



International Human Rights Law (4th edn)

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p. 257 **13. Detention and Trial**

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Abstract

This chapter discusses the protections afforded by international human rights law to the right to liberty and security of the person and the right to a fair trial. The right to liberty regulates powers of detention and provides safeguards against ill-treatment of detainees. An extreme form of arbitrary detention is enforced disappearance. The right to a fair trial sets out how court proceedings should be conducted and court systems organized. In addition, there are specific protections for those who are suspected of having committed a criminal offence.

Keywords: international human rights, right to liberty, fair trial, arbitrary detention, detainees, enforced disappearance, security of the person

Summary

This chapter introduces two rights: the right to liberty and the right to a fair trial. The right to liberty regulates powers of detention and provides safeguards against ill-treatment of detainees. The right to a fair trial sets out how court proceedings should be conducted and court systems organized. Both these rights establish extensive guarantees for individuals who are subjected to detention regimes or national justice systems, as well as specific guarantees for those suspected of having committed a criminal offence. These rights seek to prevent the arbitrary use of governmental power and create a climate conducive to the realization of all human rights.

1 Introduction

Individuals are at their most vulnerable when they are in detention. They are at the complete mercy of their captors. Therefore detention powers should only be exercised when actually necessary. Similarly, the determination of disputes by judicial bodies subjects individuals to the authority of the state. Judicial proceedings must be conducted so that this authority is not exercised in an arbitrary manner. The rule of law can only be secured if trials are conducted fairly. There is then a need to regulate how individuals are treated by national justice systems.

These concerns were recognized as early as 1215 in Magna Carta, which gave certain individuals what can now be considered to be the origins of the rights to liberty and fair trial.¹ The rights to liberty and fair trial set out safeguards to ensure that notions of ‘due process’ are adhered to in the operation of regimes of detention, the investigation and prosecution of criminal charges, and the conduct of court proceedings. This chapter considers the content and scope of obligations regarding the right to liberty, including freedom from arbitrary detention (Section 2), freedom from enforced disappearance (Section 3), and security of the person (Section 4), as well as the right to a fair trial (Section 5).

p. 258 **2 Freedom From Arbitrary Detention**

The ideal is that no one should be deprived of their liberty. However, there may be valid reasons for a state to assume custody of an individual. For example, it may be necessary to detain convicted criminals who pose a threat to the community. As such, traditionally, the main concern of human rights activists has been the capricious use of detention powers by oppressive governments in order to subdue their opponents. Beyond this, it is recognized that restrictions on liberty are permitted and may even be required. However, even where detention may be justified, individuals in detention are susceptible to violations of their human rights. They are regularly ‘forgotten’—left to languish in prisons or mental health facilities—or they may be subjected to torture or ill-treatment, either at the hands of their captors or by virtue of the conditions in which they are held.² Recognizing these concerns, human rights law provides an umbrella of protections that seek to prevent the arbitrary use of detention powers, provide timely remedies where arbitrary detention does take place, and provide safeguards to eradicate ill-treatment or ‘disappearance’ from instances of permitted detention. This section first surveys the sources of the right and then considers how these aims are realized.

2.1 Sources

Article 9 of the Universal Declaration of Human Rights (UDHR) provides that: ‘No one shall be subjected to arbitrary arrest, detention or exile’. This pithy yet powerful provision was extended and its protections elaborated in Article 9 of the International Covenant on Civil and Political Rights (ICCPR). The Human Rights Committee has adopted a detailed general comment on the right to liberty and security of the person³ and the right has been guaranteed in other UN human rights treaties and declarations, including the Convention on the Protection of the Rights of Migrant Workers (Article 16), the Convention on the Rights of the Child (Article 37), the Convention on the Rights of Persons with Disabilities (Article 14), and the Declaration on the

Rights of Indigenous Peoples (Article 7). All regional human rights instruments also guarantee the right to liberty.⁴ Freedom from arbitrary detention is a rule of customary international law⁵ and the Human Rights Committee has claimed that this rule is a *jus cogens* norm.⁶

There are a number of non-binding instruments that elaborate on the implications of the right, including the Revised UN Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules),⁷ UN Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment,⁸ UN Basic Rules for the Treatment of Prisoners,⁹ UN Rules for the Protection of Juveniles Deprived of their Liberty,¹⁰ and UN Rules for the Treatment of Women Prisoners and Non-Custodial Measures for Women Offenders.¹¹

Similar instruments have been adopted by regional human rights bodies.¹²

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In 1991, the UN Commission on Human Rights created a Working Group on Arbitrary Detention (WGAD),¹³ whose mandate has been renewed by the UN Human Rights Council.¹⁴ The Working Group receives and investigates communications alleging cases of arbitrary detention by member states of the UN. It also issues its own form of general comments—‘deliberations’—on issues concerning arbitrary detention, which contain invaluable guidance on the right and its implementation.

2.2 Scope and Types of Obligations

Most issues concerning the right to liberty involve the arrest and detention of individuals in the context of criminal proceedings. However, the protections afforded by the right to liberty are not restricted to such situations.¹⁵ For example, involuntary hospitalizations have been considered to fall within the scope of the right,¹⁶ as have certain instances of confinement of migrants in airport transit zones.¹⁷

As a general proposition, right to liberty guarantees are concerned with narrow notions of detention involving the imposition of severe restrictions upon a person’s physical being. Restrictions that do not reach this level of severity, where individuals are not permitted to travel or move freely within a state, are likely to be captured by protections relating to the right to freedom of movement, such as those set out in Article 12 ICCPR. The intensity of the restriction depends on its duration, effects, and manner of implementation. There is also a subjective element: namely, lack of consent. Where individuals ‘know that they are free to leave at any time, [they] are not being deprived of their liberty’.¹⁸

House arrest has been considered to be a deprivation of liberty,¹⁹ as have mandatory quarantine restrictions adopted in response to the COVID-19 pandemic.²⁰ However, restrictions upon movement which confine an individual to his or her home during non-working hours have been considered to be a restriction upon the right to freedom of movement rather than a deprivation of liberty.²¹ Similarly, restrictions upon movement within a state, a city, or even parts of a city are freedom of movement concerns.²² Crowd-control techniques may give rise to a deprivation of liberty, but it will depend on the context in which they are used. The European Court of Human Rights has held that the ‘kettling’—or confinement—of persons inside a police cordon for up to seven hours did not constitute a deprivation of liberty when it took place in dangerous conditions that may have led to serious injury or damage.²³

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Whilst it may seem obvious when an individual is in detention, there are difficult cases. In a controversial opinion, the WGAD decided that Julian Assange's 'stay' in the Ecuadorian Embassy in London following a claim for asylum was a deprivation of liberty. Although Assange could leave the embassy whenever he wished, he would be arrested pursuant to a European Arrest Warrant issued by Swedish authorities if he left. Although the WGAD's reasons are unclear, it would appear that the UK and Swedish authorities' failure to recognize that Assange had been granted asylum by Ecuador, coupled with constant police surveillance of the Ecuadorian Embassy, led to the conclusion that this was a deprivation of liberty.²⁴

States should *respect* the right to liberty and not arbitrarily detain an individual. They must also *protect* the right. Where private actors undertake detention functions on behalf of the state, there is an obligation to ensure that all such instances of detention are compliant with the right to liberty. Other forms of detention by private actors, such as abduction and kidnapping, must be criminalized. Similarly, systems of guardianship that prevent women from leaving their homes without permission should be abolished.²⁵ The European Court of Human Rights has held that states have an obligation not to return an individual to a country where there is a 'real risk' that there may be a 'flagrant breach' of the right to liberty, such as indefinite or incommunicado detention for many years without the prospect of being brought to trial.²⁶ The Human Rights Committee has suggested that returning an individual in such circumstances may constitute inhuman treatment.²⁷ State participation in extraordinary rendition processes, whereby the state detains an individual who is handed over to foreign officials outside the ordinary legal processes, is a clear violation of the right to liberty.²⁸ *Fulfilling* the right is essentially achieved through the establishment of procedural safeguards that are explicitly spelt out within the various international law provisions on liberty. These will be examined in Section 2.4.

2.3 Permissible Deprivations of Liberty

Article 9(1) ICCPR acknowledges that states may legitimately restrict the right to liberty. It provides that: '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 procedures as are established by law.' Therefore, only where a deprivation of liberty is unlawful and/or arbitrary will it constitute a violation of Article 9(1). Other international treaties have similar provisions on arbitrary detention.²⁹ However, some grounds for detention are prohibited explicitly by international human rights law. If detention is solely on the basis of a disability or failure to fulfil a contractual obligation, it will be unlawful.³⁰

p. 261 ↵ The European Convention on Human Rights (ECHR) sets out a more restrictive approach. Rather than simply protecting individuals against illegal and/or arbitrary detention, Article 5(1) ECHR provides a list of grounds upon which detention is justified. These are:

1. execution of a sentence after conviction by a competent court;
2. non-compliance with a lawful court order or legal obligation;
- 3 reasonable suspicion of having committed an offence, to prevent flight having done so, or to prevent the commission of an offence where the ultimate aim is to bring the person before a competent court;
4. educational supervision in the case of minors;

5. prevention of the spread of infectious diseases;
6. where persons are of unsound mind, alcoholics, drug addicts, or vagrants; and
7. prevention of unauthorized entry into the state or where action is being taken with a view to deportation or extradition.

Detention on grounds other than those listed is not permissible under the ECHR in peacetime. However, the European Court of Human Rights has accepted that, in the context of an international armed conflict, international humanitarian law provides further bases for the detention of prisoners of war and civilians whose internment is necessary for imperative reasons of security.³¹ None of the grounds set out in Article 5(1) ECHR (or international humanitarian law) by itself is enough to justify detention. As with the other treaties, the detention must also be lawful and not arbitrary.

2.3.1 Legality

Any deprivation of liberty must be pursuant to domestic law. It must be both sanctioned by and in conformity with any procedural requirements set out in national legislation or an equivalent norm of common law. Such a law must be formulated with sufficient precision to prevent arbitrary or overbroad application.³² So, the involuntary detention of psychiatric patients in secure hospitals should only take place where there is a legal basis to do so, which clearly sets out when this may take place.³³ Similarly, where arrest warrants are mandatory and an arrest takes place without one, a violation of the right to liberty will be found.³⁴

2.3.2 Arbitrariness

Whether detention is arbitrary will depend upon considerations of ‘inappropriateness, injustice and lack of predictability and due process of law’ as well as ‘elements of reasonableness, necessity and proportionality’.³⁵ Therefore, detention is arbitrary when it takes place without a legal basis, as well as where ‘it is not necessary in all the circumstances of the case’.³⁶

In order to assess the *necessity* of detention measures, a proportionality assessment must take place. This assessment involves consideration of whether, *in the specific circumstances*, the detention regime is appropriate for the purported aim and whether there is a less invasive method of achieving that aim. So, the Human Rights Committee held that detention was a disproportionate punishment in *Fernando v Sri Lanka* where the author had been sentenced to one year of ‘rigorous imprisonment’ for contempt of court on the grounds of repeated applications to court, raising his voice, and refusing to apologize to the court. A fine would have sufficed.³⁷ An Australian policy of compulsory detention of asylum-seekers until their status has been determined has also been held to be disproportionate and thus arbitrary. The Human Rights Committee held that although it is permissible to detain individuals requesting asylum for an initial period to record claims, confirm identity, and so on, detention beyond this period without good reasons that are specific to the individual, such as a risk of criminal behaviour, would be considered arbitrary.³⁸

Preventive detention³⁹—that is, detention that is aimed at protection rather than punishment—is often criticized as being arbitrary. It is clear that such a power could easily be abused. Therefore, it should only be used as a last resort, where a ‘present, direct and imperative threat is invoked to justify the detention of

persons considered to present such a threat', and for the shortest period of time.⁴⁰ In *SV and A v Denmark*, the European Court of Human Rights was satisfied that these conditions had been met. Three men who had previously committed acts of football hooliganism were detained during an international football match in order to prevent such crimes being committed. This was not arbitrary because less stringent measures would not have sufficed, and the men had been detained for less than eight hours and were released as soon as the imminent risk had passed.⁴¹

Where the detention of an individual would lead to a violation of another human right or is the result of a violation of another human right it may be considered arbitrary. As such, violations of Article 9(1) ICCPR have been found when individuals were arrested for their political views in contravention of Article 19 ICCPR⁴² or activities as a human rights defender.⁴³ Detention on the basis of ethnic origin alone will be arbitrary.⁴⁴ Therefore, arrests on the basis of racial profiling, without further evidence, are prohibited.⁴⁵ Imprisonment after a grossly unfair trial will be considered arbitrary and the Human Rights Committee has held that a state will be in breach of its obligations if it gives effect, pursuant to an international prisoner transfer agreement, to a sentence imposed following a manifestly unfair trial.⁴⁶

A detention that is legitimate at the outset may become arbitrary over time. This is because the rationale for detention may cease to be relevant. As a safeguard against this, there is a right to *periodic* review of detention in certain circumstances. If the circumstances surrounding the detention have not changed, or the detention has only been for a short period of time, then there is no review requirement. For example, where a person is serving a sentence of detention as a punishment which has been imposed by a court of law, it is assumed that the court that imposed the sentence has reviewed the necessity of the detention. However, in cases of life imprisonment, or where there is a discretionary preventive sentence of detention to be served after a mandatory 'tariff' or 'punitive' period, human rights bodies have clearly stated that there should be periodic reviews of the need for further preventive detention.⁴⁷ The key question is: does the detainee remain such a danger to society as to warrant continued detention? The European Court has held that the 'preventive' period of detention may become arbitrary if no reasonable effort is made to rehabilitate offenders and address the risks that they pose to society.⁴⁸ Similar principles apply to detention on grounds other than criminal conviction.⁴⁹

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2.4 Guarantees to Those Deprived of Their Liberty

Even if deprivation of liberty is justified, a state's obligations regarding the detainee do not end. Detainees should be kept in an officially recognized place of detention and records should be kept. Although states may legitimately restrict the enjoyment of some rights, such as freedom of expression, when necessary, the general position is that individuals do not lose their human rights as a consequence of detention. In addition to this general protection, there are a number of specific guarantees of treatment that must be accorded to detainees. Most of these are entitlements for those individuals who have been arrested or detained pursuant to a criminal charge, although some are safeguards of general application to all detainees. States should take into account specific vulnerabilities of individuals when fulfilling these guarantees to ensure their effective protection. So, the European Court of Human Rights has held that where individuals have been declared

'partially incapacitated' and placed in a psychiatric institution, 'special procedural safeguards may be called for in order to protect the interests of persons who, on account of their mental disabilities, are not fully capable of acting for themselves'.⁵⁰

2.4.1 Rights of all detainees

Right to be informed of reasons for detention

Article 9(2) ICCPR provides that '[a]nyone who is arrested shall be informed, at the time of arrest, of the reasons for his arrest'.⁵¹ This elementary safeguard exists to ensure that individuals know why they are being detained. It serves both to reduce the distress of being incarcerated, as well as to allow detainees to challenge their detention. It applies to all persons in detention. The reasons for arrest must be communicated in a language that the detainee understands and must contain sufficiently detailed information to indicate why the individual is being incarcerated. The Human Rights Committee held that a violation of Article 9(2) ICCPR had occurred when individuals were told that they had breached state security, but no further details were given.⁵² For this right to be effective for certain vulnerable detainees, such as those with certain mental disabilities or children, reasons for detention should be provided to an appropriate representative who can represent their interests.⁵³ Whilst the reasons for arrest must be communicated to the detainee

p. 264 'immediately', exceptional delays will be permitted where they are kept to a minimum. ↵ For example, where overnight delays have occurred because of the need for an interpreter, this was considered acceptable,⁵⁴ whilst a delay of two days was not.⁵⁵

Right to humane treatment

Article 10(1) ICCPR provides that all detainees must be 'treated with humanity and with respect for [their] inherent dignity'.⁵⁶ This fundamental protection has implications for the treatment of the individual as well as the conditions of detention. While most cases of severe ill-treatment will be considered inhuman treatment or torture contrary to Article 7 ICCPR, Article 10(1) is triggered by attacks on dignity that do not reach the severity of suffering threshold required by Article 7 ICCPR.⁵⁷ States are obliged to protect all individuals from 'any hardship or constraint other than that resulting from the deprivation of liberty'.⁵⁸ Thus, whilst not proscribed, solitary confinement should only be used in exceptional circumstances and for limited periods of time.

Fulfilment of a detainee's right to humane treatment is inextricably linked to the conditions of detention in which they are held. States must ensure that these conditions are adequate. Detention facilities—whether prisons, medical facilities, or immigration detention centres—must not be overcrowded and must provide satisfactory light, ventilation, bedding, sanitary facilities, food, and clothing, as well as access to appropriate medical care where necessary.⁵⁹ Many of the recommendations and declarations adopted by the UN listed in Section 2.1 set out minimum standards of detention. Although ensuring such minimum conditions may be expensive, the Human Rights Committee has emphasized that the 'fundamental nature of the right means that the application of this rule ... cannot be dependent on the material resources available in the State Party'.⁶⁰ The Committee found a violation of Article 10(1) ICCPR in *Wanza v Trinidad and Tobago* where the

author was detained in a windowless cell, ventilated by an 18 × 18 inch opening, for between 22 and 23 hours a day, whilst on weekends or holidays, when the number of prison staff was too low, he was not permitted to leave the cell at all.⁶¹

There must be strict state regulation of *all* detention facilities, even where they are run by private organizations, to ensure that conditions of detention are appropriate. The Inter-American Commission has stressed that states must exercise overall effective control of prisons and prevent systems of self-government whereby prison life is governed by ‘gangs’ of prisoners. In such situations, the state is simply unable to protect the dignity of prisoners.⁶²

Rights to challenge the legality of detention and remedies

A further element of the guarantees against arbitrary detention is the right to bring habeas corpus or *amparo* proceedings; that is, all detainees should have the opportunity to challenge the *legality* of their detention, and be released should it be considered unlawful.⁶³ This right of challenge aims to provide redress where incarceration is inconsistent with domestic law and/or arbitrary contrary to international human rights law. Review of the legality of detention must be conducted by a court empowered to order release of detainees,⁶⁴ not by an administrative or executive body, and must take place without delay. In order for the right to be effective, detainees must have access to a lawyer and individuals cannot be kept incommunicado.

Where detention is found to be unlawful, Articles 9(4) and 9(5) ICCPR provide two specific remedies: release and compensation for pecuniary and non-pecuniary harm suffered. Similar rights are provided for in Article 10 of the American Convention on Human Rights (ACHR) and Article 5(5) ECHR, and the African Commission has confirmed that the African Charter on Human and Peoples’ Rights (ACHPR) also requires such remedies.⁶⁵ Therefore national courts must have the power to order release and award compensation.⁶⁶ In order for these rights to be effective, such orders must be complied with in a timely fashion.

2.4.2 Rights of those detained on a criminal charge

In addition to those rights discussed already, there are specific rights for individuals who are detained pursuant to a criminal charge, or who have been arrested on the basis of a suspicion that they have committed a criminal offence. Prevention and punishment of crimes is the broadest basis upon which states may ground detention. The considerable powers of the state in these circumstances must be kept in check with mechanisms for accountability of law enforcement officers and safeguards for arrested persons.

Article 9(2) ICCPR provides that in the context of detention on the basis of a criminal charge, individuals should be informed promptly, in a language that they understand, of the criminal charges they face. The requirement of ‘prompt’ notification does not require notification at the moment of arrest; some delay is permitted: seven hours has been considered satisfactory,⁶⁷ whilst seven days has been considered too long.⁶⁸

All individuals who are arrested pursuant to a criminal charge must be brought ‘promptly before a judge or other officer authorized to exercise judicial power’.⁶⁹ This should be an automatic process and not dependent upon a request by the arrested individual. The initial days of detention are often those when detainees are at their most vulnerable; the likelihood that torture or ill-treatment will occur is at its highest at this time. The

aim of bringing a detainee before a judge is to ensure independent judicial supervision of the actions of law enforcement officers and to confirm the legal basis for detention. The judge or judicial officer should be empowered to order the release of detainees where detention is not appropriate. If they cannot do so, the protections provided by this right will be illusory. Furthermore, the judge or other officer should be ‘independent, objective and impartial in relation to the issues dealt with’.⁷⁰ With regard to the requirement of ‘promptness’, the Human Rights Committee has stated that ‘48 hours is ordinarily sufficient to transport the individual and to prepare for the judicial hearing; any delay longer than 48 hours must remain absolutely exceptional and justified under the circumstances.’⁷¹ Greater diligence is required for children: they should be brought before a judge within 24 hours of arrest.⁷²

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Protections afforded to those detained on a criminal charge continue beyond this first appearance before a judge. Article 9(3) ICCPR provides that such persons ‘shall be entitled to trial within a reasonable time or to release’ pending trial. Article 5(3) ECHR and Article 7 ACHR provide similar guarantees.⁷³ The general rule of liberty is applicable: individuals should not be kept in pre-trial detention unless it is necessary to do so. Essentially, these provisions provide a qualified right to release pending trial where exceptions are permitted ‘to ensure the presence of the accused at the trial, to avert interference with witnesses and other evidence, or the commission of other offences’.⁷⁴ ‘Public order’, where the release of a suspected offender may give rise to a social disturbance,⁷⁵ and the ‘personal safety of the suspect’, where release of suspects may leave them vulnerable to attack, will also be relevant considerations.⁷⁶ The burden remains on the state to demonstrate that in the specific circumstances detention is necessary and proportionate. International human rights bodies have advocated the use of financial guarantees or the removal of travel papers and passports, rather than pre-trial detention, to secure the attendance of a suspect at trial.

As part of the right to humane treatment and in order to maintain the presumption of innocence, individuals held in pre-trial detention should be kept segregated from convicted criminals (Article 10(2)(a) ICCPR). They are to be treated as innocent individuals until proven guilty of an offence. Article 10(2)(b) ICCPR also provides that ‘[a]ccused juveniles shall be separated from adults and brought as speedily as possible for adjudication’.

Where release is not possible, the trial of the accused must take place within a reasonable period of time. What is considered *reasonable* is a matter to be determined on a case-by-case basis, but factors that will be taken into account include: the complexity of the case, the conduct of the accused (whether they have delayed the proceedings with challenges or by subverting investigations), and the efficiency of national authorities. Of primary concern is ‘whether the time that has elapsed, for whatever reason, before judgment is passed on the accused has at some stage exceeded a reasonable limit whereby imprisonment without conviction imposes a greater sacrifice than could, in the circumstances of the case, reasonably be expected of a person presumed innocent’.⁷⁷

Finally, Article 10(3) ICCPR obliges states to ensure that detention following a conviction for a criminal offence is aimed at the reformation and social rehabilitation of offenders, not solely punishment. So, in *Kang v Republic of Korea*, the Human Rights Committee found a violation of this provision where the author had been held in solitary confinement for 13 years for failing to abandon his political views.⁷⁸

2.4.3 Rights of foreign nationals

Foreign detainees are particularly vulnerable. They may have problems of participation in different and often disorientating legal systems, including a lack of knowledge of the ↗ official language of the host state. All foreign nationals who are ‘arrested or committed to prison or to custody pending trial or ... detained in any other manner’ are entitled to access to a consular official from their home state.⁷⁹ Foreign detainees have the right to request that consular officials of their home state are notified of their arrest without delay and that all communications between the detainee and consular officials are forwarded without delay. All foreign detainees must be informed of these entitlements. These ‘rights’ have been confirmed by the International Court of Justice to apply in all cases of detention of foreign nationals and failure to respect these rights will impact the fairness of any subsequent judicial proceedings.⁸⁰

2.5 Emergency Detention Powers

The right to liberty has been the subject of many derogations by states from their human rights obligations.⁸¹ Detention, particularly indefinite detention without charge, is often used by states to deal with emergencies. On a purely textual basis, derogation from the right to liberty is permitted. However, any emergency deprivation of liberty measures must fulfil the requirements for a valid derogation: that is, the measures must be a necessary and proportionate response to the emergency faced. It would appear, then, that any such deprivations of liberty must not be ‘arbitrary’, and thus the right to freedom from arbitrary detention is not derogable. Rather, it is the determination of what is ‘arbitrary’ that changes when a state faces an emergency that threatens the life of the nation. So, in a time of armed conflict what constitutes an arbitrary detention will need to be determined by reference to the relevant rules of international humanitarian law.⁸² Furthermore, the essential protections that the right to liberty affords serve to prevent violations of rights which are not derogable, such as freedom from torture and ill-treatment. Recognizing these positive externalities of the right to liberty, human rights bodies have stated that the procedural safeguards discussed already, including judicial oversight of arrests and the right to bring habeas corpus proceedings, must remain in place during times of emergency. For example, the Human Rights Committee has confirmed that ‘[i]t is inherent in the protection of rights explicitly recognized as non-derogable ... that they must be secured by procedural guarantees, including, often, judicial guarantees’ and so ‘the right to take proceedings before a court to decide without delay on the lawfulness of detention must not be diminished by a State party’s decision to derogate from the [ICCPR]’.⁸³ The Inter-American Court⁸⁴ and the European Court have made similar statements.⁸⁵

3 Enforced Disappearance

The most egregious violation of the right to liberty is an ‘enforced disappearance’, which comprises the secret deprivation of a person’s liberty by state agents⁸⁶ who refuse to inform anyone of the arrest.⁸⁷ As such, at least insofar as the friends and family of the individual are concerned, the individual has effectively disappeared. The victim is removed from the protection of the law and cannot make use of the judicial safeguards described in Section 2. Such abductions often result in the death of the victim. A notorious example of enforced disappearance is the US Central Intelligence Agency’s use of ‘black sites’ across the world

to secretly detain individuals for prolonged periods of time in the context of the ‘global war on terror’.⁸⁸ Enforced disappearance was used systematically in Latin America in the 1960s and 1970s, and given its experience of the practice, the Organization of American States was the first international organization to adopt a treaty specifically directed at the eradication of the practice: the Inter-American Convention on Forced Disappearance of Persons 1994.

Enforced disappearance constitutes a violation of multiple human rights, including: the right to liberty, the right to humane conditions of detention, the right to recognition before the law, the right not to be tortured, and possibly the right to life.⁸⁹ The disappearance may also result in violations of the prohibition of torture and ill-treatment in respect of the family members who are left worrying about the fate of abducted individuals.⁹⁰ The International Convention for the Protection of All Persons from Enforced Disappearance has now confirmed that individuals have a ‘free-standing’ right not to be subjected to enforced disappearance.⁹¹ Parties to the UN Convention or the Inter-American Convention are obliged to criminalize the practice of enforced disappearance and adopt further administrative and legal measures, in addition to those which exist to prevent arbitrary detention, to bring to an end the practice of ‘secret detention’. The obligations to criminalize, investigate, and punish enforced disappearance have, according to the Inter-American Court of Human Rights, attained the status of *jus cogens*.⁹²

4 Security of the Person

Treaty provisions on the right to liberty invariably contain a reference to protection of the ‘security of the person’, which is concerned with freedom from injury. States are obliged to refrain from inflicting bodily injury on individuals, to investigate threats to the person from both state and non-state actors, and to provide protection for individuals where such threats are credible. Whilst some human rights bodies have restricted the right to security of the person to those individuals who are threatened with arbitrary detention, the Human Rights Committee has stated that ‘[i]t cannot be the case that, as a matter of law, States can ignore known threats to the life of persons under their jurisdiction, just because he or she is not arrested or otherwise detained’.⁹³ Therefore, it has found violations of the right to security where there was a failure to investigate credible death threats.⁹⁴

5 The Right to a Fair Trial

The right to a fair trial is ‘aimed at the proper administration of justice’ and securing the rule of law.⁹⁵ Treaty provisions on fair trial establish a complex set of rules that cover two aspects of how the right is to be secured. First, there are rules specifying how court proceedings should be conducted. In general, fair trial guarantees are not concerned with the *outcome* of judicial proceedings, but rather the *process* by which that outcome is achieved. Fairness of outcome is not guaranteed. Second, there are structural rules regarding the organization of domestic court systems. Securing the right to a fair trial can require significant investment in the court system and many states fail to fulfil their obligations because of serious structural problems. Human rights law does not seek to impose a particular type of court system on states, but rather implements the principle that there should be a separation of powers between the executive and the judiciary.

5.1 Sources

Article 10 UDHR provides that '[e]veryone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him'. The UDHR also provides further, more specific, protections applicable when determining a criminal charge, in Article 11. Both the general and specific criminal protections are merged into one detailed provision of the ICCPR: Article 14. Due to their importance, aspects of fair trial guarantees can be found in most of the UN human rights treaties, including: Article 40 of the Convention on the Rights of the Child (CRC), Article 18 of the Migrant Workers Convention, Article 5(a) of the Convention on the Elimination of Racial Discrimination (ICERD), Article 15 of the Convention against Torture (UNCAT), and Article 13 of the Convention on the Rights of Persons with Disabilities. All regional treaties guarantee the right to a fair trial.⁹⁶ Despite the sophisticated treaty provisions on the right to a fair trial, the protections have evolved by means of considerable elaboration by international human rights bodies.

The 'fundamental principles of fair trial' form part of customary international law and the Human Rights Committee considers them to be peremptory norms of international law.⁹⁷ Although not listed in Article 4(2) p. 270 ICCPR, the Committee has held that such principles are non-derogable in times of emergency because they ensure that 'the principles of legality and the rule of law' are respected. These fundamental principles create safeguards for those norms that are explicitly listed as non-derogable, such as the right to life and the prohibition against torture.⁹⁸

Particular aspects of the right to a fair trial are also elaborated upon in various declarations and guiding principles, including the Basic Principles on the Independence of the Judiciary,⁹⁹ the Basic Principles on the Role of Lawyers,¹⁰⁰ the UN Standard Minimum Rules for the Administration of Juvenile Justice,¹⁰¹ and the UN Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems.¹⁰²

International criminal tribunals¹⁰³ must ensure a fair trial and guarantees to this effect are provided in the relevant statutes and rules of procedure. These rules are based upon the protections found in Article 14 ICCPR and customary international law.¹⁰⁴

5.2 Scope and Types of Obligations

Though concerns regarding the conduct of judicial proceedings have traditionally focused on how *criminal* trials should be conducted, the right to a fair trial extends beyond such trials to civil and certain administrative proceedings. Article 14(1) ICCPR provides that guarantees should apply to the determination of both rights and obligations in a 'suit at law' as well as criminal charges, while Article 6(1) ECHR refers to the determination of both criminal charges and 'civil rights and obligations'. What is meant by the terms 'suit at law' and 'civil rights and obligations' has been a difficult question to answer.

The Human Rights Committee has interpreted the term 'suit at law' broadly:

[T]he concept ... is based on the nature of the right in question rather than on the status of one of the parties or the particular forum provided by domestic legal systems for the determination of particular rights. The concept encompasses (a) judicial procedures aimed at determining rights and obligations pertaining to the areas of contract, property and torts in the area of private law, as well as (b) equivalent notions in the area of administrative law such as the termination of employment of civil servants for other than disciplinary reasons, the determination of social security benefits or the pension rights of soldiers, or procedures regarding the use of public land or the taking of private property. In addition it may (c) cover other procedures which, however, must be assessed on a case by case basis in the light of the nature of the right in question.¹⁰⁵

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Article 8(1) ACHR specifies that fair trial guarantees are to be accorded in all proceedings which involve 'the determination of ... rights and obligations of a civil, labour, fiscal, or any other nature'. The case law of the European Court of Human Rights suggests that the reference to '*civil rights and obligations*' is more restrictive, covering disputes between private parties as well as certain disputes between the individual and the state.¹⁰⁶ Most importantly, for all the international bodies, the application of fair trial rights to a 'suit at law' or the determination of '*civil rights and obligations*' does not depend on whether national law has provided that the issue should be determined by a court or another body.

Similarly, what constitutes a criminal charge is not restricted to what national law considers 'criminal' and thus punishable under that law. If this were the case, then states could avoid some of their human rights obligations by simply designating certain charges as something other than criminal. The idea of 'criminal charge' extends to those offences which are criminal in nature because they apply to the population at large and are accompanied by sanctions that 'must be regarded as penal because of their purpose, character or severity'.¹⁰⁷ Expulsion of aliens or disciplinary measures against soldiers are not considered 'criminal'. In the criminal context, the right to a fair trial is triggered at the moment official notification of a charge is given. Therefore, there may be some overlap with the protections granted by the right to liberty.

Fair trial norms oblige states to secure the right through a number of different guarantees. As stated already, these norms are very detailed in the treatment that individuals must experience in order to enjoy a fair trial. There are both negative obligations to *respect* these guarantees by not interfering in their enjoyment and positive obligations to *fulfil* them through investment, monetary and otherwise, in the court system. States must also *protect* the rights. Although one might assume that justice is only administered by the state, there are instances where the state must protect fair trial rights from interference by other actors. For example, where states recognize religious courts or those based on customary laws, they must ensure that these tribunals adhere to fair trial guarantees, and that there is recourse to a remedy if there is a failure to do so.¹⁰⁸ In addition, states must not transfer an individual to a jurisdiction where an individual may face a 'flagrant denial of justice', whereby there is a 'destruction of the very essence' of the right to a fair trial.¹⁰⁹

5.3 Generally Applicable Fair Trial Guarantees

What does the right to a fair trial entail? Article 14 ICCPR provides fair trial guarantees of general application that apply to all types of judicial proceedings (considered in this section) as well as detailed guarantees specific to criminal trials (considered in Section 5.4). The generally applicable guarantees are set out in Article

14(1) ICCPR, which provides, *inter alia*, that ‘[a]ll persons shall be equal before the courts and tribunals. ... everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law’.¹¹⁰ The procedural aspects of a number of human rights include recourse to judicial procedures and the general rights of due process will apply in these contexts. To take an example referred to already, Article 9(4) ICCPR provides that detainees have the right to have the legality of their detention determined by a court. Such review proceedings must be conducted according to the fundamental principles relating to a fair trial. Failure to do so will constitute violations of both Articles 9(4) and 14(1) ICCPR.

5.3.1 Equality before the courts

The right to equality before courts and tribunals is a specific application of the right to non-discrimination, contained in Article 26 ICCPR, to judicial proceedings.¹¹¹ It incorporates: (1) the right of equal access to courts; and (2) the rights of all parties to proceedings to equality of arms and to be treated without discrimination.

p. 272 Equal access

All human rights bodies have confirmed that there is a right to access courts of first instance to determine a criminal charge or rights and obligations in a suit at law. All individuals must have an equal chance to pursue their legal rights. ‘[A]ccess to administration of justice must be effectively guaranteed in all such cases to ensure that no individual is deprived, in procedural terms, of his/her right to claim justice’.¹¹²

Ensuring equal access to courts and tribunals involves substantial activity on the part of states. They must ensure that judicial systems are organized so that ‘all individuals ... who may find themselves in the territory or subject to [their] jurisdiction’ can access the courts.¹¹³ So there is a requirement of physical accessibility, both in terms of geographic location as well as the actual buildings. But the right goes beyond this. There should be no legal or other impediments to accessing justice.¹¹⁴ For example, statutory provisions that only allow for husbands (and not wives) to bring proceedings regarding matrimonial property in the courts have been found to violate Article 14(1) ICCPR.¹¹⁵ Efforts should be made to overcome practices or norms that exclude certain vulnerable groups from accessing justice. So the Inter-American Court has held that states must take into account the ‘special situation of vulnerability, ... common values, uses and customs’ of members of indigenous communities to ensure that they can access justice.¹¹⁶

Access to courts and tribunals can be severely hampered if court fees are unaffordable or where no legal assistance is available or only available at a prohibitively high cost. Article 14(3)(d) ICCPR obliges states to provide free legal aid in criminal cases where the interests of justice so demand and the individual concerned cannot afford to pay (see Section 5.4.4). Although there is no corresponding provision for civil proceedings, the Human Rights Committee has encouraged states ‘to provide free legal aid ... for individuals who do not have sufficient means to pay for it’.¹¹⁷

However, states may restrict access to courts where such restrictions are based on law, can be justified on objective and reasonable grounds, and are not discriminatory.¹¹⁸ A contentious restriction on access to courts is where claims of state immunity—whereby a state is immune from proceedings in foreign courts regarding certain official acts—have barred judicial proceedings. The European Court of Human Rights has held that applying the rule of state immunity in cases raising civil claims regarding acts of torture, and thereby

restricting access to justice, is permissible because it pursues the legitimate aim of ‘complying with international law to promote comity and good relations between states through the respect of another’s state sovereignty’.¹¹⁹

p. 273 **Equality of arms and treatment without discrimination**

The right to equality before the courts also includes protections of equality of arms and treatment without discrimination. Equality of arms means that all parties should be provided with the same procedural rights unless there is an objective and reasonable justification not to do so and there is no significant disadvantage to either party. The essence of the guarantee is that each side should be given the opportunity to challenge all the arguments put forward by the other side.¹²⁰

There should be no differential treatment of persons during court proceedings. Like cases should be treated alike unless there are objective and justifiable reasons not to do so. On this basis, the Human Rights Committee held in *Kavanagh v Ireland* that a situation where the Director of Public Prosecutions decided, with unfettered discretion, whether or not individuals accused of certain crimes would face a jury trial raised issues of equality before the law.¹²¹ The treaties aimed at eradicating specific forms of discrimination, such as the ICERD and the Convention on the Elimination of All Forms of Discrimination Against Women, explicitly stipulate that there should not be distinction as to race, colour, national origin, heritage, or sex during court proceedings.¹²² Distinction on these grounds can never be justified.

5.3.2 Hearing by a competent, independent, and impartial tribunal

The courts and tribunals before which claims are heard and criminal charges are determined must be ‘competent, independent and impartial’ and established pursuant to national law. Courts and tribunals are those institutions empowered to make legally binding decisions on the basis of the rules of law applicable within a state. Therefore, a panel which can make recommendations as to a particular course of action but not binding decisions, such as a parole board, will not be considered a *competent* court or tribunal for the purposes of fair trial provisions. The requirement that tribunals be *established by law* means that the basic rules on jurisdiction, organization, and membership of the court should be contained in legislation. This acts as a safeguard against executive abuse of court procedures.

The requirement of independence refers to the institutional set-up of the courts. States are obliged to establish courts so that any form of interference with the activities of judges is thwarted. There are essentially two aspects to this. First, the courts should be fully independent of the executive and the parties to a dispute. Courts should not take direction from government ministers or departments on how to decide a case.¹²³ Second, states must ensure that there are safeguards in place to preserve the independence of the judiciary, including ‘clear procedures and objective criteria for the appointment, remuneration, tenure, promotion, suspension and dismissal of the judiciary and disciplinary sanctions taken against them’.¹²⁴ Providing such procedures and guarantees aims to remove the threat that justice may be subverted by appointing ‘sympathetic’ judges, corruption, or the removal of judges from their post. A clear violation of this principle was seen in *Lawyers for Human Rights v Swaziland* where the King assumed all judicial power, including the ability to remove judges as well as exercise judicial authority.¹²⁵ An ongoing attack on the

independence of the judiciary has been seen in Poland since 2015. The ruling political party has attempted to control the activities of the Polish courts and remove judges by instigating negative media campaigns, initiating various law reforms relating to, *inter alia*, the appointment of judges and mandatory retirement ages, and the creation of a disciplinary chamber composed of judges appointed by the government. These reforms are a clear attack on the rule of law and breach the obligation to ensure an independent judiciary.¹²⁶

Related to the consideration of independence is the idea of the *impartiality* of the courts. There are two aspects to this. First, judges of the court must be *subjectively* impartial. That is, they must act without any personal bias towards either party in a case. Judges must not harbour preconceptions about the action before them and should remain uninfluenced by the media and public perception. In general, there will be a presumption of subjective impartiality unless there is evidence to the contrary. Second, the court should be *objectively* impartial, so that the court and its judges must *appear* to the impartial observer to be free from bias. Justice must be seen to be done. For example, in *Piersack v Belgium* the presiding judge in the applicant's case had been the head of the public prosecutor's department during the investigation of the case. Although there was no evidence that the judge had knowledge of the investigation, the European Court of Human Rights held that he was not objectively impartial.¹²⁷ Where there is a perceived lack of independence and impartiality, the public will be wary of having recourse to justice systems and thus access to justice is affected.

Concerns have been expressed by international human rights bodies regarding the use of military courts to try civilians.¹²⁸ There are two grounds for such concerns. First, it is argued that military courts violate the principle of equality before the law because military trials deviate from the normal criminal trial procedures in a state, creating a distinction in the manner in which individuals are tried. The Human Rights Committee has stated that '[t]rials of civilians by military or special courts should be exceptional, i.e. limited to cases where the State party can show that resorting to such trials is necessary and justified by objective and serious reasons, and where with regard to the specific class of individuals and offences at issue the regular civilian courts are unable to undertake the trials'.¹²⁹

The second concern is that military courts are not sufficiently impartial to fulfil the requirements of fair trial provisions. In the words of the African Commission:

Withdrawing criminal procedure from the competence of the courts established within the judicial order and conferring [it] onto an extension of the executive necessarily compromises the impartiality of the courts. Independent of the qualities of the persons sitting in such jurisdictions, their very existence constitutes a violation of the principles of impartiality and independence of the judiciary.¹³⁰

p. 275 ↵ Thus, some have argued that military trials of civilians are, of themselves, a violation of the right to be tried by an independent and impartial court. There may even be concerns regarding impartiality where only one member of the court is a serving military officer while the others are civilians.¹³¹

The Human Rights Committee has held that a state must demonstrate that both these concerns have been adequately addressed for the military trial of a civilian to be compatible with Article 14 ICCPR.¹³² There will be no violation if it can be shown that the military trial is: necessary because regular civilian courts are inadequate for the particular determination, has maintained impartiality, and has afforded the civilian a fair trial in procedural terms. The procedural requirements of a fair trial are considered next.

5.3.3 Fair and public hearing

'Fair'

Fair trial guarantees explicitly provide for a right to a 'fair' hearing in both civil and criminal proceedings.¹³³ What is considered fair is ever-evolving as international human rights bodies consider new situations; however, there is a minimum set of guarantees for criminal trials (see Section 5.4). The principle of fairness includes 'the absence of any direct or indirect influence, pressure or intimidation or intrusion from whatever side and for whatever motive'.¹³⁴ All judicial proceedings must adhere to this principle. Other aspects of a fair hearing include, *inter alia*, the right to equality of arms discussed already, the right of the accused to attend hearings, and the expeditious disposal of proceedings. It is important to appreciate that whether a trial is fair will depend on an assessment of the proceedings as a whole; breaches of the individual elements may not lead to an unfair trial.

The right of the accused to attend hearings is based on the idea that individuals will wish to monitor proceedings concerning their interests. However, it is not an absolute guarantee. In criminal trials, a hearing in the absence of the defendant (*in absentia*) is generally not compatible with the idea of a fair hearing.¹³⁵ However, there are three exceptions to this general position. First, an individual may waive his or her right to be at the trial. Second, there will be no violation where the authorities have tried diligently but failed to inform the accused of the trial date because, for example, he or she has moved away from their stated address. Finally, there will be no violation if the accused aims to evade justice by not attending the trial. As regards civil proceedings, the right to be present at proceedings has been interpreted flexibly in accordance with different national legal systems. The presence of legal representatives may suffice. However, where 'the personal character and manner of life of the party concerned is directly relevant to the formation of the court's opinion', for example in child custody hearings, then there is a right to be present.¹³⁶

A further aspect of the right to a fair trial is that there should be no excessive procedural delays in the resolution of a dispute. Delays call the effectiveness of the judicial system into question. Furthermore, a delay in determining a criminal charge will leave the defendant unsure of his or her fate and, although the guilt or innocence of the defendant is yet to be determined, public perceptions of guilt are often encouraged by long delays. Thus, there is a specific provision in the ICCPR (Article 14(3)(c)) that provides that everyone charged with a criminal offence should 'be tried without delay'. Although there is no comparable explicit protection in Article 14(1), the Human Rights Committee has interpreted the notion of 'fair hearing' to include the expeditious disposal of proceedings and so it is applicable to civil proceedings also.¹³⁷ The entire duration of proceedings, from the moment civil proceedings are initiated or an individual is informed of a criminal charge until a final appeal decision is made, is taken into account when deciding whether there has been undue delay. In addition, there may be a determination that the reasonable time guarantee has been violated

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for a particular stage of the judicial process. For example, a violation was found in *Pinkney v Canada* because appeals proceedings were delayed by nearly three years owing to the transcripts of the trial proceedings taking 29 months to prepare.¹³⁸ There is no absolute time limit within which judicial proceedings should take place. Instead, there are a number of considerations that need to be taken into account when assessing the reasonableness of a delay. These include: the length of each stage of the proceedings, the complexity of the legal issues at stake, the detrimental effects on the individual concerned caused by the delay, the availability of remedies to accelerate proceedings, and the outcome of any appeal proceedings.¹³⁹ Where delays to the administration of justice are caused by budgetary constraints, states must ensure that more resources are allocated to the judicial system: scarce financial resources have not been accepted as a valid excuse for a delay in the determination of criminal charges,¹⁴⁰ and temporary backlogs of cases must be addressed with appropriate measures.¹⁴¹

'Public'

Article 14(1) ICCPR also provides all individuals with a right to a public trial. Trials that are shrouded in secrecy are more likely to involve, or be perceived to involve, manipulation of the justice system in some states. Such trials have been used to suppress 'dissident' groups. There are two elements to this right. First, the trial itself should be conducted publicly and orally. Information regarding upcoming court proceedings should be made readily available in good time and sufficient facilities should be provided in courtrooms to allow the press and other members of the public to observe the proceedings.¹⁴² However, this aspect of the right is qualified and Article 14(1) contains an exhaustive list of situations where hearings can be conducted without public scrutiny: 'for reasons of public morals, public order (ordre public) or national security in a democratic society, or when the interest of the private lives of the parties so requires, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice'. The language of these restrictions implies that a condition of holding a trial without public scrutiny is that the principles of a democratic society must be upheld, so that questions of proportionality will come into play. For example, in *YM v Russia* the Human Rights Committee was not convinced that an entire trial for murder, robbery, and illegal possession of weapons ought to be conducted behind closed doors because 'intimate details' would be disclosed. In the Committee's view, closing part of the trial where such details would be discussed was more appropriate.¹⁴³ There is no need for ↗ public access to pre-trial proceedings or appellate proceedings based on purely written submissions.¹⁴⁴

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The second element to the right to a public trial provides that judgments should be made available to the public. Article 14(1) ICCPR provides that there may be exceptions to this rule where 'the interest of juvenile persons otherwise requires or the proceedings concern matrimonial disputes or the guardianship of children'.¹⁴⁵ In all other circumstances, no restrictions to access to judgments are permitted. Even where the trial has been conducted without public scrutiny, the Human Rights Committee has stated that 'the judgment, including the essential findings, evidence and legal reasoning must be made public'.¹⁴⁶ Such information is a vital safeguard against arbitrariness and fosters public confidence in the justice system. Where findings of guilt or innocence in criminal cases are made by lay juries and therefore no reasons for the final verdict are given, the European Court of Human Rights has held that it is necessary to ensure that a

framework is established within which the verdict can stand. The use of procedural safeguards such as directions or guidance provided by the presiding judge to the jurors on the legal issues or evidence presented, and precise, unequivocal questions put to the jury by the judge, will provide such a framework.¹⁴⁷

5.4 Fair Trial Guarantees in Criminal Proceedings

A detailed account of what constitutes a fair criminal trial is to be found in most human rights treaty provisions on the right to a fair trial. In addition to the generally applicable principles discussed already, Article 14 ICCPR contains a further six paragraphs regarding the rights of defendants in criminal trials. Similar detailed guidance can be found in Article 6 ECHR, Article 8 ACHR, and the African Commission's Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, which expand on the protections set out in Article 7 ACHPR. The conduct of investigations often impacts upon criminal trials, and so to ensure that these rights are effective, they have been interpreted, where appropriate, to apply to the pre-trial investigatory phase as well.

5.4.1 Presumption of innocence

All treaty provisions on the right to a fair trial contain a guarantee of the right to be presumed innocent until proven guilty.¹⁴⁸ The Human Rights Committee has stated that this guarantee is one of the 'fundamental principles of fair trial' and constitutes a rule of *jus cogens*.¹⁴⁹ This right applies from the moment that an individual is accused, even before a formal criminal charge is issued, until determination of the charge by the final appeal court. State authorities, including judges, must refrain from any conduct that would influence the outcome of a trial to the defendant's disadvantage. Declarations of the guilt of an individual before trial by officials or the press¹⁵⁰ and excessively long periods of pre-trial detention that affect perceptions of innocence will constitute violations of this right,¹⁵¹ as will placing a defendant in a cage during the trial because of their 'dangerousness'.¹⁵² However, investigatory actions, such as fingerprinting, taking DNA samples, and searches of property, do not violate the presumption. As the presumption of innocence must be maintained at all times during the trial, the burden of proof rests upon the prosecution to prove guilt. If there is insufficient evidence, the court must decide in favour of the accused.

5.4.2 Freedom from self-incrimination

Closely related to the presumption of innocence is the right not to be compelled to incriminate oneself. This right is provided for in Article 14(3)(g) ICCPR as well as Articles 8(2)(g) and 8(3) ACHR, and has been read into what constitutes a fair trial for the purposes of Article 6(1) ECHR.¹⁵³ This right is 'to be understood in terms of the absence of any direct or indirect physical or undue psychological pressure from the investigating authorities on the accused, with a view to obtaining a confession of guilt'.¹⁵⁴

Self-incrimination is often a result of acts of torture or other ill-treatment. Article 15 UNCAT prohibits the use of evidence obtained by torture 'in any proceedings, except against a person accused of torture as evidence that the statement was made', while the Human Rights Committee has gone further to state that any evidence arising from treatment contrary to Article 7 ICCPR, that is torture or inhuman or degrading

treatment or punishment, must be excluded from evidence.¹⁵⁵ Use of evidence obtained by a third party—whether a private actor or an official of another state not involved in the proceedings—by means of torture or other ill-treatment will also render a trial unfair.¹⁵⁶ The African Commission has taken a strong position on this, assuming that any confession obtained during incommunicado detention has been obtained by coercion. It has held that ‘where a confession is obtained in the absence of certain procedural guarantees against [torture or ill-treatment], it should not be admitted as evidence’.¹⁵⁷ However, disappointingly perhaps, the European Court of Human Rights has held that where evidence is secured as an *indirect* result of torture or ill-treatment—so-called ‘fruit of the poisonous tree’—it may be admissible. In *Gäfgen v Germany*, the applicant was suspected of having kidnapped a young boy. He was threatened with torture in order to provide information regarding the boy’s whereabouts. Although the confessions provided by the applicant following this threat were not used, real evidence that had been found as a result of the confessions was admissible during the applicant’s trial. The European Court held that as this evidence was not the only evidence pointing to guilt, there was no violation of the right to a fair trial.¹⁵⁸

Other instances of improper pressure will be decided on a case-by-case basis, examining whether the ‘very essence of the right’ not to incriminate oneself has been destroyed. So where adverse inferences are drawn in court from a suspect’s silence during questioning, whether a violation has occurred will depend on whether there is other evidence pointing to guilt.¹⁵⁹

p. 279 **5.4.3 Right to be informed of the charge**

Individuals accused of a criminal offence have the right to be informed of the charge that they are facing. This is in addition to the right of those detained to know the charge against them (see Section 2.4.1), and applies from the moment an individual is formally charged or publicly named as an accused person, whether in detention or not.¹⁶⁰ This right, provided for in Article 14(3)(a) ICCPR, Article 7(4) ACHR, Article 6(3)(a) ECHR, and read into Article 7(1)(c) ACHPR,¹⁶¹ must be fulfilled promptly, without inexcusable delay. At the stage of being formally charged, suspects are entitled to be informed of the full details of the charge against them, including the type of offence and the elements upon which the accusation has been founded, in a language that they understand, so that they may begin to formulate a defence.

5.4.4 Right to an adequate defence

Beyond these protections are those that elaborate on the principle of equality of arms. Article 14(3)(b) ICCPR provides that everyone is entitled ‘to have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing’. Article 8(2)(c) ACHR, Article 7(1)(c) ACHPR, and Article 6(3)(b) ECHR contain similar provisions. What is considered adequate time will depend upon the nature and complexity of the case, as well as any other relevant factors, such as change of legal representative.

There are certain minimum levels of facilities, however, that must be accorded to all defendants for their defence to be effective. Explicitly provided for is the guarantee that defendants must be able to communicate with their counsel. In general, private and confidential meetings with a lawyer should be facilitated from the time individuals are taken into custody and during any pre-trial questioning. Access to a lawyer at this time serves to protect suspects from ill-treatment and coercion by the police, as well as to ensure that conditions

conducive to a fair trial are fostered during questioning. However, the European Court of Human Rights has held that access to a lawyer may be delayed in the ‘interrogation’ period in some circumstances and where any disadvantage is rectified at trial to ensure fairness overall.¹⁶²

Defendants must also be provided in a timely manner with all the materials that the prosecution is to use in court, as well as any other material that may be exculpatory. Exculpatory evidence not only includes evidence that suggests innocence, but also material regarding the gathering of evidence which may show some impropriety. For example, where there is information that the evidence against the defendant has been obtained by torture, this should be transmitted to the defence. The materials must be presented so that the defendant or his or her counsel is able to understand them. Therefore, where the defendant requires translation of documents but their counsel does not, there is no obligation on the state to provide such translations.¹⁶³ The right to this information is not absolute, however. In exceptional circumstances, for example where national security is at risk, a court may allow the prosecution to withhold disclosure of some evidence. This is only permitted where strictly necessary and where any difficulties to the defence from non-disclosure are counterbalanced in order to ensure that a fair trial takes place.¹⁶⁴

- p. 280 ↵ There are other rights associated with aspects of an adequate defence guaranteed by international human rights law. Defendants have the right to be present at their trial and to defend themselves personally or to have counsel represent them.¹⁶⁵ The right to defend oneself without counsel is not unlimited. If the interests of justice require a lawyer to represent the accused, then a lawyer may be assigned against the wishes of the accused. Such interests apply when an individual is charged with a serious offence but unable to act in his or her own interests, when the defendant is obstructing justice, or in order to prevent intimidation of witnesses if they are examined by the accused during the trial. However, an effective defence requires trust between defendant and counsel and so any imposition of unwanted counsel must be strictly proportionate to the serious purpose articulated and efforts must be made to counter any potential disadvantage.¹⁶⁶

Should the defendant require legal representation but does not have the means to pay, states are obliged to provide legal aid where the interests of justice so require.¹⁶⁷ The seriousness of the offence and the possible punishment will be relevant to this consideration. Where ‘deprivation of liberty is at stake, the interests of justice ... call for legal representation’.¹⁶⁸ Similarly, free legal assistance should be given if the proceedings may result in the death penalty.¹⁶⁹ Legal aid may also be required where the personal circumstances of the defendant require it. For example, in *Quaranta v Switzerland* the European Court of Human Rights held that a young adult with a drug addiction from an underprivileged background was not capable of presenting his case in an adequate manner and should have been provided with legal assistance.¹⁷⁰

The legal assistance provided must be effective. If the counsel provided is negligent in their duties, then the state may have breached its obligation. In *Myrie v Jamaica*, the state-appointed counsel was absent from the courtroom for significant periods of the trial. The Inter-American Commission on Human Rights held that although the state cannot be held responsible for *all* deficiencies in state-provided legal assistance, it was required to ‘intervene if a failure by legal aid counsel to provide effective representation is manifest or sufficiently brought to their attention.’¹⁷¹

The defendant should be able to follow the proceedings in order to be able present his or her defence. Therefore, where court proceedings are conducted in a language which the defendant cannot understand, interpreter assistance must be offered free of charge.¹⁷²

The defendant also has the right ‘to examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him’.¹⁷³ Essentially, this secures the same powers for the defendant to compel witnesses to appear and cross-examine them as are granted to the prosecution. What is key is that the principle of fairness is upheld at all times. In *Peart v Jamaica*, the principal witness for the prosecution had made a written statement that indicated a person other than the defendant had committed the relevant crime.¹⁷⁴ However, the statement p. 281 was not made available to the defence until after an appeal against the conviction had been rejected. The Human Rights Committee held that this was a serious obstruction of the defence’s cross-examination of the lead witness and thus precluded a fair trial of the defendant. Where cross-examination may lead to serious concerns for the safety of the witness, then restrictions upon the right to examine may be implemented. The interests of the defence must be balanced against those of a witness called to testify and so only in extreme cases may witnesses remain anonymous. However, even where the witness remains anonymous to the public and the defendant, an effective examination of their testimony must still be facilitated. Where witnesses are completely absent from the trial, for example where they have died during the course of the investigation, and a conviction is based ‘solely or decisively’ on their evidence, a violation of this right will be found unless ‘there are sufficient counterbalancing factors in place, including measures that permit a fair and proper assessment of the reliability of that evidence to take place’.¹⁷⁵

5.4.5 Right to review

Everyone convicted of a crime is entitled to have the conviction reviewed by a higher court in accordance with procedures set out in national law. This right is aimed at correcting miscarriages of justice; so higher courts are required to conduct an evaluation of the evidence presented and application of law at the trial, as well as the conduct of the trial. However, this does not mean that a full retrial is required; rather, the higher court can use transcripts and reports of evidence from the first trial to inform its review. In order to make use of this right, a convicted person is entitled to a written judgment that sets out the reasons for a finding of guilt, which can form the basis of any appeal.

The right is set out in Article 14(5) ICCPR and Article 8(2)(h) ACHR, while a more restrictive version of the right is to be found in Article 2 Protocol 7 ECHR. The African Commission on Human Rights confirmed in *Constitutional Rights Project v Nigeria* that this right is also protected by the ACHPR. The Commission criticized certain provisions of Nigerian law that precluded any judicial appeal of convictions for which the death penalty was imposed. It held that ‘to foreclose any avenue of appeal to “competent national organs” in criminal cases bearing such penalties clearly violates Article 7(1)(a) of the African Charter, and increases the risk that severe violations may go unaddressed’.¹⁷⁶

Where a newly discovered fact shows conclusively that there has been a miscarriage of justice and hence a conviction is overturned or a pardon given, all affected individuals are entitled to compensation for the punishment already endured.¹⁷⁷ In *WJH v Netherlands*, the author had been convicted of a number of offences but served no time in detention. Following a challenge to the conviction, the Dutch Supreme Court set aside the verdict and remitted the case back for consideration by a lower court, which acquitted him on procedural grounds. The Human Rights Committee rejected a claim that the Netherlands had violated its obligation to grant compensation for the initial conviction as ‘the final decision in this case ... acquitted the author, and

since he did not suffer any punishment as a result of his earlier conviction'.¹⁷⁸ Therefore, miscarriages of justice must be distinguished from acquittals on appeal. It is only for miscarriages of justice that compensation is due.

p. 282 **5.4.6 Ne bis in idem**

All major human rights treaties provide that the principle of *ne bis in idem* is applicable to all individuals who are charged with a criminal offence.¹⁷⁹ The principle essentially maintains that no person shall be tried twice for the *same* offence in the same jurisdiction. There are certain exceptions to this general rule. If there is evidence of newly discovered facts or there were serious defects in the earlier proceedings that affected the outcome of the case, the interests of justice may demand that cases should be reopened. For example, an exception should apply where the initial trial was conducted in such a way as to shield perpetrators of human rights violations.¹⁸⁰ Furthermore, individuals may be tried for the same offence in different jurisdictions. In the case of *AP v Italy*, the author of the communication was convicted by a Swiss court of being involved in a kidnapping conspiracy which had taken place in Italy. Four years later, after the author had served his sentence, an Italian court convicted him of the same offence. The Human Rights Committee held that Article 14(7) ICCPR was not engaged in this case because it 'does not guarantee *ne bis in idem* with regard to the national jurisdiction of two or more States'.¹⁸¹

5.4.7 ‘No punishment without law’

The fundamental right of ‘no punishment without law’ is guaranteed by all human rights treaties and serves to protect individuals from being held guilty of criminal behaviour without adequate legal basis.¹⁸² States may not derogate from this obligation in times of emergency. To mete out punishment without a legal basis to do so is an obvious abuse of state power. Therefore, laws that are so vague that individuals cannot know how to regulate their actions in order to act in accordance with the law will constitute a violation of the right.

The right also includes the prohibition of retroactive legislation. This encompasses two guarantees. First, there should be no punishment for acts or omissions that ‘did not constitute a criminal offence under national or international law’ at the time of the offence (*nullum crimen sine lege*). Second, where harsher penalties are introduced after the commission of an offence, they may not be applied (*nulla poena sine lege*). There are two restrictions upon this aspect of the right. First, retroactive legislation will be permitted where the new law is more lenient than the old one. Second, legislation that is enacted to introduce criminal sanctions for international crimes, such as war crimes, can be applied retrospectively as long as the conduct was a crime under international law at the time of commission.¹⁸³

5.4.8 Protection of juveniles

Juveniles, that is, those individuals who have not yet reached the age of majority, require special protection in criminal procedures and this may necessitate a stricter application of the fair trial rights discussed earlier. Recognition of this fact is set out in Article 40 CRC and Article 14(4) ICCPR¹⁸⁴ and detailed guidance has been provided by the Committee on the Rights of the Child in its General Comment 24 on Children’s Rights in the

Child Justice System.¹⁸⁵ Underpinning these protections is the idea that children should be spared the stigma of being labelled criminals as far as possible and where offences are made out they should be met with educational rehabilitation rather than punitive measures. Thus, states should establish ‘an appropriate criminal justice system, in order to ensure that juveniles are treated in a manner commensurate with their age’ where measures such as mediation between the perpetrator and the victim are contemplated as an alternative to criminal trials.¹⁸⁶ Where criminal trials are held, juveniles should:

be informed directly of the charges against them and, if appropriate, through their parents or legal guardians, be provided with appropriate assistance in the preparation and presentation of their defence; be tried as soon as possible in a fair hearing in the presence of legal counsel, other appropriate assistance and their parents or legal guardians, unless it is considered not to be in the best interest of the child, in particular taking into account their age or situation.¹⁸⁷

6 Conclusion

Rights regarding the administration of justice are some of the oldest protections granted by law to individuals. Today, it is recognized that securing the rights to liberty and a fair trial is a necessary prerequisite for the enjoyment of all other human rights. A substantial body of norms, guidelines, and jurisprudence regarding these rights has been developed to give more specific protections to all individuals. As criminal justice systems are often manipulated to the detriment of the enjoyment of human rights, a significant proportion of the human rights framework for the administration of justice is devoted to this area. But it should not be forgotten that the rights discussed in this chapter are also concerned with issues beyond the criminal justice context, such as the use of detention powers in medical and immigration settings, and the resolution of civil disputes and judicial remedies for human rights violations. Any failure to respect these rights will raise questions regarding a state’s commitment to the rule of law.

Further Reading

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ELIAS, ‘Rethinking “Preventive Detention” from a Comparative Perspective: Three Frameworks for Detaining Terrorist Suspects’ (2009) 41 *Columbia HRL* 99.

GENSER, *The UN Working Group on Arbitrary Detention: Commentary and Guide to Practice* (Cambridge University Press, 2019).

MEDINA, *The American Convention on Human Rights: Crucial Rights and their Theory and Practice* (Intersentia, 2016) chs 5, 6, 7.

MUJUZI, ‘The African Court of Human and Peoples’ Rights and its Protection of the Right to a Fair Trial’ (2017) 16 *The Law and Practice of International Courts and Tribunals* 187.

RODLEY and POLLARD, *The Treatment of Prisoners under International Law* (Oxford University Press, 2009) chs 8, 9, 11.

TOOMEY, ‘Detention on Discriminatory Grounds: An Analysis of the Jurisprudence of the United Nations Working Group p. 284 on Arbitrary Detention’ (2018) 50 *Columbia HRLR* 185.

TRECHSEL, ‘Why Must Trials be Fair?’ (1997) 31 *Israel LR* 94.

UDOMBANA, ‘The African Commission on Human and Peoples’ Rights and the Development of Fair Trial Norms in Africa’ (2006) 6 *African HRLJ* 299.

VERMEULEN, *Enforced Disappearance: Determining State Responsibility under the International Convention for the Protection of All Persons from Enforced Disappearance* (Intersentia, 2012).

WEISSBRODT, *The Right to a Fair Trial under the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights* (Martinus Nijhoff, 2001).

Useful Websites

UN Working Group on Arbitrary Detention: <<http://www.ohchr.org/EN/Issues/Detention/Pages/WGADIndex.aspx>> <<http://www.ohchr.org/EN/Issues/Detention/Pages/WGADIndex.aspx>>>

UN Special Rapporteur on Independence of Judges and Lawyers: <<https://www.ohchr.org/EN/Issues/Judiciary/Pages/SRJudgeslawyersIndex.aspx>> <<http://www2.ohchr.org/english/issues/judiciary/index.htm>>>

Questions for Reflection

1. When is an individual considered to be in ‘detention’? Should the fact that someone is technically free to leave be determinative of liberty, or should wider circumstances that impact an individual’s subjective belief of freedom be taken into account?
2. Is ‘preventive’ detention consistent with the aims of the right to liberty?
3. What is meant by a ‘fair’ trial? Given the different legal systems that exist around the world, is it possible to objectively define what is ‘fair’?
4. What special measures need be taken to ensure that: (a) women; (b) children; (c) persons with disabilities; and (d) members of indigenous groups enjoy the right to liberty and the right to a fair trial?

Notes

¹ The rights were only accorded to noblemen. See Chapter 1.

² See Chapter 9.

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³ HRC, General Comment 35, CCPR/C/GC/35 (16 December 2014), which replaces HRC, General Comment 8, HRI/GEN/1/Rev.9 (Vol I) 179.

⁴ ECHR, Art 5; CFREU, Art 6; ADHR, Art I; ACHR, Art 7; ACHPR, Art 6; Arab Charter, Art 14.

⁵ HRC, General Comment 24, HRI/GEN/1/Rev.9 (Vol I) 210, para 8. See also WGAD, Deliberation No 9, A/HRC/22/44 (24 December 2012).

⁶ HRC, General Comment 29, HRI/GEN/1/Rev.9 (Vol I) 234, para 11. Compare the International Criminal Court's decision in ICC-01/04-01/07, *Prosecutor v Katanga* (application for the interim release of detained witnesses), DRC-D02-P-0236 etc (1 October 2013) para 33.

⁷ GA Res 70/175 (17 December 2015), revising ECOSOC Res 663C(XXIV) (31 July 1957).

⁸ GA Res 43/173 (9 December 1988).

⁹ GA Res 45/111 (14 December 1990).

¹⁰ GA Res 45/113 (14 December 1990).

¹¹ GA Res 65/229 (16 March 2011).

¹² eg IACommHR Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas, OEA/Ser/L/V/II.131 doc.26 (March 2008); Council of Europe Minimum Rules for the Treatment of Prisoners, Committee of Ministers Res (73)5 (19 January 1973); ACommHPR Guidelines on the Conditions of Arrest, Police Custody and Pre-Trial Detention in Africa (8 May 2014), <https://www.achpr.org/public/Document/file/Any/guidelines_on_arrest_police_custody_detention.pdf>.

¹³ CHR Res 1991/42 (5 March 1991).

¹⁴ HR Council Res 15/18 (30 September 2010).

¹⁵ HRC, General Comment 8, para 1; *Ahmadou Sadio Diallo (Republic of Guinea v Democratic Republic of the Congo)* [2010] ICJ Rep 639, para 77.

¹⁶ *A v New Zealand*, CCPR/C/66/D/754/1997 (3 August 1999).

¹⁷ *ZA v Russia* (2020) 70 EHRR 24.

¹⁸ HRC, General Comment 35, para 6.

¹⁹ *Madani v Algeria*, CCPR/C/89/D/1172/2003 (21 June 2007); WGAD, Deliberation No 1, E/CN.4/1993/24 (12 January 1993).

²⁰ WGAD, Deliberation No 11, A/HRC/45/16 (24 July 2020), Annex II, para 8.

²¹ *Trijonis v Lithuania*, App no 2333/02, Judgment of 17 March 2005.

²² *Celepli v Sweden*, CCPR/C/51/D/456/91 (18 July 1994); *Karker v France*, CCPR/C/70/D/833/98 (26 October 2000).

²³ *Austin v UK* (2012) 55 EHRR 14.

²⁴ A/HRC/WGAD/2015/54 (22 January 2016). For critique of the decision, see the dissenting opinion of Vladimir Tochilovsky; and Happold, 'Julian Assange and the UN Working Group on Arbitrary Detention', *EJIL: Talk* (5 February 2016).

²⁵ WGAD, Deliberation No 12, A/HRC/48/55 (6 August 2021) para 62.

²⁶ *Othman v UK* (2012) 55 EHRR 1; see also the Opinion of the WGAD, A/HRC/4/40 (9 January 2000), para 47.

²⁷ HRC, General Comment 35, para 57.

²⁸ *El-Masri v the Former Yugoslav Republic of Macedonia* (2013) 57 EHRR 25.

²⁹ eg ACHR, Art 7; ACHPR, Art 6.

³⁰ CRPD, Art 14(1)(b); ICCPR, Art 11.

³¹ *Hassan v UK*, App no 29750/09, Judgment of 16 September 2014. See also Case 12.865, *Ameziane v US*, IACtHR Report No 20/29 (22 April 2020) para 117. See Chapter 25.

³² HRC, General Comment 35, paras 22–3.

³³ WGAD, Deliberation No 7, E/CN.4/2005/6 (1 December 2004).

³⁴ *Tibi v Ecuador*, IACtHR Series C No 114 (7 September 2004).

³⁵ HRC, General Comment 35, para 12; *Chaparro-Álvarez and Lapo-Iníguez v Ecuador*, IACtHR Series C No 170 (21 November 2007) para 93. See, generally, WGAD Deliberation No 9.

³⁶ *A v Australia*, CCPR/C/59/D/560/93 (3 April 1997) para 9.2.

³⁷ CCPR/C/83/D/1189/2003 (31 March 2005).

³⁸ *A v Australia; Bakhtiyari v Australia*, CCPR/C/79/D/1069/2002 (29 October 2003). See also Report of the Special Rapporteur on the human rights of migrants, A/HRC/20/24 (2 April 2012) para 10.

³⁹ Also referred to as administrative detention or internment.

⁴⁰ HRC General Comment 35, para 15.

⁴¹ (2019) 68 EHRR 17.

⁴² *Mukong v Cameroon*, CCPR/C/51/D/458/1991 (21 July 1994); *Kanana v Zaire*, CCPR/C/49/D/366/1989 (2 November 1993). See also 266/03, *Gunme v Cameroon*, 26th Activity Report of the ACommHPR (2009).

⁴³ *Khadziyev v Turkmenistan*, CCPR/C/122/D/2252/2013 (6 April 2018).

⁴⁴ 27/89, 46/91, 49/91, and 99/93, *Organisation Mondiale Contre La Torture v Rwanda*, 10th Activity Report of the ACommHPR (1997).

⁴⁵ CERD Committee, General Recommendation XXXI, HRI/GEN/1/Rev.9 (Vol II) 306, para 20.

⁴⁶ *Hicks v Australia*, CCPR/C/115/D/2005/2010 (19 February 2016).

⁴⁷ HRC, General Comment 35, para 21. In the mental health context, see *Stanev v Bulgaria* (2012) 55 EHRR 22.

⁴⁸ *James, Wells and Lee v UK* (2013) 56 EHRR 12.

⁴⁹ eg in relation to involuntary psychiatric detention: *A v New Zealand*, CCPR/C/66/D/754/1997 (3 August 1999).

⁵⁰ *Stanev*, para 170.

⁵¹ See also, ECHR, Art 5(2) ECHR; ACHR, Art 7(4).

⁵² *Ilombe and Shandwe v Democratic Republic of Congo*, CCPR/C/86/D/1177/2003 (17 March 2006).

⁵³ *Krasnova v Kyrgyzstan*, CCPR/C/101/D/1402/2005 (27 April 2010); *ZH v Hungary*, App no 28973/11, Judgment of 8 November 2012.

⁵⁴ *Hill and Hill v Spain*, CCPR/C/59/D/526/1993 (2 April 1997) para 12.2.

⁵⁵ *Ismailov v Uzbekistan*, CCPR/C/101/D/1769/2008 (25 March 2011) para 7.2.

⁵⁶ See also ACHR, Art 5(2).

⁵⁷ See Chapter 9.

⁵⁸ HRC, General Comment 21, HRI/GEN/1/Rev.9 (Vol I) 202, para 3; *Vélez Loor v Panama*, IACtHR Series C No 218 (23 November 2010) para 198.

⁵⁹ See *Pacheco Teruel et al v Honduras*, IACtHR Series C No 241 (27 April 2012); *Suleimenov v Kazakhstan*, CCPR/C/119/D/2146/2012 (21 March 2017).

⁶⁰ HRC, General Comment 21, para 4.

⁶¹ CCPR/C/74/D/683/1996 (26 March 2002).

⁶² IACommHR, *Report on the Human Rights of Persons Deprived of Liberty in the Americas* (OAS, 2011) para 14.

⁶³ ICCPR, Art 9(4); ECHR, Art 5(4); ACHR, Art 7(6). The ACommHPR has confirmed that this right is implicit in ACHPR, Art 7(1): *Constitutional Rights Project v Nigeria* (153/96), 13th Annual Activity Report (1999). See also UN Basic Principles and Guidelines on the Right of Anyone Deprived of their Liberty to Bring Proceedings Before a Court, A/HRC/30/37 (6 July 2015), Annex.

⁶⁴ On the meaning of ‘independent court’, see Section 5.3.2.

⁶⁵ *Constitutional Rights Project*.

⁶⁶ A reduction in sentence has been held to be ‘compensation’ for the purposes of ECHR, Art 5(5), where it is intended to remedy the harm suffered by unlawful detention: *Porchet v Switzerland*, App no 36391/16, Judgment of 8 October 2019.

⁶⁷ *Fox, Campbell and Hartley v UK* (1991) 13 EHRR 157, para 42.

⁶⁸ *Grant v Jamaica*, CCPR/C/56/D/597/1994 (22 March 1996) para 8.1.

⁶⁹ ICCPR, Art 9(3); ECHR, Art 5(3). ACHR, Art 7(5) establishes that this is a right for *all* detainees and not just those detained on a criminal charge.

⁷⁰ HRC, General Comment 35, para 32.

⁷¹ HRC, General Comment 35, para 33 (footnotes omitted); see *Medvedyev v France* (2010) 51 EHRR 39 for an example of when arrest on the high seas justified a delay.

⁷² CRC, General Comment 24, CRC/C/GC/24 (18 September 2019), para 90.

⁷³ This is also protected by ACHPR, Art 7: see *Constitutional Rights*.

⁷⁴ *WBE v Netherlands*, CCPR/C/46/D/432/1990 (23 October 1992) para 6.3. See CRC General Comment 24, paras 85–8, in relation to pre-trial detention of children.

⁷⁵ *Letellier v France* (1992) 14 EHRR 83.

⁷⁶ *IA v France*, App no 28213/95, Judgment of 23 September 1998.

⁷⁷ *Wemhoff v Germany* (1979–80) 1 EHRR 55, para 5; *Case of the ‘Juvenile Reeducation Institute’ v Paraguay*, IACtHR Series C No 112 (2004).

⁷⁸ CCPR/C/78/D/878/1999 (15 July 2003).

⁷⁹ Vienna Convention on Consular Relations, Art 36(1); ICRMW, Art 16(7).

⁸⁰ *LaGrand (Germany v United States)* [2001] ICJ Rep 466; *Avena and other Mexican Nationals (Mexico v United States)* [2004] ICJ Rep 12; *Diallo; Jadhav (India v Pakistan)* (2019) ICJ Rep 418. Whilst the ICJ failed to confirm that the rights were human rights in these cases, the IACtHR has done so: see *Chaparro-Alvarez and Lapo-Iniguez v Ecuador*, IACtHR Series C No 170 (21 November 2007); it has also confirmed that they are minimum guarantees for ensuring foreign nationals have a fair trial: OC-16/99, *The Right to Information on Consular Assistance*, IACtHR Series A No 16 (1 October 1999).

⁸¹ See Chapter 7.

⁸² HRC, General Comment 35, paras 64–6; *Precautionary Measures in Guantanamo Bay, Cuba*, IACommHR (13 March 2002); *Hassan*.

⁸³ HRC, General Comment 29, paras 15–16; see also WGAD Deliberation No 9, para 47.

⁸⁴ OC-8/87, *Habeas Corpus in Emergency Situations*, IACtHR Series A No 8 (30 January 1987); OC-9/87, *Judicial Guarantees in States of Emergency*, IACtHR Series A No 9 (6 October 1987).

⁸⁵ *Brannigan and McBride v UK* (1994) 17 EHRR 539, para 62.

⁸⁶ The HRC has confirmed that an enforced disappearance can be at the hands of forces ‘independent or hostile to a state party’: *Hero v Bosnia*, CCPR//C/112/D/1966/2010 (27 November 2014).

⁸⁷ See CPED, Art 2; Inter-American Convention on Forced Disappearance of Persons, Art II; Rome Statute of the International Criminal Court, Art 7(2)(i); Working Group on Enforced or Involuntary Disappearances, General Comment on the definition of enforced disappearance, A/HRC/7/2 (10 January 2008).

⁸⁸ See Joint Study on Global Practices in Relation to Secret Detention in the Context of Countering Terrorism, A/HRC/13/42 (19 February 2010); Opinion of the WGAD 29/2006, A/HRC/4/40/Add.1 (September 2006); *El-Masri*.

⁸⁹ *Sarma v Sri Lanka*, CCPR/C/78/D/950/2000 (16 July 2003); *Coronel v Columbia*, CCPR/C/76/D/778/1997 (24 October 2002); *Velásquez-Rodríguez v Honduras*, IACtHR Series C No 4 (29 July 1988); 24/97, *Mouvement Burkinabé des Droits de l’Homme et des Peuples v Burkina Faso*, 14th Activity Report of the ACommHPR (2001); *Kurt v Turkey* (1999) 27 EHRR 373; *Timurtas v Turkey* (2001) 33 EHRR 6.

⁹⁰ eg *Mojica v Dominican Republic*, CCPR/C/51/D/449/1991 (25 July 1994).

⁹¹ CPED, Art 1.

⁹² *Goiburu v Paraguay*, IACtHR Series C No 202 (22 September 2009).

⁹³ *Delgado Páez v Columbia*, CCPR/C/39/D/195/1985 (12 July 1990) para 5.5; see also General Comment 35, para 9.

⁹⁴ *Jayawardena v Sri Lanka*, CCPR/C/75/D/916/2000 (22 July 2002).

⁹⁵ HRC, General Comment 13, HRI/GEN/Rev.9 (Vol I) 184, para 1.

⁹⁶ ECHR, Arts 6 and 7; ACHR, Arts 8 and 9; ACHPR, Arts 7 and 26; Arab Charter, Arts 12, 13, 16, and 17; CFREU, Chapter VI. The protections in the ACHPR are augmented by the African Commission Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, DOC/OS (XXX) 247 (2003).

⁹⁷ HRC, General Comment 29, para 11. Not all fair trial protections can be classified as such, see *Al-Dulimi v Switzerland*, App no 5809/09, Judgment of 21 June 2016, para 136. See Clooney and Webb, *The Right to a Fair Trial in International Law* (OUP, 2020) 13–26.

⁹⁸ HRC, General Comment 29, para 15; see also HRC, General Comment 32, HRI/GEN/1/Rev.9 (Vol I) 248, para 6; ACHR, Art 27(2); *African Commission on Human and Peoples' Rights v Libya*, App no 002/2013 Judgment of 3 June 2016.

⁹⁹ GA Res 40/32 (29 November 1985) Annex.

¹⁰⁰ A/CONF.144/28/Rev.1 (1990), 118.

¹⁰¹ GA Res 45/100 (14 December 1990) Annex.

¹⁰² GA Res 67/187 (20 December 2012) Annex.

¹⁰³ See Chapter 26.

¹⁰⁴ eg Rome Statute of the International Criminal Court, Arts 55, 66, and 67. See McDermott, *Fairness in International Criminal Tribunals* (OUP, 2016).

¹⁰⁵ HRC, General Comment 32, para 16 (footnotes omitted).

¹⁰⁶ Harris et al, *Harris, O'Boyle, and Warbrick: The Law of the European Convention on Human Rights* (OUP, 2018) 382–9.

¹⁰⁷ HRC, General Comment 32, para 15.

¹⁰⁸ HRC, General Comment 32, para 24; CRC, General Comment 24 CRC/C/GC/24, paras 102–4.

¹⁰⁹ *Othman*, paras 259–60.

¹¹⁰ See also ECHR, Art 6(1); ACHR, Art 8(1).

¹¹¹ See Chapter 8.

¹¹² HRC, General Comment 32, para 9.

¹¹³ HRC, General Comment 32, para 9.

¹¹⁴ CRPD, Art 13 requires states to make ‘accommodations’ to facilitate access to justice: see *Makarov v Lithuania*, CRPD/C/18/D/30/2015 (18 August 2017).

¹¹⁵ *Ato del Avellanal v Peru*, CCPR/C/34/202/1986 (28 October 1988). See, generally, also CEDAW Committee, General Recommendation 33, CEDAW/C/GC/33 (3 August 2015).

¹¹⁶ *Tiu Tojin v Guatemala*, IACtHR Series C No 190 (26 November 2008) para 96.

¹¹⁷ HRC, General Comment 32, para 10. See also *Airey v Ireland* (1979–80) 2 EHRR 305; OC-11/90, *Exceptions to the Exhaustion of Domestic Remedies*, IACtHR Series A No 11 (10 August 1990) para 28.

¹¹⁸ HRC, General Comment 32, para 9.

¹¹⁹ *Al-Adsani v UK* (2002) 34 EHRR 11, para 54. See also *Jones v UK* (2014) 59 EHRR 1; *Sechremelis v Greece*, CCPR/C/100/D/1507/2006 (30 November 2010). In *Naīt-Liman v Switzerland*, App no 51357/07, Judgment of 15 March 2018, the European Court held that access to a court did not require states to ensure universal jurisdiction for claims for compensation arising from acts of torture.

¹²⁰ HRC, General Comment 32, para 13.

¹²¹ CCPR/C/71/D/819/1998 (4 April 2001). Although note that the majority found a violation of ICCPR, Art 26 and decided not to examine whether there had been a breach of Art 14(1).

¹²² ICERD, Art 5(a); CEDAW, Art 15(2). See also CERD, General Recommendation XXXI and CEDAW Committee, General Recommendation 33.

¹²³ eg *Bahamonde v Equatorial Guinea*, CCPR/C/49/D/468/1991 (20 October 1993).

¹²⁴ HRC, General Comment 32, para 19. See also the UN Basic Principles on the Independence of the Judiciary; *Chocrón Chodron v Venezuela*, IACtHR Series C No 227 (1 July 2011).

¹²⁵ 251/02, 18th Activity Report of the ACommHPR (2005).

¹²⁶ eg Report of the Special Rapporteur on the independence of judges and lawyers, A/HRC/38/38/Add.1 (5 April 2018); C-619/18, *Commission v Poland*, Judgment of 24 June 2019; *Xero Flor w Polska v Poland*, App no 4907/18, Judgment of 7 August 2021.

¹²⁷ (1983) 5 EHRR 169.

¹²⁸ eg Report of the Special Rapporteur on the independence of judges and lawyers, A/68/285 (7 August 2013).

¹²⁹ HRC, General Comment 32, para 22 (footnotes omitted).

¹³⁰ 54/91, *Malawi African Association v Mauritania*, 13th Activity Report of the ACommHPR (2000) para 98. See also Case 11.084, *Salinas v Peru*, IACtHR Report No 27/94 (30 November 1994); *Durand and Ugarte v Peru*, IACtHR Series C No 68 (3 December 2001) para 125.

¹³¹ *Incal v Turkey* (2000) 29 EHRR 449, paras 71–2.

¹³² See *Madani*, para 8.7.

¹³³ ICCPR, Art 14(1); ECHR, Art 6(1); ACHR, Art 8(1).

¹³⁴ HRC, General Comment 32, para 25.

¹³⁵ *Maleki v Italy*, CCPR/C/66/D/699/1996 (15 June 1999).

¹³⁶ *X v Sweden* (1959) 2 YB 354, 370.

¹³⁷ *Fei v Columbia*, CCPR/C/53/D/514/1992 (4 April 1995). ACHR, Art 8(1) and ECHR, Art 6(1) explicitly provide this protection for both the determination of civil claims and criminal charges.

¹³⁸ CCPR/C/14/D/27/1977 (29 October 1981).

¹³⁹ *Deisl v Austria*, CCPR/C/81/D/1060/2002 (23 August 2004). See HRC, General Comment 32, n 72 for examples.

¹⁴⁰ *Lubuto v Zambia*, CCPR/C/55/D/390/1990/Rev.1 (31 October 1995).

¹⁴¹ *Zimmermann v Switzerland* (1994) 6 EHRR 17. In terms of responding to the challenges from the COVID-19 pandemic, see Report of the Special Rapporteur on the independence of judges and lawyers, A/HRC/47/35 (9 April 2021).

¹⁴² *Marinich v Belarus*, CCPR/C/99/D/1502/2006 (19 August 2010).

¹⁴³ CCPR/C/116/D/2059/2011 (13 May 2016).

¹⁴⁴ *Axen v Germany* (1984) 6 EHRR 195; *Helmers v Sweden* (1993) 15 EHRR 285.

¹⁴⁵ ECHR, Art 6(1) does not allow for any exceptions to this right, while ACHR, Art 8(5) only provides this guarantee in the criminal context. No equivalent protections are set out in the ACHPR.

¹⁴⁶ HRC, General Comment 32, para 29.

¹⁴⁷ *Taxquet v Belgium* (2012) 54 EHRR 26.

¹⁴⁸ ICCPR, Art 14(2); ACHR, Art 8(2); ACHPR, Art 7(1)(b); ECHR, Art 6(2).

¹⁴⁹ HRC, General Comment 29, para 11.

¹⁵⁰ See *Marinich; Allenet de Ribemont v France* (1995) 20 EHRR 557.

¹⁵¹ eg *Cagas v Philippines*, CCPR/C/63/D/788/1997 (23 October 2001); *Chaparro-Álvarez*.

¹⁵² *Karimov and Nursatov v Tajikistan*, CCPR/C/89/D/1108 & 1121/2002 (27 March 2007).

¹⁵³ eg *Saunders v UK* (1996) 23 EHRR 313.

¹⁵⁴ HRC, General Comment 32, para 41.

¹⁵⁵ HRC, General Comment 32, para 41. See also *Othman*, paras 263–7; *Cabrera García and Montiel Flores v Mexico*, IACtHR Series C No 220 (26 November 2010), paras 165–7.

¹⁵⁶ *Ćwik v Poland* (2021) 72 EHRR 19.

¹⁵⁷ 334/06, *Egyptian Initiative for Personal Rights and Interights v Egypt*, 29th Activity Report of the ACommHPR (2011) para 218.

¹⁵⁸ (2011) 52 EHRR 39.

¹⁵⁹ *John Murray v UK* (1996) 22 EHRR 29.

¹⁶⁰ HRC, General Comment 32, para 31.

¹⁶¹ *Mohamed Abubakari v Tanzania*, App no 007/2013, Judgment of 3 June 2016, para 158.

¹⁶² *Beuze v Belgium* (2019) 69 EHRR 1; *Ibrahim and others v UK*, App nos 50541/08, 50571/08, 50573/08 and 40351/09, Judgment of 13 September 2016.

¹⁶³ *Harward v Norway*, CCPR/C/51/D/451/1991 (16 August 1994).

¹⁶⁴ *Rowe v UK* (2000) 30 EHRR 1.

¹⁶⁵ ICCPR, Art 14(3)(d); ACHR, Art 8(2)(d); ACHPR, Art 7(1)(e); ECHR, Art 6(3)(c).

¹⁶⁶ HRC, General Comment 32, para 37. The HRC and ECtHR differ on whether a blanket rule requiring legal representation is consistent with the right to defend oneself: compare *Correia de Matos v Portugal*, CCPR/C/86/D/1123/2002 (28 March 2006), and *Correia de Matos v Portugal*, App no 56402/13, Judgment of 4 April 2018.

¹⁶⁷ ICCPR, Art 14(3)(d); ECHR, Art 6(3)(d); ACHR, Art 8(2)(e).

¹⁶⁸ *Benham v UK* (1996) 22 EHRR 293, para 61.

¹⁶⁹ HRC, General Comment 32, para 38.

¹⁷⁰ A 205 (1991).

¹⁷¹ Case 12.417, IACtHR Report No 41/04 (12 October 2004) para 63.

¹⁷² ICCPR, Art 14(3)(f); ACHR, Art 8(1)(a); ECHR, Art 6(3)(e).

¹⁷³ ICCPR, Art 14(3)(e). See also ACHR, Art 8(2)(f); ECHR, Art 6(3)(d).

¹⁷⁴ CCPR/C/54/D/464/1991 (24 July 1995).

¹⁷⁵ *Al-Khawaja and Tahery v UK* (2012) 54 EHRR 23, para 147; *Catrimán v Chile*, IACtHR Series C 279 (29 May 2014) paras 259–60.

¹⁷⁶ 60/91, 8th Activity Report of the ACommHPR (1994–1995) 13.

¹⁷⁷ ICCPR, Art 14(6); ACHR, Art 10; ECHR Protocol No 7, Art 3.

¹⁷⁸ CCPR/C/45/D/408/1990 (22 July 1992).

¹⁷⁹ ICCPR, Art 14(7); ECHR Protocol No 7, Art 4; ACHR, Art 8(4); ACHPR, Art 7(2).

¹⁸⁰ *Almonacid-Arenallo v Chile*, IACtHR Series C No 154 (26 September 2006) paras 154–5.

¹⁸¹ CCPR/C/31/D/204/1986 (2 November 1987).

¹⁸² ICCPR, Art 15; ACHR, Art 9; ACHPR, Art 7; ECHR, Art 7.

¹⁸³ ICCPR, Art 15(2); ECHR, Art 7(2). See *Kononov v Latvia* (2011) 52 EHRR 21.

¹⁸⁴ See also ACHR, Art 5(5); African Charter on the Rights and Welfare of the Child, Art 17.

¹⁸⁵ CRC General Comment 24, paras 38–71.

¹⁸⁶ HRC, General Comment 32, paras 43 and 44.

¹⁸⁷ HRC, General Comment 32, para 42.

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13. Detention and Trial
