para 70(v); HRC Concluding Observations: Chad, UN Doc. [CCPR/C/TCD/CO/2](#) (2014) para 16.

<sup>478</sup> Guideline 25(b) of [the Guidelines on Arrest, Police Custody and Pre-Trial Detention in Africa](#); Principles 4, 5 and 15 of [the Basic Principles on the Use of Force and Firearms by Law Enforcement Officials](#); Article 3 of [the Code of Conduct for Law Enforcement Officials](#).

<sup>479</sup> Guideline 25(c) of [the Guidelines on Arrest, Police Custody and Pre-Trial Detention in Africa](#). This standard appears to provide stricter limits on the use of firearms in custody than Principle 16 of [the Basic Principles on the Use of Force and Firearms by Law Enforcement Officials](#).

<sup>480</sup> Principles 9 and 16 of [the Basic Principles on the Use of Force and Firearms by Law Enforcement Officials](#).

<sup>481</sup> Principle 5 of the [Basic Principles on the Use of Force and Firearms by Law Enforcement Officials](#).

<sup>482</sup> Rule 82 of the [Nelson Mandela Rules](#).

<sup>483</sup> See, e.g., *E.N v Burundi*, UN Doc. [CAT/C/56/D/578/2013](#) (2015) paras 7.2-7.6.

<sup>484</sup> See, HRC Concluding Observations: Greece, UN Doc. [CCPR/C/GRC/CO/2](#) (2015) paras 15-16.

restraints may amount to torture or other cruel, inhuman or degrading treatment or punishment.

States should have in places laws, regulations and standard operating procedures that limit the use of restraints and the type of restraints used on people who are arrested or detained. These must be consistent with human rights standards, including the duty to respect the presumption of innocence, the dignity of detainees and the prohibition of torture and other cruel, inhuman or degrading treatment or punishment.<sup>485</sup>

These rules and procedures should require the development and use of methods and practices to anticipate crisis situations and to de-escalate them and to manage violent detainees as far as possible without resorting to restraints.<sup>486</sup> Law enforcement officers and staff in detention facilities must receive training in the laws, rules, policies and human rights standards as well as in techniques that use restraints in a manner that complies with them.<sup>487</sup>

These laws, rules, policies, training and practices should ensure that restraints are used as a last resort, when lesser forms of control have proved ineffective to address the risks posed by unrestricted movement.<sup>488</sup>

Restraints may be used as a precaution against escape on the transfer of a detainee; they must however be removed when the individual appears before a judicial or administrative authority.<sup>489</sup>

With respect to the use of restraints on people in held in detention, both the **Nelson Mandela Rules** and the **Havana Rules** (applicable to children) limit the permissible use of restraints: they must be used in accordance with the law, ordered by the director of the facility and only to prevent a detainee from injuring himself or herself, another person or seriously damaging property.<sup>490</sup> In addition, the director must alert and consult medical personnel immediately and report the use of the restraint to the higher administrative authorities.<sup>491</sup>

The method used must be the least intrusive method necessary and reasonably available to control the individual's movement based on the level and nature of the risk posed. Consistent with the prohibition of torture and other cruel, inhuman or degrading treatment, the method of restraint used and its application must not be inhuman or degrading.<sup>492</sup> The restraint must be used for the shortest time possible, and removed as soon as the risk posed by unrestricted movement is no longer present.<sup>493</sup>

The **Principles on Medical Ethics** clarify that it is a contravention of medical ethics for health personnel to participate in any procedure for restraining a detainee unless the procedure is determined, in accordance with purely medical criteria, to be necessary for the protection of the physical or mental health or safety of the individual or other detainees or his or her guardians, and presents no hazard to the individual's mental or physical health.<sup>494</sup>

<sup>485</sup> Guideline 25(d) [of the Guidelines on Arrest, Police Custody and Pre-Trial Detention in Africa](#).

<sup>486</sup> Guideline 25 (f) [of the Guidelines on Arrest, Police Custody and Pre-Trial Detention in Africa](#); [Rule 49 of the Nelson Mandela Rules](#); see, Rule 76(c) of the [Nelson Mandela Rules](#).

<sup>487</sup> Rules 75-76 of the [Nelson Mandela Rules](#); [CRC General Comment 10](#), UN Doc. CRC/C/GC/10 (2007) para 89.

<sup>488</sup> Rules 47(2)(b), 48 (a) of the [Nelson Mandela Rules](#); CAT Concluding Observations: Sierra Leone, UN Doc. [CAT/C/SLE/CO/1](#) (2014) para 27(c); CRC General Comment 10, UN Doc. [CRC/C/GC/10](#) (2007) para 89; Rule 64 of the [Havana Rules](#).

<sup>489</sup> Rule 41(1) of the Nelson Mandela Rules.

<sup>490</sup> Rule 47(2)(b) of the [Nelson Mandela Rules](#); Rule 64 of the [Havana Rules](#).

<sup>491</sup> Rule 47(2)(b) of the [Nelson Mandela Rules](#); Rule 64 of the [Havana Rules](#); see CRC General Comment 10, UN Doc. [CRC/C/GC/10](#) (2007) para 89.

<sup>492</sup> Rule 48(b) of the [Nelson Mandela Rules](#); Rule 64 of the [Havana Rules](#); see Guideline 25 (d) of [the Guidelines on Arrest, Police Custody and Pre-Trial Detention in Africa](#).

<sup>493</sup> Rule 48(b) and(c) the [Nelson Mandela Rules](#); Rule 64 of the [Havana Rules](#); CAT Concluding Observations: Sierra Leone, UN Doc. [CAT/C/SLE/CO/1](#) (2014) para 27(c).

<sup>494</sup> Principle 5 of [the Principles of Medical Ethics](#).

The law and regulations should prohibit the use of restraints as punishment, including for disciplinary offences.<sup>495</sup> The authorities must ensure that restraints are never used on women during labour, childbirth or after childbirth, and this should be prohibited in law.<sup>496</sup>

The law should also prohibit the use of chains, irons and other instruments of restraint that are inherently degrading or painful.<sup>497</sup>

Records of the use of restraint on an individual should be kept, and the authorities should regularly compile and analyze data on the use of restraints, including in relation to suicide and self-harm of detainees.<sup>498</sup>

Consistent with the duty to investigate and bring to justice those responsible for torture and other ill-treatment, including the unlawful or excessive use of force (see **Section 11.7.2**), the Committee on the Rights of the Child has stated that staff who use restraints or force in violations of the rules and standards should be punished appropriately.<sup>499</sup>

#### 11.7.4 SEARCHES IN POLICE CUSTODY OR PRE-TRIAL DETENTION

While searches of cells and detainees may be lawful at times, the UN Special rapporteur on torture has emphasized that body searches, particularly strip searches and invasive body searches, may constitute ill-treatment when conducted in a disproportionate, humiliating or discriminatory manner. When conducted for a prohibited purpose or for any reason based on discrimination leading to severe mental pain or suffering, strip searches and invasive body searches amount to torture.<sup>500</sup>

States must establish laws and regulations to regulate searches of people deprived of their liberty. These must take into account security needs and be consistent with the State's human rights obligations, including the obligations to respect the rights and protect the privacy and dignity of detained individuals and to ensure that they are not subjected to torture or other ill-treatment.<sup>501</sup>

Searches of people deprived of liberty must be lawful, necessary and proportionate.<sup>502</sup> They should be exceptional and must be carried out using the least intrusive means possible.<sup>503</sup>

All searches must be carried out in a manner consistent with the inherent dignity and right to privacy of the individual and by a person of the same sex as the person being searched who has been trained in the proper and appropriate conduct of searches.<sup>504</sup> Transgender people should be given the choice of being searched by a male or female.<sup>505</sup>

<sup>495</sup> Rule 43(2) of the [Nelson Mandela Rules](#); Part 3(D)(iv) of the [Principles and Guidelines on Human and Peoples' Rights while Countering Terrorism in Africa](#); CAT Concluding Observations: Sierra Leone, UN Doc. [CAT/C/SLE/CO/1](#) (2014) para 27(c); [CRC General Comment 10](#), UN Doc. CRC/C/GC/10 (2007) para 89.

<sup>496</sup> Guideline 32(b)(vii) of the [Guidelines on Arrest, Police Custody and Pre-Trial Detention in Africa](#); [Rule 24 of the Bangkok Rules](#); [Rule 48\(2\) of the Nelson Mandela Rules](#).

<sup>497</sup> Rule 47(1) of the [Nelson Mandela Rules](#).

<sup>498</sup> CAT Concluding Observations: Sierra Leone, UN Doc. [CAT/C/SLE/CO/1](#) (2014) para 27(c); CAT Concluding Observations: Thailand, UN Doc. [CAT/C/THA/CO/1](#) (2014) para 23; CAT Concluding Observations: China, UN Doc. [CAT/C/CHN/CO/5](#) (2015), para 27(e).

<sup>499</sup> [CRC General Comment 10](#), UN Doc. CRC/C/GC/10 (2007) para 89.

<sup>500</sup> UN Special Rapporteur on torture, UN Doc. [A/HRC/31/57](#) (2016) para 23.

<sup>501</sup> Rule 50 of the [Nelson Mandela Rules](#).

<sup>502</sup> Rule 50 of the [Nelson Mandela Rules](#).

<sup>503</sup> CAT Concluding Observations: Belgium, UN Doc. [CAT/C/BEL/CO/2](#) (2014) para 16.

<sup>504</sup> Rule 50 of the [Nelson Mandela Rules](#). Rule 19 of the [Bangkok Rules](#); Guideline 32(b)(i) of the [Guidelines on Arrest, Police Custody and Pre-Trial Detention in Africa](#). See Guideline 3(d) of the [Guidelines on Arrest, Police Custody and Pre-Trial Detention in Africa](#) (while applicable to arrest, Guideline 3(d) enshrines standards relevant to the search of people detained in police custody and pre-trial detention). See, CAT General Comment 2, UN Doc. [CAT/C/GC/2/CPR.1/Rev.4](#) (2007) para 14.

<sup>505</sup> UN Special Rapporteur on torture, UN Doc. [A/HRC/31/57](#) (2016) para 70(u).

The authorities should develop alternative screening methods, such as scans, to replace strip searches and invasive body searches, to avoid the harmful psychological and possible physical impact of invasive body searches.<sup>506</sup>

Intrusive searches, including strip searches and body cavity searches, should take place only if absolutely necessary, and in private by trained staff. Body cavity searches must only be carried out by qualified health-care professionals other than those primarily responsible for the health care and treatment of the detainee, or by a member of staff who has been appropriately trained by medical professionals in standards of hygiene, health and safety.<sup>507</sup>

The UN Special Rapporteur on torture has stated that invasive body searches should be conducted only when necessary and appropriate, “by staff of the same gender with sufficient medical knowledge and skill to perform the search safely and respect the individual’s privacy and dignity and in two steps (to ensure that the detainee is never fully unclothed)”.<sup>508</sup> The Special Rapporteur has also affirmed that strip searching of children should be prohibited in the absence of reasonable suspicion that the individual is hiding contraband on his or her body.<sup>509</sup>

Records must be kept of searches of cells and people. The records should indicate the reasons for the search, the identity of those carrying out the search, the person whose cell or body was searched and the results of the search.<sup>510</sup>

### 11.7.5 SOLITARY CONFINEMENT

Solitary confinement can cause severe mental and physical suffering that amount to torture or other cruel, inhuman or degrading treatment or punishment, and can violate human dignity.<sup>511</sup>

The **Principles and Guidelines on Human and Peoples’ Rights while Countering Terrorism in Africa** have indicated that solitary confinement should be prohibited, as a practice that violates human dignity.<sup>512</sup>

If not prohibited outright in all circumstances, in accordance with international standards, the use of solitary confinement must be highly restricted and prescribed by law.<sup>513</sup>

Indefinite solitary confinement<sup>514</sup> and prolonged solitary confinement<sup>515</sup> must be prohibited, as they violate the prohibition against torture and cruel, inhuman or degrading treatment or punishment.

In addition, solitary confinement must never be imposed on children,<sup>516</sup> people with mental, intellectual or psychosocial disabilities or physical disabilities,<sup>517</sup> pregnant and breast-feeding women and mothers of young children.<sup>518</sup>

<sup>506</sup> Rule 20 of the [Bangkok Rules](#); Rule 52(1) of the [Nelson Mandela Rules](#).

<sup>507</sup> Rule 52 of the [Nelson Mandela Rules](#).

<sup>508</sup> UN Special Rapporteur on torture, UN Doc. [A/HRC/31/57](#) (2016) para 70(j).

<sup>509</sup> UN Special Rapporteur on torture, UN Doc. [A/HRC/28/68](#) (2016) para 86(f).

<sup>510</sup> Rule 51 of the [Nelson Mandela Rules](#).

<sup>511</sup> UN Special Rapporteur on torture, UN Docs. [A/66/268](#) (2011) para 81, and [A/HRC/31/57](#) (2016) para 22.

<sup>512</sup> Part 3(d)(iv) of the [Principles and Guidelines on Human and Peoples’ Rights while Countering Terrorism in Africa](#).

<sup>513</sup> Guideline 25(f) of the [Guidelines on Arrest, Police Custody and Pre-Trial Detention in Africa](#); Rule 37 of the [Nelson Mandela Rules](#); CAT Concluding Observations: China, UN Doc. [CAT/C/CHN/CO/5](#) (2015) para 27(b).

<sup>514</sup> Rule 43 (1)(a) of the [Nelson Mandela Rules](#); UN Special Rapporteur on torture, UN Doc. [A/66/268](#) (2011); CAT Concluding Observations: China, UN Doc. [CAT/C/CHN/CO/5](#) (2015) para 27(b).

<sup>515</sup> Rule 43(1)(b) of the [Nelson Mandela Rules](#). The UN Special Rapporteur on torture has defined prolonged solitary confinement as that lasting in excess of 15 days, UN Doc. [A/66/268](#) (2011) para 79; see [HRC General Comment 20](#), para 6.

<sup>516</sup> UN Special Rapporteur on torture, UN Docs. [A/HRC/28/68](#) (2015), para 44 and [A/66/268](#) (2011) para 86; CAT Concluding Observations: China, UN Doc. [CAT/C/CHN/CO/5](#) (2015) para 27(b) and



Furthermore, the UN Special Rapporteur on torture has urged states to prohibit the imposition of solitary confinement as punishment – either as part of a judicially imposed sentence following conviction of a crime or as a disciplinary measure.<sup>519</sup>

The authorities should ensure that when used, solitary confinement is an exceptional measure of last resort, and imposed for the shortest possible time, and this requirement should be prescribed by law.<sup>520</sup> Its imposition should be subject to procedural safeguards. For example, an individual should be informed of why he or she is being placed into solitary confinement, who has ordered it, the duration of the confinement and what he or she can do to be released from it. The detainee should have an opportunity to contest the grounds for the decision and the conditions of the confinement before administrative and judicial bodies and should have the assistance of counsel to do so. The decision should be subject to regular review, and the mental and physical health of the individual should be carefully monitored. During such confinement, the individual should have access to his or her lawyer, included appointed counsel, and family contact should not be prohibited. Other efforts must also be minimize its harmful effect; the individual should have access to adequate exercise and mental stimulation.<sup>521</sup>

Given its propensity to create psychological pressure, solitary confinement during an investigation and pre-trial detention can be coercive in and of itself, inducing people to make incriminatory statements. Therefore, the UN Special Rapporteur on torture has called on States to put an end to solitary confinement in pre-trial detention. The Special Rapporteur stated that when used intentionally to obtain information or a confession, the use of solitary confinement violates the prohibition against torture and other ill-treatment. He indicated that other measures to separate individuals should be employed when necessary to protect an ongoing investigation or to avoid collusion between detainees during an investigation, and to improve the efficiency of investigations.<sup>522</sup>

### 11.7.6 COMPLAINTS, INVESTIGATION AND REPARATION

Everyone who has been subjected to torture or other ill-treatment or other human rights violations during arrest, in police custody or in pre-trial detention has the right to an effective remedy and reparation. The prohibition against torture and other ill-treatment and the right to a remedy require States to provide access to an independent body to which individuals and others on their behalf can submit complaints. States also have obligations to ensure prompt independent and impartial and thorough investigations into allegations or when they have reasonable grounds to believe that torture or ill-treatment has occurred; to bring those responsible to justice and to ensure reparation to victims.<sup>523</sup>

In order to give effect to the prohibition against torture and other ill-treatment and the right to remedy States must establish independent complaint mechanisms, accessible to

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Sweden, UN Doc. [CAT/C/SWE/CO/6-7](#) (2014) para 8 recommendation (b); [CRC General Comment 10](#), UN Doc. CRC/C/GC/10 (2007), para 89; Rule 67 of the [Havana Rules](#).

<sup>517</sup> UN Special Rapporteur on torture, UN Doc. [A/66/268](#) (2011) para 86; CAT Concluding Observations: China, UN Doc. [CAT/C/CHN/CO/5](#) (2015) para 27(b).

<sup>518</sup> UN Special Rapporteur on torture, UN Doc. [A/HRC/31/57](#) (2016) para 70(i); see Rule 22 of the [Bangkok Rules](#); CAT Concluding Observations: China, UN Doc. [CAT/C/CHN/CO/5](#) (2015) para 27(b).

<sup>519</sup> UN Special Rapporteur on torture UN Doc. [A/66/268](#) (2011) para 84.

<sup>520</sup> UN Special Rapporteur on Torture, UN Doc. [A/66/268](#) (2011) para 89; CAT Concluding Observations: China, UN Doc. [CAT/C/CHN/CO/5](#) (2015) para 27(a); CAT Concluding Observations: Thailand, UN Doc. [CAT/C/THA/CO/1](#) (2014) para 23.

<sup>521</sup> UN Special Rapporteur on torture, UN Doc. [A/66/268](#) (2011) paras 88-100; See CAT Concluding Observations: China, UN Doc. [CAT/C/CHN/CO/5](#) (2015) para 27(a); CAT Concluding Observations: Thailand, UN Doc. [CAT/C/THA/CO/1](#) (2014) para 23.

<sup>522</sup> UN Special Rapporteur on torture, UN Doc. [A/66/268](#) (2011) paras 73, 85; See UN Special Rapporteur on torture, UN Doc. [A/HRC/31/57](#) (2016) para 22.

<sup>523</sup> For example, article 7(1) of the [African Charter](#); Guideline 38 of the [Guidelines on Arrest, Police Custody and Pre-Trial Detention in Africa](#); Guidelines 16-19, 40, 49-50 of the [Robben Island Guidelines](#); articles 2(3) and 7 of the [ICCPR](#); HRC General Comment 31, UN Doc [CCPR/C/21/Rev.1/Add.13](#) (2004) para 15; articles 12-14 of the [Convention against Torture](#); CAT General Comment 2, UN Doc. [CAT/C/GC/2/CPR.1/Rev.4](#) (2007) para 13; CAT General Comment 3, UN Doc. [CAT/C/GC/3](#) (2012) para 17.



people deprived of their liberty as well as members of the public.<sup>524</sup> States must ensure that people, particularly those arrested and deprived of their liberty in police custody or other detention facilities, are able to complain to such a mechanism in a way that protects them from the risk of reprisals,<sup>525</sup> and that people who do make complaints are protected from reprisals for having done so, before, during and after the investigation and subsequent proceedings.<sup>526</sup>

While the police and detention facilities are required to have internal complaint and investigation mechanisms, these are in addition to and not substitutes for independent complaint mechanisms in cases related to torture or other ill-treatment or deaths in custody.<sup>527</sup>

A failure to protect individuals who complain about torture or other ill-treatment and their families from reprisals violates the duty to ensure the right to an effective remedy, and also has been found to violate the right to private and family life.<sup>528</sup>

There should be no time limit placed upon the filing of a complaint, the prosecution of a person alleged to be responsible, or a claim for reparation of a victim of torture or other ill-treatment, due to the continuing nature of the effects of torture and the fact that such a limit would impede accountability for a serious violation of human rights.<sup>529</sup>

The duty to ensure redress and reparation for acts of torture or other ill-treatment, inherent in the prohibition of torture and other ill-treatment as guaranteed by **article 5** of the **African Charter** and other standards, requires the authorities to ensure that independent, impartial and thorough investigations of torture or other ill-treatment are promptly carried out. The duty to investigate is triggered when a complaint is filed, and even in the absence of a complaint, when the authorities have reasonable grounds to believe that an act of torture or other ill-treatment has occurred.<sup>530</sup>

This means that judges, among others, must ensure the initiation of thorough, independent and impartial investigations promptly whenever they receive complaints or have reason to believe that an individual has been subjected to torture or other ill-treatment. This duty would be triggered, for example, if an individual appeared before a judge pre-trial or during trial with visible injuries, or if there were allegations that statements or other evidence were obtained as a result of torture or other ill-treatment or other forms of coercion.<sup>531</sup>

<sup>524</sup> Guidelines 37(a) and 21 of the [Guidelines on Arrest, Police Custody and Pre-Trial Detention in Africa](#); [Guideline 40 of the Robben Island Guidelines](#); [article 13 of the Convention against Torture](#); CAT General Comment 3, UN Doc. [CAT/C/GC/3](#) (2012) para 5; see [CRC General Comment 10](#), UN Doc. CRC/C/GC/10 (2007) para 89.

<sup>525</sup> Guidelines 37(b) and 7(c) and 4(k) of the [Guidelines on Arrest, Police Custody and Pre-Trial Detention in Africa](#); [Guideline 49 of the Robben Island Guidelines](#); [article 13 of the Convention against Torture](#); CAT Concluding Observations: Jordan, UN Doc. [CAT/C/JOR/CO/3](#) (2015) paras 33 and 34 (a) and (e).

<sup>526</sup> Rule 71(3) of the [Nelson Mandela Rules](#); article 13 of [the Convention against Torture](#); [Guideline 49 of the Robben Island Guidelines](#).

<sup>527</sup> See, Rule 71 of the [Nelson Mandela Rules](#).

<sup>528</sup> CAT General Comment 3, UN Doc. [CAT/C/GC/3](#) (2012) para 31; *Tshidika v Congo*, HRC, UN Doc. [CCPR/C/115/D/2214/2012](#) (2015) para 6.7; *A.S v Nepal*, UN Doc, [CCPR/C/115/D/2077/2011](#) (2015) para 8.5.

<sup>529</sup> CAT General Comment 3, UN Doc. [CAT/C/GC/3](#) (2012) paras 38 and 40; see, HRC General Comment 31, UN Doc. [CCPR/C/21/Rev.1/Add.13](#) (2004) para 18; CAT Concluding Observations: Kenya [CAT/C/KEN/CO/2](#) (2013) para 23(a); *Prosecutor v Furundzija*, (IT-95-171/T) International Tribunal for the former Yugoslavia, [judgment of the Trial Chamber](#) (10 December 1998), para 157.

<sup>530</sup> Articles 13 and 12, (respectively) of the [Convention against Torture](#); CAT General Comment 3, UN Doc. [CAT/C/GC/3](#) (2012) para 27; [Guideline 18 of the Robben Island Guidelines](#); [Guideline 22 of the Guidelines on Arrest, Police Custody and Pre-Trial Detention in Africa](#); *Abdel Hadi, Ali Radi & Others v Republic of Sudan*, (368/09) ACHPR (2013) paras 45, 76; *Monim Elgak, Osman Hummeida and Amir Suliman (represented by FIDH and OMCT) v Sudan*, (379/09) ACHPR (2014) para 61.

<sup>531</sup> UN Special Rapporteur on torture, Report on Mission to Gambia, UN Doc. [A/HRC/28/68/Add.4](#), para 54; HRC Concluding Observations: Tajikistan, UN Doc. [CCPR/C/TJK/CO/2](#) (2013) para 14.

The aim of such investigation is to establish the facts and identify those suspected of responsibility, with a view to bringing them to justice.<sup>532</sup>

The body carrying out the investigation must be independent, including institutionally and hierarchically, from those who are suspected of responsibility for the torture or other ill-treatment.<sup>533</sup> Those potentially implicated in torture or other ill-treatment must be removed from positions of power or control over the victim, his or her family, witnesses and those carrying out the investigation. Those suspected of having been responsible should be suspended immediately from duty pending the investigation, and any proceedings brought against them.<sup>534</sup>

The investigation should be carried out in a manner consistent with **the Istanbul Protocol**. It should include an independent expert and thorough forensic examination of the alleged victim consistent with **the Istanbul Protocol**.<sup>535</sup> Where there is evidence of injuries revealed in such an examination that were not present at the time the individual was arrested, there should be a presumption of ill-treatment in detention.<sup>536</sup>

The authorities must ensure that investigation bodies have adequate resources to carry out their work.<sup>537</sup> They must also ensure that the complainant (and their family if relevant) is given information about the investigation.<sup>538</sup>

The failure to ensure that a thorough investigation is carried out promptly by an independent and impartial body violates the right to redress and can constitute a violation of the prohibition against torture or other ill-treatment itself. The violation may be considered to continue until an effective investigation is carried out.<sup>539</sup>

The obligations to prohibit torture and other ill-treatment and to ensure an effective remedy and reparation require the authorities to criminalize these acts in a manner consistent with the definition of torture set out in article 1 of **the Convention against Torture**, ensure that the crime of torture is subject to penalties commensurate with the gravity of the offence, and to take effective measures to bring those responsible for torture or other ill-treatment to justice.<sup>540</sup>

Under international human rights law, those responsible include superiors who knew or should have known that one or more of their subordinates was committing torture or other

<sup>532</sup> See, HRC General Comment 31, UN Doc. CCPR/C/21/Rev.1/Add.13 (2004) paras 15 and 18; *A.S. v Nepal*- UN Doc. [CCPR/C/115/D/2077/2011](#) (2015) §§8.5, 8.6; CAT General Comment 3, UN Doc. [CAT/C/GC/3](#) (2012) paras 7, 23, 25, 17.

<sup>533</sup> Rule 71(3) of the [Nelson Mandela Rules](#); CAT Concluding Observations: Austria (2015) UN Doc. [CAT/C/AUT/CO/6](#) (2016) paras 8(b) and 9(b); CAT Concluding Observations Jordan, UN Doc. [CAT/C/JOR/CO/3](#) (2015) paras 33-34 (a) and (b).

<sup>534</sup> Principle 3(b) of the [Principles on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment](#); CAT Concluding Observations: Kenya, UN Doc. [CAT/C/KEN/CO/2](#) (2013) para 11(b); CAT Concluding Observations: Jordan, UN Doc. [CAT/C/JOR/CO/3](#) (2015) para 34(d).

<sup>535</sup> Guideline 19 of [the Robben Island Guidelines](#); *Aarrass v Morocco*, (477/2011), CAT, UN Doc. [CAT/C/52/D/477/2011](#) (2014) paras 10.4-10.6; HRC Concluding Observations: Spain, UN Doc. [CCPR/C/ESP/CO/6](#) (2015) para 14(e); CAT Concluding Observations: Kenya [CAT/C/KEN/CO/2](#) (2013) para 22.

<sup>536</sup> See, Guideline 20 [of the Guidelines on Arrest, Police Custody and Pre-Trial Detention in Africa](#).

<sup>537</sup> Principle 3 of the [Principles on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment](#).

<sup>538</sup> CAT General Comment 3, UN Doc. [CAT/C/GC/3](#) (2012) para 30. See Guideline 40 [of the Guidelines on Arrest, Police Custody and Pre-Trial Detention in Africa](#),

<sup>539</sup> *Abdel Hadi, Ali Radi & Others v Republic of Sudan*, (368/09) ACHPR (2013), paras 45, 76-77; *Ntikarahera v Burundi*, (503/2012) UN Doc. [CAT/C/52/D/503/2012](#) (2014) paras 6.1-7; *M. T v Uzbekistan*, HRC, UN Doc. [CCPR/C/114/D/2234/2013](#) (2015) paras 7.4-7.5; see HRC General Comment 31, UN Doc. [CCPR/C/21/Rev.1/Add.13](#) (2004) para 15.

<sup>540</sup> Guideline 16(a) of [the Robben Island Guidelines](#); *Abdel Hadi, Ali Radi & Others v Republic of Sudan*, (368/09) ACHPR (2013) paras 45, 76-77; Articles 4-7 of the [Convention against Torture](#); CAT General Comment 2, UN Doc. [CAT/C/GC/2/CPR.1/Rev.4](#) (2007) paras 3, 8-11; CAT General Comment 3, UN Doc. [CAT/C/GC/3](#) (2012) para 17; HRC General Comment 31, UN Doc. [CCPR/C/21/Rev.1/Add.13](#) (2004) para 18.

ill-treatment or that it was likely to occur, and failed to take reasonable and necessary preventive measures.<sup>541</sup>

States have a duty to remove impediments to accountability for torture or other ill-treatment: they must ensure that no amnesties, immunities or statutes of limitation apply.<sup>542</sup>

Additionally, the State must ensure that victims of torture or other ill-treatment receive adequate reparation, including, as relevant, compensation, rehabilitation, restitution and guarantees of satisfaction and non-repetition. Those considered to be victims, and so entitled to reparation, include not only the person who was subjected to torture and other ill-treatment directly but also immediate family members and dependents and those who have suffered harm as a result of intervening to assist the victim or to prevent victimization. The obligation to ensure reparation does not depend on the identification, apprehension and successful prosecution of those responsible.<sup>543</sup>

**Article 7(1)(a) of the African Charter:**

7.1 Every individual shall have the right to have his cause heard. This comprises:

a) The right to an appeal to competent national organs against acts of violating his fundamental rights as recognized and guaranteed by conventions, laws, regulations and customs in force;

**Guideline 38 of the Guidelines on Arrest, Police Custody and Pre-Trial Detention in Africa:**

**Remedies**

38. All persons who are victims of illegal or arbitrary arrest and detention, or torture and ill-treatment during police custody or pre-trial detention have the right to seek and obtain effective remedies for the violation of their rights. This right extends to immediate family or dependents of the direct victim.

Remedies include, but are not limited to:

- a. Restitution to restore the victim to the situation that would have existed had the violation of their right not happened.
- b. Compensation, including any quantifiable damages resulting from the right violation and any physical or mental harm (such as physical or mental harm, pain, suffering and emotional distress, lost opportunities including education, material damage and loss of actual or potential earnings, harm to reputation or dignity, and costs required for legal services or expert assistance, medicines, medical services, and psychological and social services).
- c. Rehabilitation, including medical and psychological care as well as legal and social services.
- d. Satisfaction and guarantees of non-repetition.

## 11.8 MONITORING

In accordance with the **Guidelines on Arrest, Police Custody and Pre-Trial Detention in Africa** and the **Nelson Mandela Rules**, states should ensure a two-pronged system for regular inspection and monitoring of police custody and pre-trial detention facilities. One is an internal oversight mechanism, while the other is an independent monitoring body (or bodies).<sup>544</sup>

<sup>541</sup> CAT General Comment 2, UN Doc. [CAT/C/GC/2/CPR.1/Rev.4](#) (2007) para 26.

<sup>542</sup> CAT General Comment 3, UN Doc. [CAT/C/GC/3](#) (2012) paras 38, 40-42; see Guidelines 16(a)-(b) of [the Robben Island Guidelines](#); HRC General Comment 31, UN Doc [CCPR/C/21/Rev.1/Add.13](#) (2004) para 18, Principles 22-24 of the Updated Set of Principles for the protection and promotion of human rights through action to combat impunity, UN Doc. E/[CN.4/2005/102/Add.1](#) (2005) .

<sup>543</sup> Article 2 (3) of the ICCPR; article 14 of the [Convention against Torture](#); CAT General Comment 3, UN Doc. [CAT/C/GC/3](#) (2012) para 3; Guideline 38 [of the Guidelines on Arrest, Police Custody and Pre-Trial Detention in Africa](#).

<sup>544</sup> Guidelines 41 [of the Guidelines on Arrest, Police Custody and Pre-Trial Detention in Africa](#) and Rule 83(1)(a) of the [Nelson Mandela Rules](#) pertain to internal oversight mechanisms. Guidelines 6(a) and 42 [of the Guidelines on Arrest, Police Custody and Pre-Trial Detention in Africa](#) and Rule 83(1)(b) of the [Nelson Mandela Rules](#) pertain to independent monitoring mechanisms.

The bodies carrying out these functions are different in nature and composition: one is a governmental body carrying out oversight; the other is independent of the detaining authorities (composed of a preferably gender-balanced team of qualified and experienced, variously qualified people).<sup>545</sup> Each must do its work independently of the other, but their inspections share objectives: to ensure that the facilities are operating in accordance with laws and regulations and international standards, and that the rights of the detainees are respected.<sup>546</sup>

According to the **Nelson Mandela Rules** those carrying out such inspections and monitoring must have the authority to:

- access all information on the numbers of people deprived of their liberty and the places and locations of detention
- access all information on those deprived of their liberty, including their records and conditions of detention
- freely choose which facilities to visit and to make unannounced visits
- conduct private and fully confidential interviews with detainees and staff
- make recommendations to the administration of the facility and competent authorities.<sup>547</sup>

Furthermore, written reports of the inspections, with recommendations, should be submitted to the responsible competent authorities, and preferably made public, excluding any personal data on detainees, absent their consent. The reports should form the basis of a continuing dialogue between the competent detaining authorities and the oversight and monitoring bodies.

Furthermore, States must ensure that those who provide information to the monitoring body or bodies are protected from reprisals.

A number of human rights authorities<sup>548</sup> have indicated that all places where people are deprived of liberty (including privately run facilities and unofficial places of detention) should be monitored in this way. Such monitoring is also contemplated by human rights standards including<sup>549</sup> **Section M(8) of the Principles on the Right to Fair Trial in Africa; Article 17(2)(e) of the Convention on Enforced Disappearance; and the Optional Protocol to the Convention against Torture.**<sup>550</sup>

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<sup>545</sup> See Rule 84(2) of the [Nelson Mandela Rules](#); Section M(8) of the [Principles on the Right to Fair Trial in Africa](#); Principle 29 of the (1) of the UN [Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment](#).

<sup>546</sup> Rule 83(2) of the [Nelson Mandela Rules](#).

<sup>547</sup> Rule 84 (1) of the [Nelson Mandela Rules](#).

<sup>548</sup> For example, HRC General Comment 35 on Article 9, UN Doc. [CCPR/C/GC/35](#) (2014), para 58; [CRC General Comment 10](#), UN Doc. [CRC/C/GC/10](#) (2007) para 89; HRC Concluding Observations: Chad, UN Doc. [CCPR/C/TCD/CO/2](#) (2014) para 17; HRC Concluding Obs. Indonesia, UN Doc. [CCPR/C/IND/CO/1](#) (2013) para 20.

<sup>549</sup> See also, Guideline 41 of [the Robben Island Guidelines](#). HRC General Comment 35, UN Doc. [CCPR/C/GC/35](#) (2014), para 58.

<sup>550</sup> States Parties to the [Optional Protocol to the Convention against Torture](#) agree to grant these powers to and to cooperate both with the UN Sub-Committee on the Prevention of Torture and with a national body, called a National Prevention Mechanism.



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