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Human Rights and Pre-trial Detention

A Handbook of International Standards relating to Pre-trial Detention

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NOTE

The designations employed and the presentation of the material in this publication do not imply the expression of any opinion whatsoever on the part of the Secretariat of the United Nations concerning the legal status of any country, territory, city or area, or of its authorities, or concerning the delimitation of its frontiers or boundaries.

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PREFACE

In every country in the world, people are arrested and detained on suspicion that they have committed a criminal offence. Often, these people are held for weeks, months, or even years before a court passes judgement on their case. The conditions in which these people are held are often the worst in the national prison system. Their legal status is undetermined—they are suspected, but have not yet been found guilty—and they are also under enormous personal pressures such as economic loss and separation from family and community ties.

The United Nations programme on crime prevention and criminal justice has focused on pre-trial detention in dealing with the treatment of detained and imprisoned persons in general. Provisions on the treatment of persons detained before trial are present in many international instruments, including the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, the Standard Minimum Rules for the Treatment of Prisoners, the United Nations Standard Minimum Rules for the Administration of Juvenile Justice (Beijing Rules) and the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment.[a] In 1990, the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders called upon United Nations bodies to assist countries in improving conditions of pre-trial detention and in developing effective non-custodial measures as alternatives to the use of pre-trial detention, and requested the Secretary-General to assist in that task.[b]

This handbook is issued by the United Nations Centre for Human Rights and Crime Prevention and Criminal Justice Branch in response to the Eighth Congress as well as to the recommendation by the Commission on Crime Prevention and Criminal Justice at its first session, in 1992, that the Secretariat be requested to assist member States with the practical implementation of United Nations standards in crime prevention and criminal justice and to develop training schemes, including manuals, in this area.[c]

The handbook is also issued in accordance with the Vienna Declaration and Programme of Action adopted by the World Conference on Human Rights on 25 June 1993,[d] which states (sect. I, para. 27):

> Every State should provide an effective framework of remedies to redress human rights grievances or violations. The administration of justice, including law enforcement and prosecutorial agencies and, especially, an independent judiciary and legal profession in full conformity with applicable standards contained in international human rights instruments, are essential to the full and non-discriminatory realization of human rights and indispensable to the processes of democracy and sustainable development. In this context, institutions concerned with the administration of justice should be properly funded, and an increased level of both technical and financial assistance should be provided by the international community. It is incumbent upon the United Nations to make use of special programmes of advisory services on a priority basis for the achievement of a strong and independent administration of justice.

The handbook is meant to increase awareness of the international standards which exist in the area of pre-trial detention, as well as of interpretative material relating to those standards. To the extent that the handbook refers to regional instruments or to treaties ratified by only certain countries, those instruments vary in their legal application to different countries. None the less, the handbook provides practical guidelines for implementation of the standards, based on the opinions of experts and the experience of countries in regard to pre-trial detention. The handbook is designed to reflect flexibility, offering advisory, rather than compulsory, guidelines to criminal-justice practitioners.

The principal work in preparing the handbook was performed by Professor David Weissbrodt, with the support of William Stock at the University of Minnesota Human Rights Center. Further acknowledgements are due in particular to the staff of the Minnesota Advocates for Human Rights, for providing local experts to review early drafts of the project; prison chaplain Dr. Christian Kuhn (representative of the Howard League for Penal Reform and Chairperson of the Alliance of Non-governmental Organizations on Crime Prevention and Criminal Justice, Vienna) and his colleagues in the Austrian Penitentiary Service, for practical information on pre-trial detention; and Thomas Johnson, former County Attorney of Hennepin County, Minnesota, for his considerable efforts on the project.

Acknowledgement is also due to the following for their contribution to the handbook: Reed Brody, Helena Cook, Kelly R. Dahl, Deborah Ellingboe, Richard S. Frase, Barbara Frey, Roland Miklau, Nigel Rodley, W. Strasser, Kaisa Syrjänen-Schaal and Mary Thacker.

[a] References to these instruments are given in the list of international instruments cited in the present handbook (see p. vii below).

[b] *Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, 27 August-7 September 1990: report prepared by the Secretariat* (United Nations publication, Sales No. E.91.IV.2), chap. I, sect. C, resolution 17.

[c] See *Official Records of the Economic and Social Council, 1992, Supplement No. 10* (E/1992/30), chap. I, sect. A, draft resolution I, sect. I, para. 3 (*a*) and (*d*).

[d] A/CONF.157/24 (Part I), chap. III.

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ABBREVIATIONS

ICJ	International Court of Justice
OAS	Organization of American States
OAU	Organization of African Unity
UNESCO	United Nations Educational, Scientific and Cultural Organization
UNHCR	Office of the United Nations High Commissioner for Refugees

INTERNATIONAL INSTRUMENTS
cited in the present handbook

ABBREVIATIONS

Compilation	*Human Rights: A Compilation of International Instruments*, vol. I (2 parts), *Universal Instruments* (United Nations publication, Sales No. E.93.XIV.1 and corrigenda); vol. II, *Regional Instruments* (to be issued)
ILM	*International Legal Materials* (Washington, D.C.)
Eighth Congress report	*Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, 27 August-7 September 1990: report prepared by the Secretariat* (United Nations publication, Sales No. E.91.IV.2)

The instruments referred to in the handbook are generally identified by the short titles indicated alphabetically below.

Short title	*Instrument*	*Source*
African Charter	African Charter on Human and Peoples' Rights (Nairobi, 26 June 1981) (entry into force, 21 October 1986)	OAU, document CAB/LEG/67/3/Rev.5; ILM, vol. XXI (1982), p. 58; *Compilation*, vol. II.
American Convention	American Convention on Human Rights (''Pact of San José, Costa Rica'') (San José, 22 November 1969) (entry into force, 18 July 1978)	United Nations, *Treaty Series*, vol. 1144, p. 123; *Compilation*, vol. II.
Basic Principles on Prisoners	Basic Principles for the Treatment of Prisoners	General Assembly resolution 45/111 of 14 December 1990, annex; *Compilation*, vol. I, p. 263.
Beijing Rules	United Nations Standard Minimum Rules for the Administration of Juvenile Justice	General Assembly resolution 40/33 of 29 November 1985, annex; *Compilation*, vol. I, p. 356.
Covenant on Civil and Political Rights	International Covenant on Civil and Political Rights (New York, 16 December 1966) (entry into force, 23 March 1976)	United Nations, *Treaty Series*, vol. 999, p. 171; *Compilation*, vol. I, p. 20.
Code of Conduct	Code of Conduct for Law Enforcement Officials	General Assembly resolution 34/169 of 17 December 1979, annex; *Compilation*, vol. I, p. 312.
Convention against Torture	Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (entry into force, 26 June 1987)	General Assembly resolution 39/46 of 10 December 1984, annex; *Compilation*, vol. I, p. 293.
Convention on the Rights of the Child	Convention on the Rights of the Child (entry into force, 2 September 1990)	General Assembly resolution 44/25 of 20 November 1989, annex; ILM, vol. XXVIII (1989), p. 1448; *Compilation*, vol. I, p. 174.

Short title	*Instrument*	*Source*
Declaration on Disappearance	Declaration on the Protection of All Persons from Enforced Disappearance	General Assembly resolution 47/133 of 18 December 1992; *Compilation*, vol. I, p. 401.
European Convention	Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, 4 November 1950) (entry into force, 3 September 1953)	United Nations, *Treaty Series*, vol. 213, p. 221; *Compilation*, vol. II.
Fourth Geneva Convention	Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Geneva, 12 August 1949) (entry into force, 21 October 1950)	United Nations, *Treaty Series*, vol. 75, p. 287; *Compilation*, vol. I, p. 799.
General Comments	General Comments adopted by the Human Rights Committee under article 40, paragraph 4, of the International Covenant on Civil and Political Rights	CCPR/C/21/Rev.1 and Add.1 and 2.
Guidelines on Prosecutors	Guidelines on the Role of Prosecutors	Eighth Congress report, chap. I, sect. C, resolution 26, annex; *Compilation*, vol. I, p. 330.
Principles on Detention	Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment	General Assembly resolution 43/173 of 9 December 1988, annex; *Compilation*, vol. I, p. 265.
Principles on Lawyers	Basic Principles on the Role of Lawyers	Eighth Congress report, chap. I, sect. B.3; *Compilation*, vol. I, p. 324.
Principles on Prevention of Executions	Principles on the Effective Prevention and Investigation of Extralegal, Arbitrary and Summary Executions	Economic and Social Council resolution 1989/65 of 24 May 1989, annex; *Compilation*, vol. I, p. 408.
Principles on Protection of the Mentally Ill	Principles for the Protection of Persons with Mental Illness and for the Improvement of Mental Health Care	General Assembly resolution 46/119 of 17 December 1991, annex; *Compilation*, vol. I, p. 513.
Principles on the Judiciary	Basic Principles on the Independence of the Judiciary	*Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Milan, 26 August-6 September 1985: report prepared by the Secretariat* (United Nations publication, Sales No. E.86.IV.1), chap. I, sect. D.2; *Compilation*, vol. I, p. 386.
Principles on the Use of Force	Basic Principles on the Use of Force and Firearms by Law Enforcement Officials	Eighth Congress report, chap. I, sect. B.2; *Compilation*, vol. I, p. 318.
Riyadh Guidelines	United Nations Guidelines for the Prevention of Juvenile Delinquency	General Assembly resolution 45/112 of 14 December 1990, annex; *Compilation*, vol. I, p. 346.

Short title	*Instrument*	*Source*
Rules for the Protection of Juveniles	United Nations Rules for the Protection of Juveniles Deprived of their Liberty	General Assembly resolution 45/113 of 14 December 1990, annex; *Compilation*, vol. I, p. 275.
Standard Minimum Rules	Standard Minimum Rules for the Treatment of Prisoners	*First United Nations Congress on the Prevention of Crime and the Treatment of Offenders: report by the Secretariat* (United Nations publication, Sales No. 1956.IV.4), annex I.A; *Compilation*, vol. I, p. 243.
Tokyo Rules	United Nations Standard Minimum Rules for Non-custodial Measures	General Assembly resolution 45/110 of 14 December 1990, annex; *Compilation*, vol. I, p. 336.
Universal Declaration	Universal Declaration of Human Rights	General Assembly resolution 217 A (III) of 10 December 1948; *Compilation*, vol. I, p. 1.
Vienna Convention on Consular Relations	Vienna Convention on Consular Relations (Vienna, 24 April 1963) (entry into force, 19 March 1967)	United Nations, *Treaty Series*, vol. 596, p. 261.

INTRODUCTION

A. International standards on pre-trial detention

1. Shortly after its founding, the United Nations began to promulgate international norms for the protection of persons accused of crimes and/or deprived of liberty by their Government. Two of the foundational international instruments on human rights, the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights, guarantee persons freedom from torture and arbitrary arrest, the right to a fair trial, and the presumption of their innocence of any criminal charges brought against them. The General Assembly and other United Nations organs have promulgated more than 30 instruments concerning crime prevention and control interpreting, specifying and securing the protection of human rights. Until now, however, there has been no comprehensive set of standards for the protection of persons in pre-trial and administrative detention.

2. The fact that no single set of standards exists does not mean that there are no standards for the protection of persons in pre-trial and administrative detention. On the contrary, many of the instruments promulgated by United Nations organs in the past 45 years contain provisions relating to such detention. Some of these provisions are of a general nature and apply to pre-trial detention, administrative detention and post-conviction imprisonment, while others deal with pre-trial detention specifically. Since these standards are scattered through various instruments touching upon pre-trial detention, this handbook contains a review of the standards relating to pre-trial detention, their interpretation and commentary on their effective implementation.

3. The goal of this handbook is to propose practical steps for the implementation of the existing standards on the treatment of offenders as applied to the situation of pre-trial and administrative detainees. It is intended to assist States in response to resolution 17 on pre-trial detention adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders,[1] which established the following principles (para. 2):

(*a*) Persons suspected of having committed offences and deprived of their liberty should be brought promptly before a judge or other officer authorized by law to exercise judicial functions who should hear them and take a decision concerning pre-trial detention without delay;

(*b*) Pre-trial detention may be ordered only if there are reasonable grounds to believe that the persons concerned have been involved in the commission of the alleged offences and there is a danger of their absconding or committing further serious offences, or a danger that the course of justice will be seriously interfered with if they are left free;

(*c*) In considering whether pre-trial detention should be ordered, account should be taken of the circumstances of the individual case, in particular the nature and seriousness of the alleged offence, the strength of the evidence, the penalty likely to be incurred, and the conduct and personal and social circumstances of the person concerned, including his or her community ties;

(*d*) Pre-trial detention should not be ordered if the deprivation of liberty would be disproportionate in relation to the alleged offence and the expected sentence;

(*e*) Whenever possible, the use of pre-trial detention should be avoided by imposing alternative measures, such as release on bail or personal recognizance, or also, in the case of juveniles, close supervision, intensive care or placement with a family or in an educational setting or home; reasons should be provided if such alternatives cannot be applied;

(*f*) If the use of pre-trial detention for juveniles cannot be avoided, they should receive care, protection and all the necessary individual assistance that they may require in view of their age;

(*g*) Persons for whom pre-trial detention is ordered should be informed of their rights, in particular:

(i) The right to be assisted promptly by legal counsel;

(ii) The right to request legal aid;

(iii) The right to have the validity of the detention determined by way of *habeas corpus*, *amparo* or other means, and to be released if the detention is not lawful;

(iv) The right to be visited by and to correspond with members of their families, subject to reasonable conditions and restrictions as specified by law or lawful regulations;

(*h*) Pre-trial detention should be subject to judicial review at reasonably short intervals and should not be continued beyond that which is required in the light of the above-listed principles;

(*i*) All proceedings concerning persons in custody should be conducted as expeditiously as possible so as to reduce the period of pre-trial detention to the minimum;

(*j*) In the determination of the sentence, the period spent in pre-trial detention should either be deducted from the length of the sentence or be considered with a view to reducing the length of the sentence.

B. The development of international standards relating to pre-trial detention

4. The basic protections of the rights of detained persons are found in the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights. These instruments were adopted to promote the dignity of all human beings, including persons accused of crime. Indeed, persons accused of crime are provided specific protection: they are guaranteed the rights to a fair trial, to the presumption of innocence and to appeal of any conviction. They are also protected by the prohibition of torture and other cruel, inhuman or degrading treatment or punishment; the right to equal protection of the law; and the right to freedom from arbitrary arrest or detention. These guarantees were adopted and given the force of international law in the International Covenant on Civil and Political Rights, which, as of 31 January 1993, had been ratified by 113 States.

[1] *Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, 27 August-7 September 1990: report prepared by the Secretariat* (United Nations publication, Sales No. E.91.IV.2), chap. I, sect. C.

5. The broad protections for detained persons in the Universal Declaration and the Covenant on Civil and Political Rights have been implemented by a network of some 30 instruments relating to crime control and the treatment of offenders. Some of these instruments, like the Covenant on Civil and Political Rights, are multilateral treaties which impose binding obligations on States which have ratified them. Examples include the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment and the Convention on the Rights of the Child. Others, like the Universal Declaration, are resolutions of the General Assembly and its subsidiary bodies which do not have a binding effect on member States, but which might be useful in interpreting broader human rights standards and implementing human rights guarantees in national legislation.[2]

6. About half the instruments in the area of crime control and treatment of offenders cover persons detained before trial or without trial and persons in administrative detention. This network was not developed in a systematic way; rather, instruments were created in response to specific problems perceived by States. The instruments which provided the standards reproduced here can be divided into six subject categories: (*a*) instruments dealing with prison conditions; (*b*) instruments prohibiting torture and ill-treatment; (*c*) instruments prohibiting arbitrary executions; (*d*) instruments supporting access to lawyers and the judicial process; (*e*) instruments encouraging substitutes for confinement; (*f*) instruments promoting appropriate treatment of juvenile offenders.

1. *Standards on prison conditions*

7. The first standard-setting specifically relating to criminal justice occurred with the promulgation in 1955 of the Standard Minimum Rules for the Treatment of Prisoners. The Standard Minimum Rules contain extensive and detailed protections for the physical condition of all persons under pre-trial detention or post-conviction imprisonment. Several of the Rules apply specifically to pre-trial detention and follow from the presumption of innocence: detained persons who have not yet stood trial are presumed innocent and deserve treatment consistent with that status. Rule 95 was added in 1977, extending the protection of the Standard Minimum Rules to persons in administrative detention or otherwise detained without charge. The Economic and Social Council offered Governments further guidance on implementation of the Rules in its resolution 1984/47 of 25 May 1984, which established procedures for the Secretary-General and Governments to cooperate in reporting and disseminating information on implementation of the Rules.

8. In 1988, the General Assembly promulgated the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, which is an important source of guidance in applying the general principles of the Universal Declaration and the Covenant on Civil and Political Rights to the situation of pre-trial detainees. The Body of Principles details the measures necessary to protect the human rights of detainees.

9. Another important recent development in this area was the creation in 1991 of the Commission on Human Rights Working Group on Arbitrary Detention, with the task of "investigating cases of detention imposed arbitrarily or otherwise inconsistently with the relevant international standards".[3] The Working Group is authorized to "seek and receive information from Governments and intergovernmental and non-governmental organizations, and . . . receive information from the individuals concerned, their families or their representatives".[4] In its first report to the Commission on Human Rights, the Working Group identified three categories of cases for the purpose of deciding on the arbitrary character of cases submitted to it.[5] The third category concerns cases in which non-observance of all or part of the international provisions relating to the right to a fair trial is such that it confers on the deprivation of freedom on arbitrary character. The Working Group further identified, *inter alia*, 19 pre-trial situations in which non-respect of the right to a fair trial could confer on the detention an arbitrary character. Fifteen of these situations apply to both judicial and administrative detention, whereas four apply only to judicial detention. The Working Group has since dealt with many cases where it found arbitrary detention, and in a considerable number of cases the detainees have been released.[6]

2. *Standards on torture and ill-treatment*

10. Persons detained before or without trial are sometimes subjected to torture and ill-treatment in order to compel them to confess to crimes or divulge information, or to make them fear and follow the wishes of the torturer. In 1975, the General Assembly adopted the Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.[7] The provisions of the Declaration were given the force of international law in the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment in 1984, and the prohibition of torture and ill-treatment is now a norm of customary international law.

11. The Convention established the Committee against Torture, which oversees the implementation of the Convention by States parties and seeks to resolve cases of alleged torture brought to its attention. In addition, the Commission on Human Rights has a Special Rapporteur on Torture who acts in individual cases and

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[2] A non-treaty declaration may, however, be considered binding on a State as a matter of customary international law. See *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America), Merits*, Judgment of 27 June 1986, in which the International Court of Justice stated that "consent" to the text of declaratory resolutions setting forth customary international law "may be understood as an acceptance of the validity of the rule" (*I.C.J. Reports 1986*, p. 14, at p. 100, para. 188).

[3] Commission on Human Rights resolution 1991/42 of 5 March 1991 (*Official Records of the Economic and Social Council, 1991, Supplement No. 2* (E/1991/22), chap. II, sect. A), para. 2.

[4] Ibid., para. 3.

[5] E/CN.4/1992/20, annex I.

[6] See the second report of the Working Group, E/CN.4/1993/24.

[7] General Assembly resolution 3452 (XXX) of 9 December 1975, annex.

reports to the Commission on the actions he has taken in regard to instances of torture in particular countries.

12. In 1985, the General Assembly adopted the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power,[8] which further calls upon States to provide remedies, including restitution and/or compensation, and necessary material, medical, psychological and social assistance to victims of official abuse, and to provide them with access to justice—to the extent that such official abuse is a violation of national law.

3. *Standards on disappearances and arbitrary executions*

13. Incommunicado detention and detention without judicial supervision have also been used by government authorities to effect executions, disappearances and torture. Reversing the normal pattern of United Nations action on human rights, the Commission on Human Rights established the Working Group on Enforced or Involuntary Disappearances in 1980 to take action on behalf of the victims of disappearances perpetrated by Governments. For some years, the Working Group operated to prevent disappearances without international standards to implement; eventually, it was called upon to assist in the development of international standards in the area of disappearances.

14. A second "thematic" procedure in this area was established with the appointment in 1982 of the Commission on Human Rights' Special Rapporteur on Summary or Arbitrary Executions. Like the Working Group, the Special Rapporteur receives information from non-governmental organizations, sends urgent appeals and requests for information to Governments and makes occasional country visits. The Special Rapporteur also played an important role in the drafting of the international standards in this area.

15. The standards developed in regard to disappearances and arbitrary executions are relatively new: the Principles on the Effective Prevention and Investigation of Extralegal, Arbitrary and Summary Executions were adopted by the Economic and Social Council in 1989, and the Declaration on the Protection of All Persons from Enforced Disappearance was adopted by the General Assembly in 1992. The Standard Minimum Rules for the Treatment of Prisoners also contain the requirement that government authorities keep records of who they have detained to prevent the disappearance of detainees and to assist in supervision of places of detention.

4. *Standards on the role of the judiciary and lawyers*

16. The assistance of legal counsel is so basic to preserving the human rights of detained persons that it is included in article 14 of the International Covenant on Civil and Political Rights. The Standard Minimum Rules also guarantee effective access by detained persons to their legal counsel. To ensure "effective" access, and consistent with the Principles on Detention, a detainee is entitled to access to counsel at an early stage in criminal proceedings so that the assistance is meaningful and counsel has the opportunity to affect the outcome of the proceedings.

17. Three sets of standards—the Guidelines on the Role of Prosecutors, the Basic Principles on the Role of Lawyers and the Basic Principles on the Independence of the Judiciary—help to preserve the judicial process for the protection of the rights of individuals in detention. The role of lawyers, especially defence counsel, is particularly important as they are advocates for individuals at risk. The independence of the judiciary from improper pressure is also critical in order that cases of detention are decided by the rule of law.

5. *Standards on alternatives to pre-trial detention*

18. Article 9 (3) of the International Covenant on Civil and Political Rights states: "It shall not be the general rule that persons awaiting trial shall be detained in custody, but release may be subject to guarantees to appear for trial . . .". The United Nations Standard Minimum Rules for Non-custodial Measures (Tokyo Rules) interpret that article. The Rules help to improve conditions for all pre-trial detainees by recommending that detention be used only where non-custodial measures, such as bail, cannot. Since overcrowding of facilities and lengthy or inefficient pre-trial investigations are major factors contributing to abuses of pre-trial detention, release of the greatest possible number of detainees is desirable to the extent consistent with the investigation of the alleged offence and the protection of society and the victim.

6. *Standards on the protection of juveniles*

19. While the instruments identified thus far protect juveniles and adults, several instruments focusing principally on appropriate treatment of juvenile offenders have been promulgated. The General Assembly adopted the United Nations Standard Minimum Rules for the Administration of Juvenile Justice (Beijing Rules) in 1985. Two detailed instruments interpreting the Beijing Rules were adopted by the General Assembly in 1990: the United Nations Guidelines for the Prevention of Juvenile Delinquency (Riyadh Guidelines) and the United Nations Rules for the Protection of Juveniles Deprived of their Liberty. The general objective of the standards in this area is to provide more "care-oriented" treatment of juvenile offenders, consistent with the provisions of the Convention on the Rights of the Child, so as to reform them and prevent repeat offences. At the same time, juveniles are entitled to the same guarantees of fair process for their protection as adults accused of crime.

C. Nature of the problem of pre-trial detention

20. Despite the work of the United Nations in regard to pre-trial detention, pre-trial detainees in many countries are subjected to the worst conditions of confinement in their national prison systems. Detention facilities are often overcrowded, antiquated, unsanitary and unsuited for human habitation. Detainees are held for months or even years while their cases are investigated and processed by the judicial system. There is

[8] General Assembly resolution 40/34 of 29 November 1985, annex.

often no official or judicial authority responsible for assuring that a detainee's rights are protected and that his case is promptly heard. Pre-trial detainees are frequently not provided with educational, occupational and physical exercise opportunities to make their periods of confinement less boring and unpleasant. They typically suffer from severe emotional stress as a result of their recent separation from family, friends, employment and their community. Pre-trial detention places enormous stress on persons who are uncertain as to their future as they await trial. While detained for investigation, they are in danger of being ill-treated in attempts to make them incriminate themselves. Discipline in pre-trial detention facilities may be inadequate, and weaker detainees are in danger of being brutalized or sexually exploited by their fellows. Maintaining discipline is made more difficult by the frequent changes in the confined population and the lack of a stable inmate structure or informal organization to provide some order and protect against bullying.

1. *Overcrowding*

21. Overcrowding occurs in places of detention all over the world, in both developed and developing countries. Places of pre-trial detention receive low priority in the allocation of funds for the improvement and expansion of detention facilities; and where money is tight, even ordinary maintenance and cleaning of facilities may not be continued. Overcrowding is related to poor physical conditions of detention: older and badly maintained places of detention are likely to have insufficient capacity for their population.

22. Overcrowding is worst in the developing world: one criminal-law expert inspecting detention facilities in Africa found that, in most nations, the number of prisoners is twice the prison capacity and that it is not unusual for cells to hold three or four times their designed capacity. Cells may be so overcrowded that inmates have only enough room to stand. Detention centres in the developed world are often no better. In several European countries, cells designed for one person are likely to hold two or three.

23. Overcrowding increases the amount of staff time which must be spent on physical control of detainees and so reduces the ability of the staff to provide detainees with exercise, employment or visits from outside. Overcrowding also means that detainees are usually confined to their cells for 23 hours a day; they are allowed out only to "walk the yard" once a day.

24. The primary cause of overcrowding is not the absolute number of detainees, but rather the average length of detention for each detainee. One detailed study of pre-trial jail overcrowding showed that even a modest decrease in the average length of stay in detention will have a big effect on reducing overcrowding in the facility.

2. *Conditions of detention*

25. The conditions of pre-trial detention are usually worse than the conditions in which convicted persons are held, even though pre-trial detainees are legally considered innocent while convicted persons have been found guilty of a criminal offence. The indeterminate duration and uncertainty of pre-trial detention aggravates the severity of the confinement.

26. The facilities for holding pre-trial detainees are often old and outdated, having been built in an era during which fewer arrests ordinarily occurred and fewer detainees were held. In some countries, colonial fortresses or former slave pens are used as prisons, meaning they not only lack room for their population, but also do not have exercise and sanitary facilities. Poor physical facilities, however, are not confined to the developing world. In one developed country, pre-trial detainees are still held in facilities which lack toilets in the cells, and detainees must use pots which remain unemptied in the cells for up to 11 hours. The Government has acknowledged that these conditions are not only unpleasant, but also unhealthy, and has pledged to modernize its detention facilities.

27. Overcrowding results in poor physical conditions for detainees. They may be packed for hours into cells where no one can lie down. The staff of the detention centre is less able to control violence between detainees. Time for visits from outside is reduced, since visiting facilities are limited.

28. Overcrowded, dirty conditions are conducive to the transmission of infectious diseases among detainees. In this connection it is important to mention the prevalence of the HIV virus in prison populations: one non-governmental organization has reported that 15 per cent of persons admitted to one country's prisons in 1987 were infected with HIV and that by 1989 30 per cent of prisoners carried the virus. An infected detainee not only has the infection, but is at increased risk of abuse from other prisoners.

29. The physical conditions of detention combine with great uncertainty for detainees, who feel unsure about their future. The physical and mental conditions place enormous stress on detainees. They must adjust to a new and often dangerous environment, worry about their legal position, and deal with conditions over which they have little or no control, such as economic concerns and separation from family. This stress manifests itself in depression and suicide: one national study found that persons in pre-trial detention were five times as likely to commit suicide as the general public,[9] while a survey of another national prison system found that, of 37 suicides by all prisoners in one year, 25 (or 68 per cent) were by pre-trial detainees.[10]

3. *Length of detention*

30. Pre-trial detainees may spend a year or more in detention before being released or tried. Some countries' legal systems lack any mechanism for pre-trial release, and the long processing time contributes to the length of detention. In many countries, arresting authorities are not required to bring a person before a judge for days or even months after the arrest, and the judge may not be

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[9] F. Dünkel, *U-haft und U-haftvollzug in der B.R.D.* (1988), p. 24.

[10] Howard League for Penal Reform, *Remands in Custody* (briefing paper) (November 1989), p. 4.

required at that point to make a decision regarding pre-trial confinement. In many cases, the investigating authority must investigate the legal status of each detainee before making a release decision, and large case-loads lead to long delays and lengthy detention periods.

31. A significant number of persons held in pre-trial detention will eventually be found not guilty, will not be prosecuted, or will be convicted and given a sentence which does not include detention. Some detainees are even held for periods longer than the sentences they might have served had they been sentenced for the criminal offences for which they were arrested.

32. One indication of the problem of prolonged pre-trial detention may be found in the number of pre-trial detainees as a percentage of the total prison population. In many European countries, pre-trial detainees make up between 25 per cent and 50 per cent of the prison population. In South American countries, however, pre-trial detainees typically comprise 45 per cent to 90 per cent of the prison population, i.e. up to nine pre-trial detainees for every sentenced prisoner. In one Asian nation, 83 per cent of the prison population is untried.[11]

4. *Legal status of pre-trial detainees*

33. One of the most important rights of persons accused of a crime is the right to have the assistance of counsel in preparing their defence. Yet the conditions of pre-trial detention make effective communication with legal counsel difficult. Detainees are dependent on their attorneys to contact them, as they rarely have the opportunity to use a telephone or otherwise communicate with their attorneys. Meetings with attorneys take place in communal areas or under the supervision of staff members, who may intimidate the detainee. In many countries, attorneys are simply not available, or are so expensive as to be beyond the means of most detainees. Even when the Government provides attorneys to indigent detainees, the lawyers are often so overworked that no one case can receive sufficient attention.

34. Other legal systems lack a mechanism by which a person held in detention can have his detention reviewed by a neutral judicial authority. The person may not be allowed to present evidence to the judicial authority. Even when a hearing is held, an attorney's assistance may not be available to present evidence in the best way. Many systems allow release, but only by giving a financial surety, leaving in detention persons who are eligible for release but have no money to pay a bond.

35. Another set of problems is caused not by a country's legal system, but by the government authority's lack of respect for it. In many places in the world, persons are arrested and never brought before a judicial authority, and may even be held incommunicado. Other detainees may be brought before a judicial authority but then not be released when their release is ordered; alternatively, individuals are released and then rearrested. At the extreme end of this spectrum are countries where persons may be held indefinitely by executive order, and so have little expectation of receiving a trial.

D. The role of the handbook

36. No country can claim a pre-trial detention system that could not be improved. Persons are held who could be safely released prior to trial. Persons are held for longer than should be necessary, as their cases are not given enough priority. The physical condition of facilities is neglected because pre-trial detention is perceived as "only temporary"; these facilities should receive more attention and better upkeep. Staff of places of detention should be made more aware of the special problems and rights of pre-trial detainees. The critical problem of overcrowding, as a cause of many of the problems facing pre-trial detainees, needs to be addressed. While implementing international standards for safeguarding the rights of pre-trial detainees will not cure all these ills, the lot of pre-trial detainees would be greatly improved if the existing standards set forth in this handbook were respected.

E. Note on the text and terms used

37. This handbook has been prepared from United Nations documents relating to detained persons. The standards have been arranged into subject-matter categories. Within each category, the handbook generally contains a summary of the category, and then the subcategories "A. General principles", "B. Standards", "C. Interpretations", and "D. Practical guidelines". The subcategory "General principles" contains provisions of the Universal Declaration of Human Rights, which is generally recognized as embodying customary international law, as well as of legally binding multilateral treaties such as the International Covenant on Civil and Political Rights. The subcategory "Standards" contains provisions of instruments adopted by United Nations bodies elaborating upon and interpreting the provisions of the International Covenant on Civil and Political Rights. The subcategory "Interpretations" contains jurisprudence of the Human Rights Committee interpreting the Covenant on Civil and Political Rights and jurisprudence of regional authorities (courts and commissions of human rights) interpreting the analogous provisions of regional human rights instruments. The subcategory "Practical guidelines" contains the opinions of non-governmental organizations, expert bodies and authors, as well as observations on national practices, which suggest means of implementing the standards and interpretations presented here.

38. Where the text of a standard contains a reference to another portion of the source instrument, explanatory remarks have been added; such additions are indicated by square brackets. Non-relevant portions of sources are indicated by three points of elision ("..."). The full texts of almost all the instruments included in the handbook are reproduced in the *Compendium of*

[11] K. Neudek, *Activities of the United Nations to Improve the Actual Conditions and the Legal Status of Persons in Pre-trial Detention or Administrative Detention*, paper presented at the International Seminar on Human Rights and Pre-Trial Detention (Kazmierz, Poland, 24-28 September 1990), pp. 11-12.

United Nations Standards and Norms in Crime Prevention and Criminal Justice.[12]

39. Because of their diverse origins, the source instruments use different terms to refer to detention and persons in detention. The following glossary is provided as a guide for understanding the way these terms are used in the source instruments and in the practical guidelines:

"*Administration*" means those persons and agencies responsible for the operation of a place of detention, when used in standards governing conditions of detention.

"*Administrative detention*" means the taking into detention of a person by a State without a criminal charge filed against that person and without judicial oversight of the detention. It includes, but is not limited to, persons under investigation who have not been charged with a criminal offence; persons detained by government agencies not involved in criminal-law enforcement, such as immigration officials or military personnel; persons detained in mental health institutions; and situations where the reason for detention is not made clear.

"*Arrest*" means the act of depriving a person of liberty under governmental authority for the purpose of taking that person into detention and charging the person with a criminal offence.

"*Detained person*" means any person deprived of liberty by a governmental authority without having been convicted of a criminal offence.

"*Detention*" means the condition of being a detained person under investigation for having committed a criminal offence, having been accused of a criminal offence, or during trial; under administrative detention; or for any other reason other than as a consequence of a criminal conviction.

"*Imprisoned person*" or "*prisoner*" means any person deprived of liberty by a governmental authority as a consequence of having been convicted of a criminal offence, except that in the Standard Minimum Rules for the Treatment of Prisoners the word "prisoner" also includes detained persons.

"*Institution*" refers to a place of detention when used in the Standard Minimum Rules for the Treatment of Prisoners.

"*Judicial or other authority*" means a judicial or other authority under the law whose status and tenure should afford the strongest possible guarantees of competence, impartiality and independence.

"*Offender*", as used in this handbook, refers to all persons suspected of a criminal offence, subject to prosecution, awaiting trial, under administrative detention, or detained for any other reason, including the execution of a sentence.

"*Place of detention*" means any place where detained persons are kept by a governmental authority.

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[12] United Nations publication, Sales No. E.92.IV.1.

I. NON-DISCRIMINATION

40. As the standards below indicate, when implementing rights it is fundamental that Governments assure those rights for every person within their jurisdiction. The category "Non-discrimination" is placed first to emphasize this priority, as well as to stress that non-discrimination may require particular efforts to secure rights for vulnerable groups.

A. General principles

1. *Universal Declaration*, art. 2

Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

Furthermore, no distinction shall be made on the basis of the political, jurisdictional or international status of the country or territory to which a person belongs, whether it be independent, trust, non-self-governing or under any other limitation of sovereignty.

2. *Covenant on Civil and Political Rights*, art. 2 (1)

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

3. *Covenant on Civil and Political Rights*, art. 26

All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground . . .

B. Standards

1. *Principles on Detention*, principle 5 (2)

Measures applied under the law and designed solely to protect the rights and special status of women, especially pregnant women and nursing mothers, children and juveniles, aged, sick or handicapped persons shall not be deemed to be discriminatory. The need for, and the application of, such measures shall always be subject to review by a judicial or other authority.

2. *Standard Minimum Rules*, rule 6 (2)

. . . it is necessary to respect the religious beliefs and moral precepts of the group to which a prisoner belongs.

C. Interpretations

Human Rights Committee, General Comment 3 (1)

. . . the obligation under the Covenant is not confined to the respect of human rights, but . . . States parties have also undertaken to ensure the enjoyment of these rights to all individuals under their jurisdiction. This aspect calls for specific activities by the States parties to enable individuals to enjoy their rights. . . .

D. Practical guidelines

41. Special measures respecting religious and moral beliefs, such as providing food which conforms to religious custom or time for religious observance, do not constitute discrimination in violation of the above standards and should be implemented to the extent feasible.

II. PRESUMPTION OF INNOCENCE

42. The presumption of innocence is given priority as the starting-point for all standards in the area of pre-trial detention. Persons not yet convicted of the crime of which they have been accused are guaranteed the right to "separate treatment appropriate to their status as unconvicted persons" by article 10 (2) (*a*) of the Covenant on Civil and Political Rights.

A. General principles

1. *Universal Declaration*, art. 11 (1)

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

2. *Covenant on Civil and Political Rights*, art. 14 (2)

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

B. Standards

Standard Minimum Rules, rule 84 (2)

Unconvicted prisoners are presumed to be innocent and shall be treated as such.

C. Interpretations

Human Rights Committee, General Comment 13 (7)

. . . By reason of the presumption of innocence, the burden of proof of the charge is on the prosecution and the accused has the benefit of doubt. No guilt can be presumed until the charge has been proved beyond reasonable doubt. Further, the presumption of innocence implies a right to be treated in accordance with this principle. It is, therefore, a duty for all public authorities to refrain from prejudging the outcome of a trial.

D. Practical guidelines

43. There is a distinction between pre-trial detainees and convicted persons. Pre-trial detainees are presumed innocent. When implementing the present standards with respect to pre-trial detainees, law enforcement officials may impose only those conditions specifically outlined, unless otherwise stated. In other words, pre-trial detainees may be placed only under such restraints, and under such conditions, as will ensure their appearance at trial, prevent their interference with evidence, and prevent further offences. If detention is necessary, officials may also impose those restrictions required to maintain order and security in the place of detention. In any case, pre-trial detainees may not be subjected to "punishment".

III. ARREST

44. Arrest begins the process of detention and should only occur when authorized by law. Arrest must always be subject to judicial control or supervision to ensure that it is legal. Accurate records of arrests are vital for effective judicial supervision and the prevention of disappearances.

A. General principles

1. *Universal Declaration*, art. 3

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

2. *Universal Declaration*, art. 9

No one shall be subjected to arbitrary arrest, detention or exile.

3. *Covenant on Civil and Political Rights*, art. 9 (1)

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

4. *African Charter*, art. 6

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

5. *American Convention*, art. 7

1. Every person has the right to personal liberty and security.

2. No one shall be deprived of his physical liberty except for the reasons and under the conditions established beforehand by the constitution of the State Party concerned or by a law established pursuant thereto.

3. No one shall be subject to arbitrary arrest or imprisonment.

. . .

6. *European Convention*, art. 5 (1)

Everyone has the right to liberty and security of person.

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

(*a*) the lawful detention of a person after conviction by a competent court;

(*b*) the lawful arrest or detention of a person for non-compliance with the lawful order of a court or in order to secure the fulfilment of any obligation prescribed by law;

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

(*d*) the detention of a minor by lawful order for the purpose of educational supervision or his lawful detention for the purpose of bringing him before the competent legal authority;

(*e*) the lawful detention of persons for the prevention of the spreading of infectious diseases, of persons of unsound mind, alcoholics or drug addicts or vagrants;

(*f*) the lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition.

B. Standards

1. *Principles on Detention*, principle 9

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

2. *Principles on Detention*, principle 12

1. There shall be duly recorded:

(*a*) The reasons for the arrest;

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

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

(*d*) Precise information concerning the place of custody.

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

C. Interpretations

1. *Human Rights Committee*, General Comment 8 (1)

. . . paragraph 1 [of article 9 of the Covenant on Civil and Political Rights] is applicable to all deprivations of liberty, whether in criminal cases or in other cases such as, for example, mental illness, vagrancy, drug addiction, educational purposes, immigration control, etc. . . .

45. The Human Rights Committee has stated that the term ''arbitrary'', as used in the Covenant on Civil and Political Rights, is applied broadly. It ''is not to be equated with 'against the law', but must be interpreted more broadly to include elements of inappropriateness, injustice and lack of predictability''.[13] It includes, for example, the situation of detainees who are kept in detention after their release has been ordered by a judicial or other authority[14] and those arrested with no criminal charge against them.[15]

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[13] *Hugo van Alphen* v. *the Netherlands* (305/1988) (23 July 1990), *Official Records of the General Assembly, Forty-fifth Session, Supplement No. 40* (A/45/40), vol. II, annex IX, sect. M, para. 5.8.

[14] See *Ana María García Lanza de Netto, Beatriz Weismann and Alcides Lanza Perdomo* v. *Uruguay* (8/1977) (3 April 1980), *Human Rights Committee, Selected Decisions under the Optional Protocol, International Covenant on Civil and Political Rights (Second to Sixteenth Sessions)* (United Nations publication, Sales No. E.84.XIV.2) (hereinafter referred to as *Selected Decisions . . .*, vol. 1), p. 45.

[15] See *Daniel Monguya Mbenge* et al. v. *Zaire* (16/1977) (25 March 1983), *Selected Decisions of the Human Rights Committee under the Optional Protocol, International Covenant on Civil and Political Rights, Volume 2, Seventeenth to Thirty-second Sessions (October 1982-April 1988)* (United Nations publication, Sales No. E.89.XIV.1) (hereinafter referred to as *Selected Decisions . . .*, vol. 2), p. 76.

46. The Human Rights Committee has also held that the abduction of a former national by a State from the territory of another State constitutes an arbitrary arrest in violation of article 9 (1) of the Covenant.[16]

2. *Inter-American Commission on Human Rights*

47. According to the Inter-American Commission, the arrest of a person by paramilitary groups or security forces in civilian dress who present neither the appropriate identification nor an arrest warrant issued by the competent authorities constitutes an arbitrary arrest and violates the individual's due process rights.[17]

3. *European Court of Human Rights*

48. Article 5 (1) of the European Convention states that a person may be deprived of his liberty only in certain circumstances. Article 5 (1) (*c*) allows a person to be arrested or detained "in accordance with a procedure prescribed by law" where there is a "reasonable suspicion" that he has committed a crime. The European Court defines this reasonable suspicion as the existence of facts or information which would satisfy an objective observer that the person concerned may have committed the offence.[18]

D. Practical guidelines

49. In many cases, especially in minor ones, the police may avoid arrest and detention by issuing a summons to appear in court at a specific time. Police agencies might be empowered to issue summonses in specified cases and could be given guidance and training as to when such non-custodial measures are appropriate.

50. It is desirable that the national law prevent the practice of rearresting or detaining a person who has been held for the maximum period established by law—in particular when rearrest is used to circumvent judicial review of confinement—unless there is a well-founded belief that he has committed another criminal offence.

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[16] *Delia Saldías de López* v. *Uruguay* (52/1979) (29 July 1981), *Selected Decisions . . .*, vol. 1, p. 88; and *Lilian Celiberti de Casariego* v. *Uruguay* (56/1979) (29 July 1981), ibid., p. 92.

[17] See OAS, Inter-American Commission on Human Rights, *Report on the Situation of Human Rights of a Segment of the Nicaraguan Population of Miskito Origin* (OEA/Ser.L/V/II.62, doc. 10/Rev.3) (1983), pp. 100-101 and 104.

[18] *Fox, Campbell and Hartley* case, judgement of 30 August 1990, European Court of Human Rights, *Series A*, No. 182, p. 16, para. 32.

IV. NOTIFICATION

51. The Covenant on Civil and Political Rights requires States to inform arrested persons of the reasons for their arrest. The arrested person needs this information to begin preparing a defence and to petition for release if the reasons do not support detention. Arrested persons should also be notified of the rights they have under national and international law, particularly of their right to legal counsel.

A. General principles

Covenant on Civil and Political Rights, art. 9 (2)

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

B. Standards

1. *Principles on Detention*, principle 10

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

2. *Principles on Detention*, principle 13

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

C. Interpretations

1. *Human Rights Committee*, General Comment 13 (8)

. . . the right to be informed of the charge "promptly" requires that information is given in the manner described as soon as the charge is first made by a competent authority. . . . this right must arise when in the course of an investigation a court or an authority of the prosecution decides to take procedural steps against a person suspected of a crime or publicly names him as such. . . .

2. *Human Rights Committee*, General Comment 3 (2)

. . . it is very important that individuals should know what their rights under the Covenant (and the Optional Protocol, as the case may be) are and also that all administrative and judicial authorities should be aware of the obligations which the State party has assumed under the Covenant. To this end, the Covenant should be publicized in all official languages of the State and steps should be taken to familiarize the authorities concerned with its contents as part of their training. . . .

52. The Human Rights Committee has held that the purpose of the notice requirement is to enable a person to "take immediate steps to secure his release if he believes that the reasons given are invalid or unfounded".[19] To fulfil this purpose, the notice must be sufficiently detailed as to the facts and the law authorizing the person's arrest that he can tell if the arrest is in accordance with the law.[20]

3. *European Commission of Human Rights*

53. Under article 5 (2) of the European Convention, everyone who is arrested must be "informed promptly, in a language which he understands, of the reasons for his arrest and of any charge against him". The European Commission has stated that this provision requires that the person be "informed sufficiently about the facts and the evidence which are proposed to be the foundation of a decision to detain him. In particular, he should be enabled to state whether he admits or denies the alleged offence".[21]

54. According to article 6 (3) (*a*) of the European Convention, an accused person is entitled to be informed of the nature and cause of the accusation against him. The European Commission has interpreted the "cause" of the accusation to be the material facts which form the basis of the accusation. The "nature" of the accusation, however, refers to the legal character or classification of the material facts. The information should contain the material needed to enable the accused to prepare his defence.[22]

D. Practical guidelines

55. Article 9 (2) of the Covenant on Civil and Political Rights contemplates a two-stage notification process: at the moment of arrest, a person must be told the reason he is being taken into custody; within a short period of time, the person must be informed of the charges brought against him.

56. The Principles on Detention extend the notification requirements to the detained person's rights as well as the charges against him. The most important right of which the arrested person must be made aware is his right to legal counsel.

57. In order for notification to be effective, it must be in a language which the person understands. Hence, where the person to be taken into custody is not fluent in the language of the country, the authorities should make a translator promptly available to notify that person of his rights and the charges against him. A written translation should be provided.

[19] *Adolfo Drescher Caldas* v. *Uruguay* (43/1979) (21 July 1983), *Selected Decisions* . . ., vol. 2, p. 80, at p. 81, para. 13.2.

[20] See *Monja Jaona* v. *Madagascar* (132/1982) (1 April 1985), ibid., p. 161, at p. 164, paras. 12.2-13.

[21] *X.* v. *Federal Republic of Germany* (No. 8098/77), Decision of 13 December 1978, European Commission of Human Rights, *Decisions and Reports*, vol. 16, p. 111, at p. 114.

[22] *X.* v. *Belgium* (No. 7628/76), Decision of 9 May 1977, ibid., vol. 9, p. 169, at p. 173, para. 1; *Ofner* v. *Austria* (No. 524/59), Decision of 19 December 1960, *Yearbook of the European Convention on Human Rights, 1960*, p. 322, at p. 344.

V. APPEARANCE BEFORE A JUDICIAL OR OTHER AUTHORITY

58. The provisions of article 9 (3) of the Covenant on Civil and Political Rights secure three rights to persons arrested on a criminal charge, and these are the subjects of the next three categories. The first of these rights is the right to be brought promptly before a judicial authority, whose function is to assess whether a legal reason exists for a person's arrest and whether detention until trial is necessary. This procedure is the first opportunity for a detained person or his counsel to secure release if the arrest and detention are in violation of his rights. The requirements that authorities detain persons only in official places of detention and keep records of all detainees are important for securing effective judicial oversight.

A. General principles

Covenant on Civil and Political Rights, art. 9 (3)

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

B. Standards

1. *Standard Minimum Rules*, rule 7

(1) In every place where persons are imprisoned there shall be kept a bound registration book with numbered pages in which shall be entered in respect of each prisoner received:

(*a*) Information concerning his identity;

(*b*) The reasons for his commitment and the authority therefor;

(*c*) The day and hour of his admission and release.

(2) No person shall be received in an institution without a valid commitment order of which the details shall have been previously entered in the register.

2. *Principles on Detention*, principle 4

Any form of detention or imprisonment and all measures affecting the human rights of a person under any form of detention or imprisonment shall be ordered by, or be subject to the effective control of, a judicial or other authority.

3. *Principles on Detention*, principle 11

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

2. A detained person and his counsel, if any, shall receive prompt and full communication of any order of detention, together with the reasons therefor.

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

4. *Principles on Detention*, principle 37

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

5. *Declaration on Disappearance*, art. 10

1. Any person deprived of liberty shall be held in an officially recognized place of detention and, in conformity with national law, be brought before a judicial authority promptly after detention.

2. Accurate information on the detention of such persons and their place or places of detention, including transfers, shall be made promptly available to their family members, their counsel or to any other persons having a legitimate interest in the information unless a wish to the contrary has been manifested by the persons concerned.

...

C. Interpretations

1. *Human Rights Committee*, General Comment 8 (2)

Paragraph 3 of article 9 [of the Convenant on Civil and Political Rights] requires that in criminal cases any person arrested or detained has to be brought "promptly" before a judge or other officer authorized by law to exercise judicial power. More precise time-limits are fixed by law in most States parties and, in the view of the Committee, delays must not exceed a few days. . . .

59. The Human Rights Committee has held that a period of about one month between arrest and appearance before a judicial authority was too long to be considered "prompt" under article 9 (3).[23] In fact, members of the Committee have expressed the view that detention for 48 hours without judicial review is unreasonably long and called upon the State concerned to reduce that period of time.[24] In response to another country's report, Committee members stated that legislation which allowed a five-day period before judicial review did not conform with article 9 (3).[25]

2. *Inter-American Commission on Human Rights*

60. The Inter-American Commission has found that the right to judicial review requires that the judicial

[23] See *Alberto Grille Motta* v. *Uruguay* (11/1977) (29 July 1980), *Selected Decisions . . .*, vol. 1, p. 54.

[24] See *Official Records of the General Assembly, Forty-fifth Session, Supplement No. 40* (A/45/40), vol. I, para. 333 (Federal Republic of Germany).

[25] Ibid., paras. 406 and 425 *in fine* (Nicaragua).

authority do more than accept the evidence presented by public security bodies in reviewing a provisional detention order. The law in one State allowed public security bodies 15 days to investigate the cases of detainees. Since a judge was not required to check the evidence supporting a provisional order, detainees could be held for 15 days without judicial review and this procedure violated their rights to prompt review.[26]

61. In order for judicial control of detention to be effective, the court must be promptly informed of persons being held in detention. One purpose behind judicial control of detention is to safeguard the well-being of the detainee and prevent any violation of fundamental rights. The Inter-American Commission has found that, if the court is not informed of the detention or is informed after a significant delay from the date of the arrest, the rights of the detainee are not protected and the detention violates the detainee's right to due process.[27]

3. *European Court of Human Rights*

62. The European Court has also interpreted the requirement to be brought "promptly" before a judicial authority, which is guaranteed by article 5 (3) of the European Convention. The Court held that a detention of four days and six hours did not fulfil the requirement of promptness, and so violated article 5 (3).[28]

D. Practical guidelines

63. When a person is brought before a judge or judicial officer, that judge or officer should determine the necessity of pre-trial detention for the person and, if such detention is necessary, establish limits to it, such as a maximum period after which the detainee must be sentenced or released. In making such a determination, the judge or officer should seek the least confining measure compatible with the interests of justice and society.

64. Some organizations and penal experts have suggested that persons should be kept in detention before trial only in so far as necessary for the criminal procedures in their case. Under no circumstances should such detention be transformed into a punishment or sanction.[29]

65. The Organization of American States has recommended three steps which States could take to ensure judicial control of detainees. First, States could establish central registries containing a record of all persons who have been subject to imprisonment. Secondly, they could ensure that detention is administered exclusively by competent and duly identified authorities. Thirdly, detainees should be kept in custody in places established for that purpose.[30]

66. To comply with the standards for the treatment of detainees, officials should not detain persons in places of detention administered by authorities responsible for investigation and apprehension of suspected criminals. Where possible, authorities responsible for the detention of arrested persons should be placed in a facility under the supervision of a separate chain of command.[31] If there is no possible alternative to detention in police facilities, such detention should last for a very short period. Furthermore, officers responsible for supervising detainees should be independent from arresting officers and officers conducting investigations.

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[26] See OAS, *Annual Report of the Inter-American Commission on Human Rights, 1984-1985* (OEA/Ser.L/V/II.66, doc. 10 rev.1) (1985), p. 141; and ibid., *1985-1986* (OEA/Ser.L/V/II.68, doc. 8 rev.1) (1986), p. 154 (El Salvador).

[27] OAS, Inter-American Commission on Human Rights, *Second Report on the Human Rights Situation in Suriname* (OEA/Ser.L/V/II.66, doc. 21 rev.1) (1985), pp. 23-24.

[28] *Brogan and others* case, judgement of 29 November 1988, European Court of Human Rights, *Series A*, No. 145-B, pp. 33-34, para. 62.

[29] See Arab-African Seminar on Criminal Justice and Penal Reform (Tunis, 2 December 1991), *Recommendations* (hereinafter referred to as *Arab-African Seminar Recommendations*), p. 2.

[30] Resolution AG/RES. 618 (XII-0/82) of 20 November 1982 (OAS, General Assembly, *Proceedings of the Twelfth Regular Session, Washington, D.C., November 15-21, 1982*, vol. I (OEA/Ser.P/XII.0.2) (1982), p. 61, para. 8.

[31] Amnesty International, *Torture in the Eighties* (London, 1984), p. 249, 12-Point Programme for the Prevention of Torture, point 4.

VI. SUBSTITUTES FOR CONFINEMENT

67. Article 9 (3) of the Covenant on Civil and Political Rights guarantees that persons awaiting trial shall not generally be kept in detention. The Principles on Detention also indicate that pre-trial detention is strongly discouraged, and the Tokyo Rules were promulgated in order to encourage the use of non-custodial measures in, *inter alia*, the time before trial. Another alternative to detention is to dismiss the charges against a person when the interests of justice would be served.

A. General principles

Covenant on Civil and Political Rights, art. 9 (3)

. . . It shall not be the general rule that persons awaiting trial shall be detained in custody, but release may be subject to guarantees to appear for trial, at any other stage of the judicial proceedings, and, should occasion arise, for execution of the judgement.

B. Standards

1. *Principles on Detention*, principle 36 (2)

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

2. *Principles on Detention*, principle 39

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

3. *Tokyo Rules*, rule 6.1

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

4. *Tokyo Rules*, rule 2.3

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

5. *Tokyo Rules*, rule 3.4

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

6. *Tokyo Rules*, rule 3.5

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

7. *Tokyo Rules*, rule 5.1

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

8. *Tokyo Rules*, rule 6.2

Alternatives to pre-trial detention shall be employed at as early a stage as possible. Pre-trial detention shall last no longer than necessary to achieve the objectives stated under rule 6.1 and shall be administered humanely and with respect for the inherent dignity of human beings.

9. *Tokyo Rules*, rule 6.3

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

10. *Guidelines on Prosecutors*, guideline 18

In accordance with national law, prosecutors shall give due consideration to waiving prosecution, discontinuing proceedings conditionally or unconditionally, or diverting criminal cases from the formal justice system, with full respect for the rights of the suspect(s) and the victim(s). For this purpose, States should fully explore the possibility of adopting diversion schemes not only to alleviate excessive court loads, but also to avoid the stigmatization of pre-trial detention, indictment and conviction, as well as the possible adverse effects of imprisonment.

C. Interpretations

1. *Human Rights Committee*

68. Detention before trial should be used only where it is lawful, reasonable and necessary. The "necessity" requirement is interpreted narrowly by the Human Rights Committee. Detention may be necessary "to prevent flight, interference with evidence or the recur-

rence of crime'',[32] or ''where the person concerned constitutes a clear and serious threat to society which cannot be contained in any other manner''.[33] The seriousness of a crime or the need for continued investigation, considered alone, do not justify prolonged pre-trial detention.[34]

69. In connection with the right to release pending trial, members of the Committee have stated that a national system whose only alternative to confinement before trial was supervised release, which was granted only in certain circumstances, and which had no provision for bail did not conform to the requirements of article 9 (3) of the Covenant.[35]

2. *European Commission of Human Rights*

70. It appears from the jurisprudence of the European Commission that detention should be ordered only if it can reasonably be considered necessary, and that the Commission can assess a denial of release under the ''reasonableness'' standard of article 5 (3) of the European Convention.[36]

D. Practical guidelines

71. Custody pending trial should be ordered only if there is reasonable suspicion that the accused has committed the alleged offence and that he is likely to abscond, interfere with the course of justice, or commit a serious offence.[37] Individual decisions refusing release on bail should clearly indicate the reasons for the refusal. Reasons for imposing pre-trial detention should be related to the requirements of the investigation, the prevention of further offences by the same person, or the protection of the offender's alleged victim.[38]

72. In order for the safeguard of rule 3.5 of the Tokyo Rules to be effective, a person subjected to a non-custodial measure must receive notice from the authorities which administer the measure of the right to judicial review. The person should also receive information on the appropriate procedure for pursuing the review.[39]

73. It is desirable that the accused be, in principle, eligible for release until convicted of a crime, except in cases specifically defined by law. If charges against the detainee do not fall under such exceptions, a judicial authority should order pre-trial detention only when there is sufficient evidence that the accused is likely to abscond before trial or obstruct evidence, or if he presents a danger to the community.

74. Offenders should be released with the minimum controls necessary to ensure their return to stand trial. Factors which indicate that a person is likely to return even when released on his own recognizance are stable family and social circumstances, current employment, and past conduct, including lack of a criminal record or a history of complying with conditions in past criminal proceedings. When these factors are present to a lesser extent, or there is some fear that the accused may commit further offences, supervised release is appropriate.

75. Consent to the imposition of non-custodial measures, required by rule 3.4 of the Tokyo Rules, must be informed consent. Hence, the offender should be given clear and accurate information about the obligations imposed and the consequences of either giving or withholding consent.[40]

76. A supervised release programme may have several stages of intervention, each progressively more controlling of the offender. At one end of the spectrum is release on recognizance, at the other is detention, but a variety of possibilities exist in between, including required presence at a residence except during working hours; required check-ins by telephone or in person on an hourly, daily or weekly schedule; or spot checks by bail-supervision officials.

77. Successful implementation of non-custodial measures depends on reliable information about the circumstances of the offender. This information should be made available to the prosecutor, judge and defence counsel prior to a hearing on the necessity of custody, and should preferably be gathered by an agency independent of the police and prosecution services. Some States use a specialized pre-trial release risk-assessment agency; others assign bail assessment to probation or parole officials, who may already be acquainted with the accused if he has been convicted in the past.

78. The possible role of pre-trial release service agencies is discussed in annex I of this handbook. A sample form for the collection of information relevant to the determination of pre-trial release is reproduced in annex II. It is important that this information be verified by the agency, as it is the verification which gives the prosecutor and judge the confidence to release the accused and expect his return at the time of trial.

79. It is desirable that States identify certain crimes the penalties for which are so lacking in severity that pre-trial detention may be inappropriate. In regard to such offences, delays that occur prior to and during trial are often longer than the penalty for the crime and make pre-trial detention inappropriate.

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[32] *Hugo van Alphen* v. *the Netherlands*, loc. cit. (footnote 13 above).

[33] *David Alberto Cámpora Schweizer* v. *Uruguay* (66/1980) (12 October 1982), *Selected Decisions . . .*, vol. 2, p. 90, at p. 93, para. 18.1.

[34] See *Floresmilo Bolaños* v. *Ecuador* (238/1987) (26 July 1989), *Official Records of the General Assembly, Forty-fourth Session, Supplement No. 40* (A/44/40), annex X, sect. I.

[35] Ibid., *Forty-sixth Session, Supplement No. 40* (A/46/40), para. 348 (Sweden).

[36] See P. van Dijk and G. J. H. van Hoof, *Theory and Practice of the European Convention on Human Rights*, 2nd. ed. (Deventer-Boston, Kluwer, 1990), pp. 276-281.

[37] Committee of Ministers of the Council of Europe, Recommendation No. R (80) 11 of 27 June 1980 concerning custody pending trial, para. 3.

[38] Preliminary draft commentary to rule 6.1 of the Tokyo Rules (January 1992).

[39] Preliminary draft commentary to rule 3.5 of the Tokyo Rules (January 1992).

[40] Preliminary draft commentary to rule 3.4 of the Tokyo Rules (January 1992).

80. Some organizations and penal experts have suggested that States should abandon the use of imprisonment of less than one year and substitute alternative measures under judicial control, such as probation or community service.[41] If imprisonment is not to be expected as punishment for a crime, every effort should be made to avoid pre-trial detention.

81. In order to relieve the overcrowding of places of detention, Governments should consider developing a programme whereby the authorities responsible for the place of detention would meet periodically with the prosecution, a judge, police investigators and other government officials (such as social workers and jail wardens) to assist in identifying persons for whom detention is no longer necessary. These meetings are particularly useful immediately before a weekend or holiday, since the facility will become more crowded during those times when cases are not being processed by the judicial or other authorities.

[41] See *Arab-African Seminar Recommendations* (see footnote 29 above), p. 3.

VII. LENGTH OF PRE-TRIAL DETENTION

82. Article 9 (3) of the Covenant on Civil and Political Rights guarantees the right to trial within a reasonable time or to release. The present category deals with the length of pre-trial detention which may be considered "reasonable" under the Covenant and regional instruments.

A. General principles

Covenant on Civil and Political Rights, art. 9 (3)

Anyone arrested or detained on a criminal charge . . . shall be entitled to trial within a reasonable time or to release. . . .

B. Standards

Principles on Detention, principle 38

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

C. Interpretations

1. *Human Rights Committee*

83. The Human Rights Committee understands the right to trial without undue delay as the right to a trial which produces a final judgement without undue delay.[42] Unreasonable delay during the course of a trial is just as much a violation of these standards as delay in the beginning of a trial.

84. It is the State's responsibility to see that the entire process is completed without delay. The Human Rights Committee has held that a State cannot avoid responsibility for a delayed proceeding by arguing that the accused should have asserted the right to a prompt trial before the trial court.[43]

85. In reviewing the national legislation of one country, members of the Committee implied that a six-month limit on pre-trial detention was too long to be compatible with article 9 (3) of the Covenant.[44]

2. *Inter-American Commission on Human Rights*

86. The American Convention on Human Rights prohibits indefinite pre-trial detention. The Inter-American Commission has held that failing to set a time-limit for the release of a detainee without charges or for announcing the nature of the accusations violates the detainee's rights.[45] In addition, if the time a detainee is held before trial exceeds the period he would serve if convicted and sentenced, the detention is a serious violation of the detainee's right to be charged and convicted before being punished.[46]

3. *European Court* and *European Commission of Human Rights*

87. Construing the right "to trial within a reasonable time or to release pending trial" under article 5 (3) of the European Convention, the European Court has held that "this provision cannot be understood as giving the judicial authorities a choice between either bringing the accused to trial within a reasonable time or granting him provisional release".[47] The reasonableness of the length of detention is assessed independently of the reasonableness of the delay before trial, and though the length of time before trial may be "reasonable" under article 6 (1) of the Convention, detention for that period may not be.[48] The European Commission has explained that "the aim [of article 5 (3)] is to limit the length of a person's detention and not to promote a speedy trial".[49]

88. The European Court, considering the guarantee of trial within a "reasonable time", has held that a person in detention is entitled to have his case given priority and to have it conducted with particular expedition.[50]

89. In one case before the European Court, a State argued that the applicant had not taken steps necessary to expedite the criminal proceedings and that he had further displayed passivity as to the promptness of the process. The Court found that the applicant was under no duty to

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[42] See *Adolfo Drescher Caldas* v. *Uruguay*, loc. cit. (footnote 19 above), p. 80.

[43] *Earl Pratt and Ivan Morgan* v. *Jamaica* (210/1986 and 225/1987) (6 April 1989), *Official Records of the General Assembly, Forty-fourth Session, Supplement No. 40* (A/44/40), annex X, sect. F, para. 13.4.

[44] Ibid., *Forty-fifth Session, Supplement No. 40* (A/45/40), vol. I, para. 47 (Democratic Yemen).

[45] OAS, Inter-American Commission on Human Rights, *Report on the Situation of Human Rights in Paraguay* (OEA/Ser.L/V/II.43, doc. 13) (1978), p. 53.

[46] OAS, Inter-American Commission on Human Rights, *Report on the Situation of Human Rights in Panama* (OEA/Ser.L/V/II.44, doc. 38 rev.1) (1978), p. 58.

[47] *Neumeister* case, judgement of 27 June 1968, European Court of Human Rights, *Series A*, No. 8, p. 37, para. 4.

[48] *Matznetter* case, judgement of 10 November 1969, ibid., No. 10, p. 34, para. 12.

[49] *Dieter Haase* v. *Federal Republic of Germany* (No. 7412/76), Report of 12 July 1977, European Commission of Human Rights, *Decisions and Reports*, vol. 11, p. 78, at p. 92, para. 120.

[50] *Wemhoff* case, judgement of 27 June 1968, European Court of Human Rights, *Series A*, No. 7, p. 26, para. 17; see also the *Stögmüller* case, judgement of 10 November 1969, ibid., No. 9, p. 40, para. 5.

be more active.[51] In fact, an individual is not required to cooperate actively with judicial authorities in connection with criminal proceedings.[52]

D. Practical guidelines

90. States should establish a maximum period of time during which a person may be detained without trial. If a person is detained without trial for a longer period, he should be entitled to release. In establishing such a maximum period of time, States should take into account the maximum period of incarceration to which a person convicted of the criminal offence for which he has been detained could be sentenced. The maximum length of pre-trial detention should be proportionate to that maximum potential sentence.

91. The maximum period of time established under this guideline does not affect the operation of the international standards limiting the period of time a person may be detained before having his detention reviewed by a judicial authority. Those standards and this guideline deal with two separate issues: the standards guarantee prompt judicial review, while this guideline seeks to establish a limit on the period of pre-trial detention.

92. Some organizations and penal experts have suggested that in no case should any person be detained incommunicado or under *garde à vue* for longer than 24 hours.[53]

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[51] *Moreira de Azevedo* case, judgement of 23 October 1990, ibid., No. 189, p. 18, para. 72; see also the *Guincho* case, judgement of 10 July 1984, ibid., No. 81, pp. 14-15, para. 34.

[52] *Eckle* case, judgement of 15 July 1982, ibid., No. 51, p. 36, para. 82.

[53] See *Arab-African Seminar Recommendations* (see footnote 29 above), p. 2.

VIII. SEGREGATION OF CLASSES OF DETAINEES

93. The presumption of innocence requires that accused persons be given treatment appropriate to their unconvicted status. One aspect of this treatment is that, if they are detained instead of being released pending trial, they should be separated from convicted persons and be given their own regimen. Because of their vulnerability, accused juveniles must be separated from adults and be given treatment appropriate to their age.

A. General principles

Covenant on Civil and Political Rights, art. 10 (2)

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

(*b*) Accused juvenile persons shall be separated from adults and brought as speedily as possible for adjudication.

B. Standards

Standard Minimum Rules, rule 8

The different categories of prisoners shall be kept in separate institutions or parts of institutions taking account of their sex, age, criminal record, the legal reason for their detention and the necessities of their treatment. Thus,

(*a*) Men and women shall so far as possible be detained in separate institutions; in an institution which receives both men and women the whole of the premises allocated to women shall be entirely separate;

(*b*) Untried prisoners shall be kept separate from convicted prisoners;

(*c*) Persons imprisoned for debt[54] and other civil prisoners shall be kept separate from persons imprisoned by reason of a criminal offence;

(*d*) Young prisoners shall be kept separate from adults.[55]

C. Interpretations

Human Rights Committee, General Comment 9 (2)

...

Subparagraph 2 (*b*) [of article 10 of the Covenant on Civil and Political Rights] calls, *inter alia*, for accused juvenile persons to be separated from adults. The information in reports shows that a number of States are not taking sufficient account of the fact that this is an unconditional requirement of the Covenant. It is the Committee's opinion that, as is clear from the text of the Covenant, deviation from States parties' obligations under subparagraph 2 (*b*) cannot be justified by any consideration whatsoever.

94. The Human Rights Committee has held that article 10 (2) (*a*) of the Covenant requires that convicted and unconvicted persons be kept in separate quarters, but need not be kept in separate buildings.[56] Arrangements whereby convicted persons are regularly brought into contact with unconvicted persons, as when convicted persons perform chores in the area where unconvicted persons are held, do not violate article 10 (2) (*a*) "provided that contacts between the two classes of prisoners are kept strictly to a minimum necessary for the performance of those tasks".[57]

D. Practical guidelines

95. The segregation of male from female detainees should be accompanied by division of responsibility among male and female staff of the detention centre. Female detainees should be guarded by female staff members to the maximum extent possible. During the hours of night, male staff members should be allowed in the female detention area only in emergency situations and should be accompanied by female staff members whenever possible. Any detainee alleging that he or she has been sexually assaulted by a staff member or other person should be given access to justice and, if necessary, immediate medical attention.[58]

96. Detained persons suffering from infectious diseases should be separated from the general population of detainees to prevent those diseases from spreading. Like all detainees, they should be given appropriate medical treatment. Of special concern are those detained persons who are tested positive for the HIV virus and those persons with AIDS, who should be given appropriate care, counselling, supervision and education, but who do not necessarily need to be separated from the general population.[59]

97. All persons, upon entering pre-trial detention, should be assessed by an officer with appropriate training as a routine part of the reception process. This assessment should note signs of illness or injury, the

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[54] The rule requires that "persons imprisoned for debt" be separated from prisoners convicted of crimes. However, imprisonment for debt is prohibited by article 11 of the Covenant on Civil and Political Rights.

[55] In accordance with subparagraph (*b*), untried juveniles should be separated from juveniles found guilty of a criminal offence. See also rule 17 of the Rules for the Protection of Juveniles.

[56] *Larry James Pinkney* v. *Canada* (27/1978) (29 October 1981), *Selected Decisions* . . ., vol. 1, p. 95, at p. 100, para. 30.

[57] Ibid.

[58] See Asia Watch and the Women's Rights Project, *Double Jeopardy: Police Abuse of Women in Pakistan* (1992), pp. 148-150.

[59] See K. Tomasevski, *Prison Health: International Standards and National Practices in Europe* (Helsinki, Helsinki European United Nations Institute, 1992), pp. 99-100.

influence of alcohol or other drugs, and the apparent mental state of the detainee. Injured persons, persons under the influence of alcohol or drugs, and persons thought likely to commit suicide should be identified as "at risk" and placed under constant supervision until examined fully by a qualified medical practitioner. Documented evidence of the assessment made and the treatment a detainee received should be retained.[60]

98. Under no circumstances is a detained person who is unconscious when received into custody (whether from the apparent effects of alcohol or drugs, or due to a medical condition) to be left unattended for any period. Medical help should be obtained without delay. In addition, all detention facilities should have appropriate medical equipment readily available and staff on duty who are trained in its use for the purpose of treating urgent cases.[61]

[60] D. Biles, "Draft guidelines for the prevention of Aboriginal deaths in custody", *in* Australian Institute of Criminology, *Deaths in Custody: Australia, 1980-1989* (1990), p. 13.

[61] Ibid., p. 14.

IX. ACCESS TO COUNSEL

99. The right of access to counsel is guaranteed in connection with the right to a fair trial in the determination of a criminal charge against a person. As the interpretations make clear, however, access to counsel must be provided soon after detention to give effect to the right of assistance by counsel. Access to legal counsel is an important means of ensuring that the rights of a detained person are respected.

A. General principles

1. *Covenant on Civil and Political Rights*, art. 14 (3)

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

. . .

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

. . .

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

(*e*) 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;

. . .

B. Standards

1. *Standard Minimum Rules*, rule 93

For the purposes of his defence, an untried prisoner shall be allowed to apply for free legal aid where such aid is available, and to receive visits from his legal adviser with a view to his defence and to prepare and hand to him confidential instructions. For these purposes, he shall if he so desires be supplied with writing material. Interviews between the prisoner and his legal adviser may be within sight but not within the hearing of a police or institution official.

2. *Principles on Detention*, principle 17

1. A detained person shall be entitled to have the assistance of a legal counsel. He shall be informed of his right by the competent authority promptly after arrest and shall be provided with reasonable facilities for exercising it.

2. If a detained person does not have a legal counsel of his own choice, he shall be entitled to have a legal counsel assigned to him by a judicial or other authority in all cases where the interests of justice so require and without payment by him if he does not have sufficient means to pay.

3. *Principles on Lawyers*, principle 3

Governments shall ensure the provision of sufficient funding and other resources for legal services to the poor and, as necessary, to other disadvantaged persons. Professional associations of lawyers shall cooperate in the organization and provision of services, facilities and other resources.

4. *Principles on Lawyers*, principle 4

Governments and professional associations of lawyers shall promote programmes to inform the public about their rights and duties under the law and the important role of lawyers in protecting their fundamental freedoms. Special attention should be given to assisting the poor and other disadvantaged persons so as to enable them to assert their rights and where necessary call upon the assistance of lawyers.

5. *Principles on Lawyers*, principle 7

Governments shall further ensure that all persons arrested or detained, with or without criminal charge, shall have prompt access to a lawyer, and in any case not later than forty-eight hours from the time of arrest or detention.

6. *Principles on Lawyers*, principle 8

All arrested, detained or imprisoned persons shall be provided with adequate opportunities, time and facilities to be visited by and to communicate and consult with a lawyer, without delay, interception or censorship and in full confidentiality. Such consultations may be within sight, but not within the hearing, of law enforcement officials.

7. *Principles on Lawyers*, principle 22

Governments shall recognize and respect that all communications and consultations between lawyers and their clients within their professional relationship are confidential.

8. *Principles on Lawyers*, principle 16

Governments shall ensure that lawyers (*a*) are able to perform all of their professional functions without intimidation, hindrance, harassment or improper interference; (*b*) are able to travel and to consult with their clients freely both within their own country and abroad; and (*c*) shall not suffer, or be threatened with, prosecution or administrative, economic or other sanctions for any action taken in accordance with recognized professional duties, standards and ethics.

9. *Principles on Lawyers*, principle 21

It is the duty of the competent authorities to ensure lawyers access to appropriate information, files and documents in their possession or control in sufficient time to enable lawyers to provide effective legal assistance to their clients. Such access should be provided at the earliest appropriate time.

C. Interpretations

1. *Human Rights Committee*

100. The Human Rights Committee has recognized that the right to counsel means the right to effective counsel. The person providing legal representation must be qualified to represent the accused.[62] Legal counsel

[62] See *Elena Beatriz Vasilskis* v. *Uruguay* (80/1980) (31 March 1983), *Selected Decisions . . .*, vol. 2, p. 105, at p. 108, para. 9.3 (appointed defence counsel was not trained as a lawyer).

must also fully represent a person's interests and advocate in his or her favour.[63]

101. The Committee has also indicated that the right to choose one's counsel must be available immediately upon detention. Members of the Committee disapproved of a State system whereby a suspected terrorist could have only a State-appointed defence attorney for the first five days of detention.[64]

102. The Human Rights Committee has held that, while article 14 (3) (*d*) of the Covenant on Civil and Political Rights does not guarantee a right to choose one's own appointed counsel, it does require a State to take measures to ensure that appointed counsel provides effective representation for the accused.[65]

2. *Inter-American Commission on Human Rights*

103. The right to counsel means that the accused must be allowed to obtain legal counsel when first detained. In one case, the Inter-American Commission examined a law which prevented a detainee from having counsel during the period of administrative detention and investigation. The Commission noted that decisive evidence may be produced during this initial period and held that the lack of legal advice during this first part of a trial could seriously impinge upon the right to defence.[66] Ensuring access to an attorney also prevents possible abuse of other fundamental human rights. In addition, counsel must be permitted to be present when the accused gives a statement, is interrogated, or signs a statement.[67]

3. *European Court* and *European Commission of Human Rights*

104. Interpreting the right to counsel under the European Convention, the European Commission has held that it is not enough for a State to appoint defence counsel for indigent defendants. The State must also provide effective counsel and has an obligation to see that the appointed counsel is carrying out his duties. The authorities must, if necessary, supervise the appointed counsel, replace him, or cause him to fulfil his duties adequately.[68]

105. In one case before the European Court, the domestic court had refused to replace the court-appointed legal counsel despite complaints from the defendant that the counsel was not performing his duties. The European Court found that, by failing to replace the appointed counsel, the State had denied the applicant effective legal counsel.[69] Normally, however, appointed counsel should not be subject to strict control by the court.[70]

106. The European Court has held that appointment of counsel is required by the "interests of justice" when expertise is necessary to conduct an adequate defence.[71] If appointment of counsel is necessary, the defendant must be consulted on his choice of counsel.[72]

107. The right to counsel includes the right to consultations with counsel which are unsupervised by the authorities of places of detention. This right applies both to personal visits and to correspondence between a detained person and counsel.[73]

108. In some cases, the European Commission has held that the right to adequate facilities for preparing a defence implies a right of reasonable access to the prosecution's files.[74] Defendants have a right to all relevant information held by the prosecution that could help them exonerate themselves or reduce their sentences, and often this information will be in the prosecution's files.[75]

D. Practical guidelines

109. It is clear that access to counsel should be provided at the earliest opportunity after a person is charged.

110. Places of detention often make detainees available to attorneys only during the morning or afternoon on business days, when many attorneys must appear in court or handle other cases. Administrators of places of detention should consider making detainees available for visits from counsel after the court day or on days when courts are not in session to facilitate detainees' contacts with their lawyer.[76]

111. Places of detention should make special rooms available for visits from counsel separate from general

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[63] See *Miguel Angel Estrella* v. *Uruguay* (74/1980) (29 March 1983), ibid., p. 93, at p. 95, para. 1.8.

[64] See *Official Records of the General Assembly, Forty-sixth Session, Supplement No. 40* (A/46/40), para. 166 (Spain).

[65] *Paul Kelly* v. *Jamaica* (253/1987) (8 April 1991), ibid., annex XI, sect. D, para. 5.10.

[66] See OAS, *Annual Report of the Inter-American Commission on Human Rights, 1985-1986* (OEA/Ser.L/V/II.68, doc. 8 rev.1) (1986), p. 154 (El Salvador).

[67] See OAS, Inter-American Commission on Human Rights, *Report on the Situation of Human Rights in the Republic of Guatemala* (OEA/Ser.L/V/II.61, doc. 47 rev.1) (1983), p. 91.

[68] See Application No. 9127/80 (6 October 1981) (unpublished), *Strasbourg Digest of Case Law*, vol. 2, p. 846.

[69] *Artico* case, judgement of 13 May 1980, European Court of Human Rights, *Series A*, No. 37, p. 16, para. 33 *in fine*. The Court stated:

"... mere nomination does not ensure effective assistance since the lawyer appointed for legal aid purposes may die, fall seriously ill, be prevented for a protracted period from acting or shirk his duties. If they are notified of the situation, the authorities must either replace him or cause him to fulfil his obligations."

[70] See the *Kamasinski* case, judgement of 19 December 1989, ibid., No. 168.

[71] *Artico* case, loc. cit. (footnote 69 above), p. 18, para. 36.

[72] *Pakelli* case, judgement of 25 April 1983, ibid., No. 64, p. 15, para. 31.

[73] See, for example, the *Schönenberger and Durmaz* case, judgement of 20 June 1988, ibid., No. 137; and *S.* v. *Switzerland*, judgement of 28 November 1991, ibid., No. 220.

[74] See *X.* v. *Austria* (No. 7138/75), Decision of 5 July 1977, European Commission of Human Rights, *Decisions and Reports*, vol. 9, p. 50; and Application No. 2435/65 (17 December 1966) (unpublished), *Strasbourg Digest of Case Law*, vol. 2, p. 805.

[75] See *Guy Jespers* v. *Belgium* (No. 8403/78), Report of 14 December 1981, European Commission of Human Rights, *Decisions and Reports*, vol. 27, p. 61. On the general principle of the requirement of "equality of arms" in criminal trials, see van Dijk and van Hoof, op. cit. (footnote 36 above), pp. 319-321.

[76] S. Casale and J. Plotnikoff, *Regimes for Remand Prisoners* (Prison Reform Trust, 1990), p. 20.

visiting rooms. These rooms should ensure privacy and face-to-face contact, as well as appropriate furniture for working (desks or tables with chairs).[77]

112. If the pre-trial detainee is not fluent in the language of the detaining country and his counsel is not fluent in the detainee's native language (especially where such counsel is court-appointed), States should protect the rights of the accused to prepare a defence and to receive adequate representation by endeavouring to provide a translator for all visits between the detainee and his counsel.

113. It follows from the legal rights laid down in the international standards and from the duty of the authorities to inform detainees of those rights that no detained person should be punished or sanctioned for providing other detained persons with information about their legal rights or means for asserting their rights. Nor should any detained person be punished or sanctioned for asserting such rights on his own or another's behalf.

[77] Ibid., p. 21.

X. COMMUNICATION BY DETAINEES

114. Not only do detainees have a right to communicate with legal counsel, but they also have the right to communicate with the outside world. Communication with the outside world is important for the protection of a detainee's rights and is also an aspect of humane treatment. The right to freedom from arbitrary interference with correspondence applies to detainees as well as to citizens in general, although the "arbitrariness" of controls on detainee's correspondence is evaluated with due regard for the requirements of administering a place of detention and securing evidence without obstruction. Persons not nationals of the detaining State have the additional right to communicate with consular officials of their State of nationality.

A. General principles

1. *Covenant on Civil and Political Rights*, art. 10 (1)

All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person.

2. *Covenant on Civil and Political Rights*, art. 17

1. No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.

2. Everyone has the right to the protection of the law against such interference or attacks.

3. *Vienna Convention on Consular Relations*, art. 36 (1)

With a view to facilitating the exercise of consular functions relating to nationals of the sending State:

(*a*) consular officers shall be free to communicate with nationals of the sending State and to have access to them. Nationals of the sending State shall have the same freedom with respect to communication with and access to consular officers of the sending State;

(*b*) if he so requests, the competent authorities of the receiving State shall, without delay, inform the consular post of the sending State if, within its consular district, a national of that State is arrested or committed to prison or to custody pending trial or is detained in any other manner. Any communication addressed to the consular post by the person arrested, in prison, custody or detention shall also be forwarded by the said authorities without delay. The said authorities shall inform the person concerned without delay of his rights under this subparagraph;

(*c*) consular officers shall have the right to visit a national of the sending State who is in prison, custody or detention, to converse and correspond with him and to arrange for his legal representation. They shall also have the right to visit any national of the sending State who is in prison, custody or detention in their district in pursuance of a judgement. Nevertheless, consular officers shall refrain from taking action on behalf of a national who is in prison, custody or detention if he expressly opposes such action.

B. Standards

1. *Principles on Detention*, principle 15

Notwithstanding the exceptions contained in principle 16, paragraph 4 [of the Principles on Detention, relating to delaying notification of family members when exceptional needs of the investigation require such delay], and principle 18, paragraph 3 [requiring that access of a detained person to counsel be suspended only in exceptional circumstances], communication of the detained or imprisoned person with the outside world, and in particular his family or counsel, shall not be denied for more than a matter of days.

2. *Standard Minimum Rules*, rule 92

An untried prisoner shall be allowed to inform immediately his family of his detention and shall be given all reasonable facilities for communicating with his family and friends, and for receiving visits from them, subject only to restrictions and supervision as are necessary in the interests of the administration of justice and of the security and good order of the institution.

3. *Standard Minimum Rules*, rule 44

(1) Upon the death or serious illness of, or serious injury to a prisoner, or his removal to an institution for the treatment of mental affections, the director [of the place of detention] shall at once inform the spouse, if the prisoner is married, or the nearest relative and shall in any event inform any other person previously designated by the prisoner.

(2) A prisoner shall be informed at once of the death or serious illness of any near relative. In case of the critical illness of a near relative, the prisoner should be authorized, whenever circumstances allow, to go to his bedside either under escort or alone.

(3) Every prisoner shall have the right to inform at once his family of his imprisonment or his transfer to another institution.

4. *Standard Minimum Rules*, rule 38

(1) Prisoners who are foreign nationals shall be allowed reasonable facilities to communicate with the diplomatic and consular representatives of the State to which they belong.

(2) Prisoners who are nationals of States without diplomatic or consular representation in the country and refugees or stateless persons shall be allowed similar facilities to communicate with the diplomatic representative of the State which takes charge of their interests or any national or international authority whose task it is to protect such persons.

C. Interpretations

1. *Human Rights Committee*

115. The practices of detaining persons for an extended period of time without allowing them to communicate with family, friends or legal counsel, and subjecting their correspondence to excessive censorship, are violations of these standards. Those practices violate articles 10 (1) (humane treatment)[78] and 14 (3) (access

[78] See *Miguel Angel Estrella* v. *Uruguay*, loc. cit. (footnote 63 above), at p. 98, para. 10 (restrictions on correspondence); *Elsa Cubas* v. *Uruguay* (70/1980) (1 April 1982), *Selected Decisions . . .*, vol. 1, p. 130, at p. 132, para. 12 (incommunicado detention for three months); *Adolfo Drescher Caldas* v. *Uruguay*, loc. cit. (footnote 19 above), at p. 82, para. 14 (incommunicado detention for six weeks); *Lucía Arzuaga Gilboa* v. *Uruguay* (147/1983) (1 November 1985), ibid., p. 176, at p. 178, para. 14 (incommunicado detention for 15 days).

to counsel)[79] of the Covenant on Civil and Political Rights.

116. Although officials may exercise control over a detainee's correspondence to effect the orderly administration of the place of detention, such control must be subject to safeguards against arbitrary application.[80] In general, "prisoners should be allowed under necessary supervision to communicate with their family and reputable friends at regular intervals, by correspondence as well as by receiving visits".[81]

2. *European Court* and *European Commission of Human Rights*

117. The European Court and the European Commission have held most restrictions on correspondence with counsel and with family members invalid.[82] The Commission has also held that family members must be informed of the fact and location of a person's detention.[83]

[79] See *Adolfo Drescher Caldas* v. *Uruguay*, loc. cit. (footnote 19 above), at p. 82, para. 13.3.

[80] See *Larry James Pinkney* v. *Canada*, loc. cit. (footnote 56 above), at pp. 100-101, para. 34.

[81] *Miguel Angel Estrella* v. *Uruguay*, loc. cit. (footnote 63 above), p. 98, para. 9.2

[82] See, for example, the *Silver and others* case, judgement of 25 March 1983, European Court of Human Rights, *Series A*, No. 61; and *Campbell* v. *United Kingdom*, judgement of 25 March 1992, ibid., No. 233.

[83] See *Bernard Leo McVeigh, Oliver Anthony O'Neill and Arthur Walter Evans* v. *United Kingdom* (Nos. 8022/77, 8025/77 and 8027/77), Report of 18 March 1981, European Commission of Human Rights, *Decisions and Reports*, vol. 25, p. 15.

D. Practical guidelines

118. Where feasible, pre-trial detainees should have access to telephones with which to contact their counsel; these may be pay telephones. Officials should not unreasonably limit a pre-trial detainee's ability to use a telephone to contact his counsel.[84]

119. States should, in general, seek to comply with rule 92 of the Standard Minimum Rules ("all reasonable facilities for communicating with his family and friends, and for receiving visits from them") by providing detainees with writing instruments and paper, and the opportunity for face-to-face contact with visitors once or more often per week. Pre-trial detainees should not be limited in the number of letters they may send at their own expense. Those who lack funds for postage should have the opportunity to pass letters to visitors as an alternative to posting them.

120. Visits with family members should take place with the minimum restrictions compatible with the good order of the place of detention and the need to avoid destruction of evidence. Contact should be face to face, although a grill, wall, table, or similar divider may be placed between visitors and detainees.

121. Rule 44 (1) of the Standard Minimum Rules requires authorities to inform relatives of a detainee's death in custody. Authorities should also inform relatives of the results of the investigation required by the standards on supervision of places of detention (category XV below) any time the death of a detained person occurs.

[84] Casale and Plotnikoff, op. cit. (footnote 76 above), p. 20.

XI. INVESTIGATION OF DETAINED PERSONS; TORTURE AND ILL-TREATMENT

122. Persons detained before trial are sometimes subjected to torture and ill-treatment in order to compel them to confess and to divulge information. Absence of torture and ill-treatment is the guiding principle behind the standards on the treatment of detainees. Related to torture and ill-treatment is the information obtained by it: statements found to have been procured by torture should not be used as evidence against anyone. Accordingly, allegations of torture must be vigorously investigated and the perpetrators of torture prosecuted. Practical steps, such as the exclusion of evidence found to have been procured by torture and keeping records of interrogations, are necessary to secure the right to freedom from torture and ill-treatment.

A. General principles

1. *Universal Declaration*, art. 5

No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.

2. *Covenant on Civil and Political Rights*, art. 7

No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation.

3. *Convention against Torture*, art. 2

1. Each State Party shall take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction.

2. No exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture.

3. An order from a superior officer or a public authority may not be invoked as a justification of torture.

4. *Convention against Torture*, art. 4

1. Each State Party shall ensure that all acts of torture are offences under its criminal law. The same shall apply to an attempt to commit torture and to an act by any person which constitutes complicity or participation in torture.

2. Each State Party shall make these offences punishable by appropriate penalties which take into account their grave nature.

5. *Convention against Torture*, art. 15

Each State Party shall ensure that any statement which is established to have been made as a result of torture shall not be invoked as evidence in any proceedings, except against a person accused of torture as evidence that the statement was made.

B. Standards

1. *Principles on Detention*, principle 21 (1)

It shall be prohibited to take undue advantage of the situation of a detained or imprisoned person for the purpose of compelling him to confess, to incriminate himself otherwise or to testify against any other person.

2. *Principles on Detention*, principle 21 (2)

No detained person while being interrogated shall be subject to violence, threats or methods of interrogation which impair his capacity of decision or his judgement.

3. *Guidelines on Prosecutors*, guideline 16

When prosecutors come into possession of evidence against suspects that they know or believe on reasonable grounds was obtained through recourse to unlawful methods, which constitute a grave violation of the suspect's human rights, especially involving torture or cruel, inhuman or degrading treatment or punishment, or other abuses of human rights, they shall refuse to use such evidence against anyone other than those who used such methods, or inform the Court accordingly, and shall take all necessary steps to ensure that those responsible for using such methods are brought to justice.

4. *Principles on Detention*, principle 23

1. The duration of any interrogation of a detained or imprisoned person and of the intervals between interrogations as well as the identity of the officials who conducted the interrogations and other persons present shall be recorded and certified in such form as may be prescribed by law.

2. A detained or imprisoned person, or his counsel when provided by law, shall have access to the information described in paragraph 1 of the present principle.

C. Interpretations

1. *Human Rights Committee*, General Comment 7 (1)

. . . Complaints about ill-treatment must be investigated effectively by competent authorities. Those found guilty must be held responsible, and the alleged victims must themselves have effective remedies at their disposal, including the right to obtain compensation. . . .

2. *Human Rights Committee*, General Comment 7 (2)

. . . the prohibition [of torture and cruel, inhuman or degrading treatment or punishment] must extend to corporal punishment, including excessive chastisement as an educational or disciplinary measure. Even such a measure as solitary confinement may, according to the circumstances, and especially when the person is kept incommunicado, be contrary to this article [art. 7 of the Covenant on Civil and Political Rights]. Moreover, the article clearly protects not only persons arrested or imprisoned, but also pupils and patients in educational and medical institutions. Finally, it is also the duty of public authorities to ensure protection by the law against such treatment even when committed by persons acting outside or without any official authority. . . .

D. Practical guidelines

123. This handbook does not attempt to catalogue all the forms of mistreatment which constitute "torture or cruel, inhuman or degrading treatment or punishment" under international law.[85]

124. Some non-governmental organizations encourage States to establish a comprehensive programme for the elimination of torture. Such a programme would include official condemnation of torture, eliminating incommunicado and secret detention, independent investigations of allegations of torture, no use of statements extracted under torture, prohibition of torture by law, prosecution of torturers, training officials involved in detention and investigation, compensation and rehabilitation for victims of torture, and involvement internationally in the elimination of all torture.[86]

125. One possible model for independent investigations for the prevention of torture is the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment.[87] The Committee is a body of human rights experts serving in their individual capacities who are authorized to visit "any place within [the] jurisdiction [of States parties] where persons are deprived of their liberty by a public authority"[88] periodically and at any other time the Committee deems necessary, to communicate freely with anyone believed to have relevant information, and to communicate immediately with State authorities regarding the situation of detained persons.

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[85] For a discussion of the definition of torture and other treatment prohibited by international standards, see N. S. Rodley, *The Treatment of Prisoners Under International Law* (Paris, UNESCO—Oxford, Clarendon Press, 1987), chap. 3.

[86] Amnesty International, 12-Point Programme for the Prevention of Torture, loc. cit. (footnote 31 above).

[87] Established by the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (Strasbourg, 26 November 1987) (entered into force 1 February 1989) (Council of Europe, document H (87) 4 (1987)).

[88] Ibid., art. 2.

XII. PHYSICAL CONDITIONS OF DETENTION

126. Two principles guide the standards for the physical conditions under which persons detained pending trial must be kept. The first is the obligation to treat detainees with dignity and humanity, and the second is the presumption of innocence. The first guarantees a minimum level of physical conditions as regards accommodation, food, etc., and the second requires better treatment for persons who, innocent before the law, are not yet detained as a punishment. Physical conditions also extend to rights over one's own property and to medical care.

A. General principles

1. *Covenant on Civil and Political Rights*, art. 10 (1)

All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person.

2. *Covenant on Civil and Political Rights*, art. 14 (2)

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

B. Standards

ACCOMMODATION

1. *Standard Minimum Rules*, rule 10

All accommodation provided for the use of prisoners and in particular all sleeping accommodation shall meet all requirements of health, due regard being paid to climatic conditions and particularly to cubic content of air, minimum floor space, lighting, heating and ventilation.

2. *Standard Minimum Rules*, rule 86

Untried prisoners shall sleep singly in separate rooms, with the reservation of different local custom in respect of the climate.

3. *Standard Minimum Rules*, rule 19

Every prisoner shall, in accordance with local or national standards, be provided with a separate bed, and with separate and sufficient bedding which shall be clean when issued, kept in good order and changed often enough to ensure its cleanliness.

4. *Standard Minimum Rules*, rule 15

Prisoners shall be required to keep their persons clean, and to this end they shall be provided with water and with such toilet articles as are necessary for health and cleanliness.

5. *Standard Minimum Rules*, rule 21

(1) Every prisoner who is not employed in outdoor work shall have at least one hour of suitable exercise in the open air daily if the weather permits.

(2) Young prisoners, and others of suitable age and physique, shall receive physical and recreational training during the period of exercise. To this end space, installations and equipment should be provided.

6. *Principles on Detention*, principle 20

If a detained or imprisoned person so requests, he shall if possible be kept in a place of detention or imprisonment reasonably near his usual place of residence.

7. *Principles on Detention*, principle 31

The appropriate authorities shall endeavour to ensure, according to domestic law, assistance when needed to dependent and, in particular, minor members of the families of detained or imprisoned persons and shall devote a particular measure of care to the appropriate custody of children left without supervision.

FOOD AND WATER

8. *Standard Minimum Rules*, rule 20

(1) Every prisoner shall be provided by the administration at the usual hours with food of nutritional value adequate for health and strength, of wholesome quality and well prepared and served.

(2) Drinking water shall be available to every prisoner whenever he needs it.

9. *Standard Minimum Rules*, rule 87

Within the limits compatible with the good order of the institution, untried prisoners may, if they so desire, have their food procured at their own expense from the outside, either through the administration or through their family or friends. Otherwise, the administration shall provide their food.

MEDICAL CARE

10. *Standard Minimum Rules*, rule 22

(1) At every institution there shall be available the services of at least one qualified medical officer who should have some knowledge of psychiatry. The medical services should be organized in close relationship to the general health administration of the community or nation. They shall include a psychiatric service for the diagnosis and, in proper cases, the treatment of states of mental abnormality.

(2) Sick prisoners who require specialist treatment shall be transferred to specialized institutions or to civil hospitals. Where hospital facilities are provided in an institution, their equipment, furnishings and pharmaceutical supplies shall be proper for the medical care and treatment of sick prisoners, and there shall be a staff of suitably trained officers.

(3) The services of a qualified dental officer shall be available to every prisoner.

11. *Standard Minimum Rules*, rule 23

(1) In women's institutions there shall be special accommodation for all necessary prenatal and post-natal care and treatment. Arrangements shall be made wherever practicable for children to be born in a hospital outside the institution. If a child is born in prison, this fact should not be mentioned in the birth certificate.

(2) Where nursing infants are allowed to remain in the institution with their mothers, provision shall be made for a nursery staffed by

qualified persons, where the infants shall be placed when they are not in the care of their mothers.

12. *Standard Minimum Rules*, rule 24

The medical officer [of the place of detention] shall see and examine every prisoner as soon as possible after his admission and thereafter as necessary, with a view particularly to the discovery of physical or mental illness and the taking of all necessary measures; the segregation of prisoners suspected of infectious or contagious conditions; the noting of physical or mental defects which might hamper rehabilitation; and the determination of the physical capacity of every prisoner for work.

13. *Standard Minimum Rules*, rule 25

(1) The medical officer shall have the care of the physical and mental health of the prisoners and should daily see all sick prisoners, all who complain of illness, and any prisoner to whom his attention is specially directed.

(2) The medical officer shall report to the director whenever he considers that a prisoner's physical or mental health has been or will be injuriously affected by continued imprisonment or by any condition of imprisonment.

14. *Standard Minimum Rules*, rule 91

An untried prisoner shall be allowed to be visited and treated by his own doctor or dentist if there is reasonable ground for his application and he is able to pay any expenses incurred.

15. *Principles on Detention*, principle 24

A proper medical examination shall be offered to a detained or imprisoned person as promptly as possible after his admission to the place of detention or imprisonment, and thereafter medical care and treatment shall be provided whenever necessary. This care and treatment shall be provided free of charge.

16. *Principles on Detention*, principle 25

A detained or imprisoned person or his counsel shall, subject only to reasonable conditions to ensure security and good order in the place of detention or imprisonment, have the right to request or petition a judicial or other authority for a second medical examination or opinion.

17. *Principles on Detention*, principle 26

The fact that a detained or imprisoned person underwent a medical examination, the name of the physician and the results of such an examination shall be duly recorded. Access to such records shall be ensured. Modalities therefor shall be in accordance with relevant rules of domestic law.

CLOTHING

18. *Standard Minimum Rules*, rule 88

(1) An untried prisoner shall be allowed to wear his own clothing if it is clean and suitable.

(2) If he wears prison dress, it shall be different from that supplied to convicted prisoners.

19. *Standard Minimum Rules*, rule 17

(1) Every prisoner who is not allowed to wear his own clothing shall be provided with an outfit of clothing suitable for the climate and adequate to keep him in good health. Such clothing shall in no manner be degrading or humiliating.

(2) All clothing shall be clean and kept in proper condition. Underclothing shall be changed and washed as often as necessary for the maintenance of hygiene.

(3) In exceptional circumstances, whenever a prisoner is removed outside the institution for an authorized purpose, he shall be allowed to wear his own clothing or other inconspicuous clothing.

20. *Standard Minimum Rules*, rule 18

If prisoners are allowed to wear their own clothing, arrangements shall be made on their admission to the institution to ensure that it shall be clean and fit for use.

PROPERTY RIGHTS

21. *Standard Minimum Rules*, rule 43

(1) All money, valuables, clothing and other effects belonging to a prisoner which under the regulations of the institution he is not allowed to retain shall on his admission to the institution be placed in safe custody. An inventory thereof shall be signed by the prisoner. Steps shall be taken to keep them in good condition.

(2) On the release of the prisoner all such articles and money shall be returned to him except in so far as he has been authorized to spend money or send any such property out of the institution, or it has been found necessary on hygienic grounds to destroy any article of clothing. The prisoner shall sign a receipt for the articles and money returned to him.

(3) Any money or effects received for a prisoner from outside shall be treated in the same way.

(4) If a prisoner brings in any drugs or medicine, the medical officer shall decide what use shall be made of them.

C. Interpretations[89]

1. *Human Rights Committee*, General Comment 9 (1)

. . .

The humane treatment and the respect for the dignity of all persons deprived of their liberty is a basic standard of universal application which cannot depend entirely on material resources. . . . [This principle applies to] all institutions where persons are lawfully held against their will, not only in prisons but also, for example, hospitals, detention camps or correctional institutions.

2. *Human Rights Committee*, General Comment 16 (8)

. . . So far as personal and body search is concerned, effective measures should ensure that such searches are carried out in a manner consistent with the dignity of the person who is being searched. Persons being subjected to body search by State officials, or medical personnel acting at the request of the State, should only be examined by persons of the same sex.

127. The Human Rights Committee has recognized that poor conditions of confinement are inconsistent with States' obligations under article 10 (1) of the Covenant on Civil and Political Rights.[90] In several cases, the Committee found that a prison's policy of harassment and arbitrary punishment, constant surveillance, lack of contact with families, and lack of adequate food, sunshine and exercise violated article 10 (1).[91] In another

[89] In addition to the Human Rights Committee interpretations, the European Court and the European Commission of Human Rights have an extensive body of case-law dealing with conditions of confinement that violate article 3 of the European Convention. See generally van Dijk and van Hoof, op. cit. (footnote 36 above), pp. 226-241.

[90] See *Carmen Améndola Massiotti and Graciela Baritussio* v. *Uruguay* (25/1978) (26 July 1982), *Selected Decisions* . . ., vol. 1, p. 136 (overcrowded, unsanitary conditions with hard labour and poor food violated article 10 (1)).

[91] *David Alberto Cámpora Schweizer* v. *Uruguay*, loc. cit. (footnote 33 above), at pp. 92-93, paras. 11 and 19; *Miguel Angel Estrella* v. *Uruguay*, loc. cit. (footnote 63 above), at p. 95, para. 1.10, and p. 98, para. 10; *Juan Almirati Nieto* v. *Uruguay* (92/1981) (25 July 1983), ibid., p. 126, at pp. 127-128, para. 1.7, and p. 130, para. 11 (all dealing with conditions at Libertad prison).

case, the Committee found that a detained person who was chained to the floor in a solitary confinement cell with minimal clothing and food had suffered a violation of articles 7 and 10 (1) of the Covenant.[92]

128. Physical conditions of detention may violate articles 7 and 10 (1) even when the duration of detention is relatively short. In one case, the Committee held that articles 7 and 10 (1) were violated when a person was held for 50 hours in an overcrowded cell with insufficient food and water.[93]

D. Practical guidelines

129. Places of detention should provide meals at regular times during each 24-hour period, with no more than 15 hours between the evening meal and the morning meal. Meals should be prepared with consideration for food flavour, texture, temperature, appearance and palatability. The food served should meet basic human dietary needs, including sufficient caloric content and nutrient value.

130. Places of detention should provide a variety of foods at every meal calculated to serve the dietary needs of the various groups of detained persons. Special diets should be provided when medically necessary. Provision should also be made for special diets required by religious beliefs and cultural preferences of detainees where reasonably possible.[94]

131. Appropriate medical care for detainees includes psychological care. Because of the high risk of suicide by pre-trial detainees, all places of detention should at all times have on staff at least one officer who has received appropriate training in the identification of persons who are at risk of suicide.[95]

132. As recommended in the practical guidelines in category VIII.D above, all persons, upon entering pre-trial detention, should be assessed by an officer with appropriate training as a routine part of the reception process. This assessment should note signs of illness or injury, the influence of alcohol or other drugs, and the apparent mental state of the detainee. Injured persons, persons under the influence of alcohol or drugs, and persons thought likely to commit suicide should be identified as "at risk" and placed under constant supervision until examined fully by a qualified medical practitioner. Documented evidence of the assessment made and the treatment a detainee received should be retained.[96]

133. As also recommended in category VIII.D above, under no circumstances is a detained person who is unconscious when received into custody (whether from the apparent effects of alcohol or drugs, or due to a medical condition) to be left unattended for any period. Medical help should be obtained without delay. In addition, all detention facilities should have appropriate medical equipment readily available and staff on duty who are trained in its use for the purpose of treating urgent cases.[97]

134. Provision should be made for detained persons with particular health needs. Foremost among these persons are women, who should be provided with health care particular to their needs by women medical officers whenever possible. Pregnant women and women with infants also should receive particular care and attention, including proper nutrition and appropriate prenatal care. Women with infants and young children should be allowed to keep their children with them and appropriate facilities should be made available for their care.[98]

135. Whenever a detained person is to appear before a judicial or other authority, clothing appropriate to that situation should be made available. This clothing may be the prisoner's own, be brought in from outside, or be loaned by the institution. This guideline is similar to the provision of rule 33 (*a*) of the Standard Minimum Rules (see category XIII.B.3 below). These measures are required because the person is presumed innocent: hence, when coming before a judicial or other authority, he should not have the appearance of guilt imparted by prison garb and restraints.

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[92] *John Wight* v. *Madagascar* (115/1982) (1 April 1985), ibid., p. 151, at p. 154, paras. 15.2 and 17.

[93] *Ramón B. Martínez Portorreal* v. *Dominican Republic* (188/1984) (5 November 1987), ibid., p. 214, at pp. 215-216, paras. 9.2 and 11.

[94] Casale and Plotnikoff, op. cit. (footnote 76 above), p. 13.

[95] Biles, loc. cit. (footnote 60 above).

[96] Ibid.

[97] Ibid., p. 14.

[98] Amnesty International, *Women in the Front Line: Human Rights Violations Against Women* (London, 1991), p. 52.

XIII. USE OF DISCIPLINE AND RESTRAINTS IN PRE-TRIAL DETENTION

136. Another aspect of the physical conditions of detention relates to the types of discipline and restraints used on detainees. Again, use of discipline and restraints must be guided by respect for the presumed innocence of the pre-trial detainee and the obligation to treat all detainees humanely. Another problem is arbitrariness of discipline in the place of detention, which can be reduced by setting clear rules of conduct with specified disciplinary measures for breaches and making both detainees and institutional personnel aware of those rules.

A. General principles

1. *Covenant on Civil and Political Rights*, art. 10 (1)

All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person.

B. Standards

1. *Standard Minimum Rules*, rule 27

Discipline and order shall be maintained with firmness, but with no more restriction than is necessary for safe custody and well-ordered community life.

2. *Standard Minimum Rules*, rule 31

Corporal punishment, punishment by placing in a dark cell, and all cruel, inhuman or degrading punishments shall be completely prohibited as punishments for disciplinary offences.

3. *Standard Minimum Rules*, rule 33

Instruments of restraint, such as handcuffs, chains, irons and straitjackets, shall never be applied as a punishment. Furthermore, chains or irons shall not be used as restraints. Other instruments of restraint shall not be used except in the following circumstances:

(*a*) As a precaution against escape during a transfer, provided that they shall be removed when the prisoner appears before a judicial or administrative authority;

(*b*) On medical grounds by direction of the medical officer;

(*c*) By order of the director, if other methods of control fail, in order to prevent a prisoner from injuring himself or others or from damaging property; in such instances the director shall at once consult the medical officer and report to the higher administrative authority.

4. *Standard Minimum Rules*, rule 34

The patterns and manner of use of instruments of restraint shall be decided by the central prison administration. Such instruments must not be applied for any longer time than is strictly necessary.

5. *Standard Minimum Rules*, rule 35

(1) Every prisoner on admission shall be provided with written information about the regulations governing the treatment of prisoners of his category, the disciplinary requirements of the institution, the authorized methods of seeking information and making complaints, and all such other matters as are necessary to enable him to understand both his rights and his obligations and to adapt himself to the life of the institution.

(2) If a prisoner is illiterate, the aforesaid information shall be conveyed to him orally.

6. *Basic Principles on Prisoners*, principle 7

Efforts addressed to the abolition of solitary confinement as a punishment, or to the restriction of its use, should be undertaken and encouraged.

7. *Principles on Detention*, principle 30

1. The types of conduct of the detained or imprisoned person that constitute disciplinary offences during detention or imprisonment, the description and duration of disciplinary punishment that may be inflicted and the authorities competent to impose such punishment shall be specified by law or lawful regulations and duly published.

2. A detained or imprisoned person shall have the right to be heard before disciplinary action is taken. He shall have the right to bring such action to higher authorities for review.

8. *Principles on the Use of Force*, principle 15

Law enforcement officials, in their relations with persons in custody or detention, shall not use force, except when strictly necessary for the maintenance of security and order within the institution, or when personal safety is threatened.

9. *Principles on the Use of Force*, principle 16

Law enforcement officials, in their relations with persons in custody or detention, shall not use firearms, except in self-defence or in the defence of others against the immediate threat of death or serious injury, or when strictly necessary to prevent the escape of a person in custody or detention presenting the danger referred to in principle 9 [the danger of the perpetration of a particularly serious crime involving grave threat to life].

C. Interpretations

European Court and *European Commission of Human Rights*

137. The European Commission has considered several cases in which special disciplinary or security measures, such as solitary confinement under constant surveillance, were challenged as violating article 3 of the European Convention (prohibiting torture and inhuman or degrading treatment or punishment). The Commission has held that the individual rights of the detainee must be balanced against the requirements of security.[99] The Commission generally disapproves of restrictive meas-

[99] See *Gabriele Kröcher and Christian Möller* v. *Switzerland* (No. 8463/78), Report of 16 December 1982, European Commission of Human Rights, *Decisions and Reports*, vol. 34, p. 24, at p. 52, para. 57.

ures, but will allow them in some situations, such as dangerous or self-abusive behaviour by a prisoner.

138. The European Court has held that disciplinary sanctions which are punishments normally associated with criminal law cannot be imposed without a procedure which guarantees the fair-trial rights of article 6 of the European Convention.[100]

D. Practical guidelines

139. Minor matters of discipline—if no danger to life, security or property exists—should be handled discreetly and routinely. For minor violations of disciplinary rules, detainees should be subject to minor sanctions, not more severe than reprimands, temporary loss of one or more privileges, or temporary confinement for a brief period in their cell. Records should be kept of which staff member imposed a disciplinary sanction and what sanction was imposed. Such records should be made available to officials responsible for oversight of the place of detention.

140. Officers present with detained persons should not be armed with firearms, except when transporting persons outside the place of detention and at night. The absence of firearms protects both the person detained and the officers of the place of detention. All officers working in places of detention should be trained in non-lethal methods of control of persons and of riot control; appropriate equipment for non-lethal control of persons and situations should be readily available to staff in the place of detention.

141. To facilitate accurate reporting of violations of detainees' human rights, all staff members should, in so far as resources permit, wear an identification badge or name strip on their uniform which is clearly legible from a distance of several feet.[101]

142. Places of detention should keep records of which staff members have been issued firearms or non-lethal control equipment; this equipment should be checked in and out at the beginning and end of every shift. Accurate records of which staff members possessed or used this equipment, and of the times at which they possessed or used it, will assist in determining violations of human rights.

143. In conjunction with the information about regulations of the place of detention provided to incoming detainees in accordance with rule 35 of the Standard Minimum Rules, places of detention may find it useful to provide an introduction to the detention system to new pre-trial detainees, since for many detainees pre-trial detention is their first experience of detention. That introduction could cover such matters as procedures, daily routines and methods for contacting lawyers and family members.[102]

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[100] See the *Engel and others* case, judgement of 8 June 1976, European Court of Human Rights, *Series A*, No. 22; and the *Campbell and Fell* case, judgement of 28 June 1984, ibid., No. 80.

[101] Amnesty International, *Report on Allegations of Ill-treatment of Prisoners at Archambault Institution, Quebec, Canada* (London, 1983), p. 34.

[102] Casale and Plotnikoff, op. cit. (footnote 76 above), pp. 18-19.

XIV. INTELLECTUAL AND RELIGIOUS CONDITIONS OF DETENTION

144. As important as physical conditions of detention are the intellectual and spiritual conditions. Detention, and particularly pre-trial detention, should not be an occasion to break down a detainee's will or spirit. Access to religious observance is a basic human right and should not be denied detainees. In addition, opportunities for meaningful employment during detention promote the dignity and humanity of detainees.

A. General principles

1. *Covenant on Civil and Political Rights*, art. 10 (1)

All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person.

2. *Covenant on Civil and Political Rights*, art. 18 (1)

Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching.

3. *Covenant on Civil and Political Rights*, art. 19

1. Everyone shall have the right to hold opinions without interference.

2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.

...

B. Standards

1. *Standard Minimum Rules*, rule 40

Every institution shall have a library for the use of all categories of prisoners, adequately stocked with both recreational and instructional books, and prisoners shall be encouraged to make full use of it.

2. *Standard Minimum Rules*, rule 39

Prisoners shall be kept informed regularly of the more important items of news by the reading of newspapers, periodicals or special institutional publications, by hearing wireless transmissions, by lectures or by any similar means as authorized or controlled by the administration.

3. *Standard Minimum Rules*, rule 90

An untried prisoner shall be allowed to procure at his own expense or at the expense of a third party such books, newspapers, writing materials and other means of occupation as are compatible with the interests of the administration of justice and the security and good order of the institution.

4. *Principles on Detention*, principle 28

A detained or imprisoned person shall have the right to obtain within the limits of available resources, if from public sources, reasonable quantities of educational, cultural and informational material, subject to reasonable conditions to ensure security and good order in the place of detention or imprisonment.

5. *Standard Minimum Rules*, rule 42

So far as practicable, every prisoner shall be allowed to satisfy the needs of his religious life by attending the services provided in the institution and having in his possession the books of religious observance and instruction of his denomination.

6. *Standard Minimum Rules*, rule 89

An untried prisoner shall always be offered opportunity to work, but shall not be required to work. If he chooses to work, he shall be paid for it.

7. *Basic Principles on Prisoners*, principle 8

Conditions shall be created enabling prisoners to undertake meaningful remunerated employment which will facilitate their reintegration into the country's labour market and permit them to contribute to their own financial support and to that of their families.

8. *Basic Principles on Prisoners*, principle 6

All prisoners shall have the right to take part in cultural activities and education aimed at the full development of the human personality.

C. Interpretations

European Commission of Human Rights

145. The European Commission has upheld restrictions on religious and intellectual pursuits by detainees in some cases, stating that these restrictions were justified for the "good order" of the institution. More recently, however, the Commission has held that denial of food mandated by religious beliefs and academic materials was a violation of the European Convention.[103]

D. Practical guidelines

146. The library for the use of detained persons (Standard Minimum Rules, rule 40) should include such legal materials as will allow detained persons to research

[103] Decision 13669/88 of 7 March 1990 (denial of kosher food).

their rights under national and international law. The library should include materials written for the non-lawyer to enable such persons to assert those rights effectively before national and international tribunals.

147. Provision should be made at the place of detention for access by ministers of all denominations and religions to persons of their faith in detention. Officers of places of detention should be made aware of and respect customs of the religious groups in the place of detention.

148. When it is necessary to hold persons in multiple-occupancy cells, detainees (especially foreigners not speaking the language of the detaining country) should be placed with persons of the same culture, language and/or religion, whenever possible.

149. Officers of places of detention should be given training in subjects in addition to control of detained persons. Training may include activities such as exercise, occupational programmes and counselling, with the possibility of officers cooperating with detained persons in such activities. Working together creates mutual respect between staff and detained persons, making the staff's job easier.

150. Professional training programmes and employment programmes in places of detention should conform to the Standard Minimum Rules, and a part of the revenues earned by those programmes should be devoted to improving the infrastructure and conditions of life in the place of detention.[104]

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[104] See *Arab-African Seminar Recommendations* (see footnote 29 above), p. 4.

XV. SUPERVISION OF PLACES OF DETENTION

151. Effective supervision of places of detention by impartial authorities interested in maintaining humane treatment is vital for the protection of human rights of detainees. Supervisors should be trained in the rights of detainees under national and international law. Looking after the well-being of detained persons is an obligation under the Covenant on Civil and Political Rights. Special measures must be taken in the event of the death of a detainee, to find its cause and prosecute any persons found responsible, especially in cases of torture and ill-treatment. The location of detainees should also be known at all times so that their treatment may be supervised. This supervision is in addition to the rights of detainees to take judicial proceedings to challenge the basis and conditions of their detention.

A. General principles

1. *Covenant on Civil and Political Rights*, art. 10 (1)

All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person.

2. *Covenant on Civil and Political Rights*, art. 6 (1)

Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.

B. Standards

1. *Standard Minimum Rules*, rule 36

(1) Every prisoner shall have the opportunity each week day of making requests or complaints to the director of the institution or the officer authorized to represent him.

(2) It shall be possible to make requests or complaints to the inspector of prisons during his inspection. The prisoner shall have the opportunity to talk to the inspector or to any other inspecting officer without the director or other members of the staff being present.

(3) Every prisoner shall be allowed to make a request or complaint, without censorship as to substance but in proper form, to the central prison administration, the judicial authority or other proper authorities through approved channels.

(4) Unless it is evidently frivolous or groundless, every request or complaint shall be promptly dealt with and replied to without undue delay.

2. *Principles on Detention*, principle 29

1. In order to supervise the strict observance of relevant laws and regulations, places of detention shall be visited regularly by qualified and experienced persons appointed by, and responsible to, a competent authority distinct from the authority directly in charge of the administration of the place of detention or imprisonment.

2. A detained or imprisoned person shall have the right to communicate freely and in full confidentiality with the persons who visit the places of detention or imprisonment in accordance with paragraph 1 of the present principle, subject to reasonable conditions to ensure security and good order in such places.

3. *Principles on Detention*, principle 33

1. A detained or imprisoned person or his counsel shall have the right to make a request or complaint regarding his treatment, in particular in case of torture or other cruel, inhuman or degrading treatment, to the authorities responsible for the administration of the place of detention and to higher authorities and, when necessary, to appropriate authorities vested with reviewing or remedial powers.

2. In those cases where neither the detained or imprisoned person nor his counsel has the possibility to exercise his rights under paragraph 1 of the present principle, a member of the family of the detained or imprisoned person or any other person who has knowledge of the case may exercise such rights.

3. Confidentiality concerning the request or complaint shall be maintained if so requested by the complainant.

4. Every request or complaint shall be promptly dealt with and replied to without undue delay. If the request or complaint is rejected or, in case of inordinate delay, the complainant shall be entitled to bring it before a judicial or other authority. Neither the detained or imprisoned person nor any complainant under paragraph 1 of the present principle shall suffer prejudice for making a request or complaint.

4. *Principles on Prevention of Executions*, principle 9

There shall be a thorough, prompt and impartial investigation of all suspected cases of extralegal, arbitrary and summary executions, including cases where complaints by relatives or other reliable reports suggest unnatural death in the above circumstances. Governments shall maintain investigative offices and procedures to undertake such inquiries. The purpose of the investigation shall be to determine the cause, manner and time of death, the person responsible, and any pattern or practice which may have brought about that death. It shall include an adequate autopsy, collection and analysis of all physical and documentary evidence, and statements from witnesses. The investigation shall distinguish between natural death, accidental death, suicide and homicide.

5. *Principles on Prevention of Executions*, principle 12

The body of the deceased person shall not be disposed of until an adequate autopsy is conducted by a physician, who shall, if possible, be an expert in forensic pathology. Those conducting the autopsy shall have the right of access to all investigative data, to the place where the body was discovered, and to the place where the death is thought to have occurred. If the body has been buried and it later appears that an investigation is required, the body shall be promptly and competently exhumed for an autopsy. If skeletal remains are discovered, they should be carefully exhumed and studied according to systematic anthropological techniques.

6. *Principles on Prevention of Executions*, principle 13

The body of the deceased shall be available to those conducting the autopsy for a sufficient amount of time to enable a thorough investigation to be carried out. The autopsy shall, at a minimum, attempt to establish the identity of the deceased and the cause and manner of death. The time and place of death shall also be determined to the extent possible. Detailed colour photographs of the deceased shall be included in the autopsy report in order to document and support the findings of the investigation. The autopsy report must describe any and all injuries to the deceased including any evidence of torture.

7. *Principles on Prevention of Executions*, principle 14

In order to ensure objective results, those conducting the autopsy must be able to function impartially and independently of any potentially implicated persons or organizations or entities.

C. Interpretations

1. *Human Rights Committee*

152. When a death occurs in custody, the State must take steps to ascertain how it occurred. In a case where a deceased detainee was given an autopsy by military authorities, but the State did not submit any information on the circumstances of death or the inquiries it had made into those circumstances, the Human Rights Committee held that the State had violated article 6 (1) of the Covenant on Civil and Political Rights by not taking appropriate measures to protect the detainee's life in detention.[105] The Committee held that, while it could not determine whether the detainee committed suicide or was killed by others, the State authorities had violated article 6 (1) by not protecting the detainee's life and not investigating impartially how his death occurred.

2. *Inter-American Commission on Human Rights*

153. The names and whereabouts of all detainees should be made known to the court and families. Failure to reveal the whereabouts of a detainee is an obstruction of justice which prejudices a detainee's right to legal guarantees.[106] The Inter-American Commission welcomed a State's efforts to establish a Detainee Control Registry, which recorded all detainees regardless of what authority detained them. The Registry replaced a previous recording system which registered only persons turned over to the courts and not those detained by police, security or armed forces.[107]

D. Practical guidelines

154. As recommended in the practical guidelines in category V.D (see para. 66 above), places of detention should not be administered by the same division of government which supervises officers with responsibility for the investigation of crime and the apprehension of criminals, whether in the police, security forces or military units. Officers of the prison service should receive training separate from that given police and other security forces. This training should be appropriate to their role in supervising places of detention, and should include material on national and international protection of human rights.

155. States should ensure that there exists effective oversight of the status of detained persons and places of detention, with a view to protecting the rights of all detained persons under the present standards, other applicable international instruments and national law. The officials responsible for such oversight should have the authority to compel judicial review of a person's detention and request his release if the interests of justice so require.

156. Where appropriate, a judicial or similar authority should oversee the application of detention. In any case, such oversight should be performed by authorities independent of the police, security forces and other officials responsible for the apprehension of offenders or the investigation of offences. These authorities should also be responsible for keeping track of the status of all persons in detention to ensure that their cases are being processed appropriately.

157. Independent international monitoring of places of detention, such as the visits provided for in the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment,[108] is an effective means of supervising places of detention. The Committee established by the Convention is authorized to visit "any place within [the] jurisdiction [of States parties] where persons are deprived of their liberty by a public authority" (art. 2) periodically and at any other time the Committee deems necessary, to communicate freely with anyone believed to have relevant information, and to communicate immediately with State authorities regarding the situation of detained persons. Such international monitoring can assist national authorities in supervising places of detention.

158. The medical examination upon being admitted to the place of detention has two purposes: the first is to detect impaired health and determine special health needs of each detainee with a view to providing him or her with appropriate treatment; the second is to provide a permanent record of the state of the detainee's health, especially the presence or absence of injuries. This record can then be compared with later observations to determine whether torture or ill-treatment has occurred.[109]

159. When a detainee is found dead, the scene of the death should be preserved for full forensic investigation and for police and coroner's inquiries. Such investigations should be led by police officers of supervisory rank and a coroner with the assistance of expert pathologists and forensic scientists. The investigation should not only establish the facts of the particular case, but also review the practices and procedures of the relevant authorities with a view to reducing the possibility of similar deaths occurring in the future.[110]

160. States should consider the possibility of creating a permanent, authoritative body to monitor the implementation of penal reforms, which would have as one function to inquire into the degree of application of the

[105] *Guillermo Ignacio Dermit Barbato and Hugo Haroldo Dermit Barbato* v. *Uruguay* (84/1981) (21 October 1982), *Selected Decisions* . . ., vol. 2, p. 112, at p. 115, para. 9.2.

[106] Op. cit. (footnote 17 above), pp. 100-101 and 109.

[107] See OAS, document OEA/Ser.P/AG/doc.2518/89 (1989), pp. 179-180 (Guatemala).

[108] See footnote 87 above.

[109] Tomasevski, op. cit. (footnote 59 above), p. 154.

[110] Biles, loc. cit. (footnote 60 above), p. 16.

present standards and to gather information about violations of these standards.[111]

161. At the level of the individual detention facility, a committee might be established to provide advice on the administration of the facility. Such a committee might be headed by a judicial or similar authority; the participation of specialized and interested non-governmental organizations could improve the efficiency of the committee.[112]

162. Public authorities responsible for the administration of places of detention should consider establishing positive relationships with the International Committee of the Red Cross and other relevant organizations and institutions concerned with conditions in places of detention, with judicial or administrative proceedings relating to life in detention, and with the return of detained persons to society after their release. All such organizations should also work together to share their experience and protect the rights of detained persons.[113]

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[111] See *Arab-African Seminar Recommendations* (see footnote 29 above), p. 3.

[112] Ibid.

[113] Ibid., pp. 4-5.

XVI. FAIR TRIAL

163. Certain guarantees in the Covenant on Civil and Political Rights have implications for the treatment of pre-trial detainees. The full range of international standards protecting the right to a fair trial and the measures needed to realize that right, however, are outside the scope of this handbook.[114]

A. General principles

1. *Universal Declaration*, art. 10

Everyone 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.

2. *Covenant on Civil and Political Rights*, art. 14 (1)

All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. . . .

3. *Covenant on Civil and Political Rights*, art. 14 (3)

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

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

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

(*c*) To be tried without undue delay;

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

(*e*) 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;

(*f*) To have the free assistance of an interpreter if he cannot understand or speak the language used in court;

(*g*) Not to be compelled to testify against himself or to confess guilt.

4. *African Charter*, art. 7 (1)

Every individual shall have the right to have his cause heard. This comprises:

(*a*) the right to an appeal to competent national organs against acts violating his fundamental rights as recognized and guaranteed by conventions, laws, regulations and customs in force;

(*b*) the right to be presumed innocent until proved guilty by a competent court or tribunal;

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

(*d*) the right to be tried within a reasonable time by an impartial court or tribunal.

B. Standards

1. *Guidelines on Prosecutors*, guideline 10

The office of prosecutors shall be strictly separated from judicial functions.

C. Interpretations

1. *Human Rights Committee*

164. The Human Rights Committee has noted that, in many countries, civilians are tried before military or special courts, which often "do not afford the strict guarantees of the proper administration of justice in accordance with the requirements of article 14 [of the Covenant on Civil and Political Rights] which are essential for the effective protection of human rights".[115] Trial of civilians by such courts should therefore be very exceptional and should afford the full guarantees of article 14.

165. The purpose of the notice required in article 14 (3) (*a*) of the Covenant is to inform the accused of the charges in a manner which allows him to prepare a defence. In one case, the Human Rights Committee found that notice issued three days before the start of a trial gave insufficient time to prepare a defence.[116] This case concerned two trials *in absentia*, which the Committee has said are permissible in some circumstances, but only if the State makes "sufficient efforts with a view to informing the [accused] about the impending court proceedings, thus enabling him to prepare his defence".[117]

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[114] For a comprehensive review of international standards and decisions of international human rights bodies in the area of fair trial, see the reports by Mr. Stanislav Chernichenko and Mr. William Treat to the Subcommission on Prevention of Discrimination and Protection of Minorities on "The right to a fair trial: current recognition and measures necessary for its strengthening": first report, E/CN.4/Sub.2/1990/34; second report, E/CN.4/Sub.2/1991/29; third report, E/CN.4/Sub.2/1992/24 and Add.1-3; fourth report, E/CN.4/Sub.2/1993/24 and Add.1 and 2.

[115] Human Rights Committee, General Comment 13 (4). See also, for example, *Miguel Angel Estrella* v. *Uruguay*, loc. cit. (footnote 63 above), p. 93; *Elena Beatriz Vasilskis* v. *Uruguay*, loc. cit. (footnote 62 above), p. 105 (military court procedure violated article 14 of the Covenant); *Official Records of the General Assembly, Forty-fifth Session, Supplement No. 40* (A/45/40), vol. I, para. 209 (Chile).

[116] *Daniel Monguya Mbenge* et al. v. *Zaire*, loc. cit. (footnote 15 above), at p. 78, para. 14.2.

[117] Ibid.

2. *African Commission on Human and Peoples' Rights*

166. The African Commission has adopted a resolution on the right to recourse procedure and a fair trial which elaborates on article 7 (1) of the African Charter and guarantees several further rights, including notification of charges; appearance before a judicial officer; right to release pending trial; presumption of innocence; adequate preparation of the defence; speedy trial; examination of witnesses; and the right to an interpreter.[118]

3. *European Court* and *European Commission of Human Rights*

167. The European Convention requires a trial to be before an "independent and impartial tribunal" (art. 6 (1)). The Commission and the Court have established a series of requirements a tribunal must fulfil, including: independence from the executive and the parties to the proceedings;[119] conditions relating to the manner of appointment and the duration of its members' term of office;[120] the existence of guarantees afforded by its procedure;[121] and impartiality.[122]

D. Practical guidelines

168. For pre-trial detainees, one important factor necessary for a fair trial is effective access to legal counsel. States should ensure that all persons held on criminal charges have access to counsel and that counsel have had the opportunity adequately to prepare for the trial.

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[118] African Commission on Human and Peoples' Rights, document ACHPR/COMM/FIN(XI)/Annex VII (9 March 1992).

[119] *Leo Zand* v. *Austria* (No. 7360/76), Report of 12 October 1978, European Commission of Human Rights, *Decisions and Reports*, vol. 15, p. 70, at p. 81, para. 74.

[120] *Le Compte, Van Leuven and De Meyere* v. *Belgium*, judgement of 23 June 1981, European Court of Human Rights, *Series A*, No. 43, p. 24, para. 57.

[121] *Piersack* case, judgement of 1 October 1982, ibid., No. 53, p. 13, para. 27; see also the *Belilos* case, judgement of 29 April 1988, ibid., No. 132, p. 29, para. 64.

[122] The European Court and the European Commission use both an objective and a subjective test in determining whether a tribunal is impartial. The *objective test* examines whether there are any ascertainable facts, apart from the judge's personal conduct, that raise doubts about his impartiality (*Hauschildt* case, judgement of 24 May 1989, ibid., No. 154, p. 21, para. 48). Facts to consider include the way in which a tribunal is composed and organized. The *subjective test* inquires whether a particular judge is impartial in his personal convictions. The Commission has stated that "appearances [of impartiality] may be important" and that "justice must not only be done: it must also be seen to be done" (*Ben Yaacoub* case, judgement of 27 November 1987, ibid., No. 127-A, p. 11, para. 96 (opinion of the Commission)).

XVII. JUDICIAL REVIEW OF CONFINEMENT

169. The right to challenge one's detention before a judicial authority empowered to order release is guaranteed to anyone deprived of his liberty, including pre-trial detainees. This right is in addition to the right to be brought promptly before a judicial authority after arrest on criminal charges, and it applies whenever a person is detained—whether with or without charges. This right encompasses national proceedings such as *habeas corpus* and *amparo*, but, for it to be implemented effectively, the detainee must have notice of the reasons for detention and any criminal charges, as well as access to legal counsel to advocate for his release.

A. General principles

1. *Universal Declaration*, art. 8

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

2. *Covenant on Civil and Political Rights*, art. 9 (4)

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

B. Standards

1. *Principles on Detention*, principle 32

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

2. The proceedings . . . shall be simple and expeditious and at no cost for detained persons without adequate means. The detaining authority shall produce without unreasonable delay the detained person before the reviewing authority.

2. *Commission on Human Rights*, resolution 1992/35[123]

The Commission on Human Rights,

. . .

1. *Calls upon* all States that have not yet done so to establish a procedure such as *habeas corpus* by which anyone who is deprived of his or her liberty by arrest or detention shall be entitled to institute proceedings before a court, in order that that court may decide without delay on the lawfulness of his or her detention and order his or her release if the detention is found to be unlawful;

2. *Also calls upon* all States to maintain the right to such a procedure at all times and under all circumstances, including during states of emergency.

C. Interpretations

1. *Human Rights Committee*

170. An authority is not a "court" simply because it reviews detention according to established legal procedures. The Human Rights Committee has ruled that the purpose of article 9 (4) of the Covenant on Civil and Political Rights is to ensure that it is a court which reviews detention, not merely any authority regulated by law. The authority must possess a degree of objectivity and independence in order to exercise adequate control over detention.[124]

171. Article 9 (4) of the Covenant applies to all cases of detention, including detention ordered by an administrative body or authority. The Human Rights Committee has ruled that a person detained by order of such an authority has the right to have that decision reviewed in a court of law.[125]

172. The Human Rights Committee has found repeatedly that detention of a person during a period of "prompt security measures" violated article 9 (4), since under such measures detainees had no recourse to *habeas corpus* or similar remedies.[126]

173. The Committee has also indicated that the right to apply for the remedy of *habeas corpus* should be extended, so that a detainee's family or friends could apply on his behalf.[127] Allowing others to apply makes the right to *habeas corpus* more effective.

2. *Inter-American Court of Human Rights*

174. The Inter-American Court has held that the remedy of *habeas corpus* must be effective. In a case where a State's courts did not handle three *habeas corpus* petitions submitted on behalf of a "disappeared" person, the Court held that States have an obligation to

[123] Adopted on 28 February 1992 (*Official Records of the Economic and Social Council, 1992, Supplement No. 2* (E/1992/22), chap. II, sect. A).

[124] See *Antti Vuolanne* v. *Finland* (265/1987) (7 April 1989), *Official Records of the General Assembly, Forty-fourth Session, Supplement No. 40* (A/44/40), annex X, sect. J; and *Mario I. Torres* v. *Finland* (291/1988) (2 April 1990), ibid., *Forty-fifth Session, Supplement No. 40* (A/45/40), vol. II, annex IX, sect. K.

[125] *Antti Vuolanne* v. *Finland*, loc. cit. (footnote 124 above).

[126] See, for example, *Adolfo Drescher Caldas* v. *Uruguay*, loc. cit. (footnote 19 above), at p. 82, para. 14; *David Alberto Cámpora Schweizer* v. *Uruguay*, loc. cit. (footnote 33 above), at p. 93, para. 19.

[127] *Official Records of the General Assembly, Forty-fourth Session, Supplement No. 40* (A/44/40), para. 207 (Netherlands).

make *habeas corpus* effective: "that is, capable of producing the result for which it was designed".[128]

3. *African Charter*, art. 7 (1)

Every individual shall have the right to have his cause heard. This comprises:

(*a*) the right to an appeal to competent national organs against acts violating his fundamental rights as recognized and guaranteed by conventions, laws, regulations and customs in force;

...

4. *European Court of Human Rights*

175. The European Court has held that, in the case of remand (detention prior to trial), the requirement of judicial review of the necessity of detention includes the requirement to review the necessity of detention periodically.[129] In particular, it was reasonable for a detainee to seek a second review of his detention one month after the first review.[130]

D. Practical guidelines

176. The protection afforded by judicial review, like the right to a fair trial, is very dependent on access to the detainee by his legal counsel. In addition, independence of the national judiciary is necessary to ensure that judicial recourse is effective. For further discussion, see category IX (Access to counsel) above.

[128] *Velásquez Rodríguez* case, judgement of 29 July 1988, Inter-American Court of Human Rights, *Series C*, No. 4, p. 115, para. 66.

[129] *Toth* v. *Austria*, judgement of 12 December 1991, European Court of Human Rights, *Series A*, No. 224, p. 18, para. 67.

[130] *Bezicheri* case, judgement of 25 October 1989, ibid., No. 164, pp. 10-11, para. 21.

XVIII. ADMINISTRATIVE DETENTION

177. Administrative detention applies to a broad range of situations outside the process of police arresting suspects and bringing them into the criminal justice system. This category of standards emphasizes rights guaranteed to all people, regardless of the reason for their detention, and points out some dangers of detention outside judicial control. Standards on the committal of persons to mental health institutions are included because a kind of detention is involved; however, the subject of involuntary committal to such institutions is beyond the scope of this handbook.

A. General principles

Covenant on Civil and Political Rights, art. 9

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

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

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

. . .

B. Standards

1. *Principles on Detention*, principle 38

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

2. *Standard Minimum Rules*, rule 95

Without prejudice to the provisions of article 9 of the International Covenant on Civil and Political Rights, persons arrested or imprisoned without charge shall be accorded the same protection as that accorded under part I [Rules of General Application, rules 6-55 of the Standard Minimum Rules] and part II, section C [Prisoners Under Arrest or Awaiting Trial, rules 84-93]. Relevant provisions of part II, section A [Prisoners Under Sentence, rules 56-81], shall likewise be applicable where their application may be conducive to the benefit of this special group of persons in custody, provided that no measures shall be taken implying that re-education or rehabilitation is in any way appropriate to persons not convicted of any criminal offence.

3. *Principles on Protection of the Mentally Ill*, principle 16

1. A person may be admitted involuntarily to a mental health facility as a patient or, having already been admitted voluntarily as a patient, be retained as an involuntary patient in the mental health facility if, and only if, a qualified mental health practitioner authorized by law . . . determines . . . that that person has a mental illness and considers:

(*a*) That, because of that mental illness, there is a serious likelihood of immediate or imminent harm to that person or to other persons; or

(*b*) That, in the case of a person whose mental illness is severe and whose judgement is impaired, failure to admit or retain that person is likely to lead to a serious deterioration in his or her condition or will prevent the giving of appropriate treatment that can only be given by admission to a mental health facility in accordance with the principle of the least restrictive alternative.

In the case referred to in subparagraph (*b*), a second such mental health practitioner, independent of the first, should be consulted where possible. If such consultation takes place, the involuntary admission or retention may not take place unless the second mental health practitioner concurs.

2. Involuntary admission or retention shall initially be for a short period as specified by domestic law for observation and preliminary treatment pending review of the admission or retention by [a] review body. The grounds of the admission shall be communicated to the patient without delay and the fact of the admission and the grounds for it shall also be communicated promptly and in detail to the review body, to the patient's personal representative, if any, and, unless the patient objects, to the patient's family.

3. A mental health facility may receive involuntarily admitted patients only if the facility has been designated to do so by a competent authority prescribed by domestic law.

4. *Fourth Geneva Convention*, art. 43[131]

Any protected person who has been interned or placed in assigned residence shall be entitled to have such action reconsidered as soon as possible by an appropriate court or administrative board designated by the Detaining Power for that purpose. If the internment or placing in assigned residence is maintained, the court or administrative board shall periodically, and at least twice yearly, give consideration to his or her case with a view to the favourable amendment of the initial decision, if circumstances permit.

. . .

C. Interpretations

1. *Human Rights Committee*

178. The Human Rights Committee has held that, where a person has been declared "disappeared", a State still has an obligation under the Covenant on Civil and Political Rights to conduct a full investigation into his whereabouts, to secure his release, and to bring to justice those responsible for the disappearance.[132]

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[131] The provisions of article 43 of the Fourth Geneva Convention do not apply *de jure* in most cases of administrative detention by a national Government. The right to judicial review of confinement is, however, secured by article 9, paragraph 4, of the Covenant on Civil and Political Rights, and that provision makes no distinction between administrative and other detention. Article 43 is included here to demonstrate one internationally agreed minimum standard (review of detention every six months).

[132] *Elena Quinteros Almeida and María del Carmen Almeida de Quinteros* v. *Uruguay* (107/1981) (21 July 1983), *Selected Decisions* . . ., vol. 2, p. 138, at p. 141, para. 10.6, and pp. 142-143, para. 16; see also *Irene Bleier Lewenhoff and Rosa Valiño de Bleier* v. *Uruguay* (30/1978) (29 March 1982), *Selected Decisions* . . ., vol. 1, p. 109, at p. 112, paras. 13.4-15.

2. *United Nations High Commissioner for Refugees*

179. Refugees and asylum-seekers should ordinarily not be detained. Detention should be resorted to only on grounds prescribed by law

> to verify identity; to determine the elements on which the claim to refugee status or asylum was based; to deal with cases where refugees or asylum-seekers had destroyed their travel and/or identification documents . . . in order to mislead the authorities of the State in which they intended to claim asylum; or to protect national security or public order;[133]

In addition, refugees and asylum-seekers should be detained in humane conditions and should not, whenever possible, be detained with persons convicted of crimes or in places where their physical safety is endangered.[134]

D. Practical guidelines

180. Because administrative detention is not reviewed by independent judicial authorities, it is easily subject to abuse by States.

181. No person should be subjected to incommunicado detention in the absence of a state of public emergency declared according to article 4 of the Covenant on Civil and Political Rights. In any event, a person should not be detained incommunicado for more than a matter of days.

182. If administrative detention must be used, the following safeguards can help diminish the possibility of abuse of detainees' rights:[135]

The law which authorizes administrative detention should be formulated specifically, with precise guidelines and criteria as to when detention is appropriate. These criteria should limit administrative detention to persons who pose an extreme and imminent danger to security.

All persons arrested under an administrative detention order should be served with a copy of that order, which should clearly indicate the reason they are being detained. Persons detained administratively should have the right to appear in court, with legal counsel, within days after their arrest in order that the court may determine the necessity of continued detention. The court should review the facts of each case to determine if the exceptional measure of administrative detention is warranted.

All detainees should have a right to be present at their review proceedings, to present their case through counsel, and to have access to the evidence used as a basis for the detention order. If evidence may not be released to the detainee for reasons of national security, the court should review that evidence to determine if it supports the detention order.

When a court continues a person's detention, that person should have the right to an appeal to a higher tribunal; this appellate review should take place without delay.

There should be a frequent and periodic review of the necessity of continuing to hold each person in administrative detention. This review should be held with a view to releasing all persons who no longer pose an extreme and imminent danger to security.

183. In many States, law enforcement officials have the authority to detain material witnesses pending the trial in which they are to testify. This form of administrative detention should be exercised only when necessary to ensure that the witness will appear for the trial, and should be subject to the safeguards set out above.

184. Administrative detention also refers to disciplinary measures taken by authorities in charge of places of detention, such as imposition of a period of solitary confinement or a disciplinary diet (bread and water). This disciplinary power should be exercised only in accordance with a scheme of national law and subject to review by a judicial or other authority.

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[133] Conclusion No. 44 (XXXVII) of the Executive Committee of UNHCR (*Official Records of the General Assembly, Forty-first Session, Supplement No. 12A* (A/41/12/Add.1), para. 128; HCR/IP/2/Eng/REV.1991 (1992), p. 96), para. (*b*).

[134] Ibid., para. (*f*).

[135] See Amnesty International, *Israel and the Occupied Territories: Administrative Detention During the Palestinian Intifadah* (London, 1989), pp. 35-36.

XIX. SPECIAL RULES FOR JUVENILES

185. Juveniles, because of their young age, receive special treatment in international human rights instruments. These standards require that juveniles be treated in a way which maximizes their opportunity to mature into responsible citizens, rather than to fall into a life of crime. All measures with regard to juveniles should be taken with this goal of rehabilitation in mind.

A. General principles

1. *Covenant on Civil and Political Rights*, art. 14 (4)

In the case of juvenile persons, the procedure [determining a criminal charge] shall be such as will take account of their age and the desirability of promoting their rehabilitation.

2. *Convention on the Rights of the Child*, art. 37

States Parties shall ensure that:

(*a*) No child[136] shall be subjected to torture or other cruel, inhuman or degrading treatment or punishment. Neither capital punishment nor life imprisonment without possibility of release shall be imposed for offences committed by persons below eighteen years of age;

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

(*c*) Every child deprived of liberty shall be treated with humanity and respect for the inherent dignity of the human person, and in a manner which takes into account the needs of persons of his or her age. In particular, every child deprived of liberty shall be separated from adults unless it is considered in the child's best interest not to do so and shall have the right to maintain contact with his or her family through correspondence and visits, save in exceptional circumstances;

(*d*) Every child deprived of his or her liberty shall have the right to prompt access to legal and other appropriate assistance, as well as the right to challenge the legality of the deprivation of his or her liberty before a court or other competent, independent and impartial authority, and to a prompt decision on any such action.

3. *Convention on the Rights of the Child*, art. 40

1. States Parties recognize the right of every child alleged as, accused of, or recognized as having infringed the penal law to be treated in a manner consistent with the promotion of the child's sense of dignity and worth, which reinforces the child's respect for the human rights and fundamental freedoms of others and which takes into account the child's age and the desirability of promoting the child's reintegration and the child's assuming a constructive role in society.

...

3. States Parties shall seek to promote the establishment of laws, procedures, authorities and institutions specifically applicable to children alleged as, accused of, or recognized as having infringed the penal law, and, in particular:

(*a*) The establishment of a minimum age below which children shall be presumed not to have the capacity to infringe the penal law;

(*b*) Whenever appropriate and desirable, measures for dealing with such children without resorting to judicial proceedings, providing that human rights and legal safeguards are fully respected.

4. A variety of dispositions, such as care, guidance and supervision orders; counselling; probation; foster care; education and vocational training programmes and other alternatives to institutional care shall be available to ensure that children are dealt with in a manner appropriate to their well-being and proportionate both to their circumstances and the offence.

B. Standards

1. *Beijing Rules*, rule 10.1

Upon the apprehension of a juvenile, her or his parents or guardian shall be immediately notified of such apprehension, and, where such immediate notification is not possible, the parents or guardian shall be notified within the shortest possible time thereafter.

2. *Beijing Rules*, rule 10.2

A judge or other competent official or body shall, without delay, consider the issue of release.

3. *Beijing Rules*, rule 13.2

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

4. *Rules for the Protection of Juveniles*, rule 17

Juveniles who are detained under arrest or awaiting trial (''untried'') are presumed innocent and shall be treated as such. Detention before trial shall be avoided to the extent possible and limited to exceptional circumstances. Therefore, all efforts shall be made to apply alternative measures. When preventive detention is nevertheless used, juvenile courts and investigative bodies shall give the highest priority to the most expeditious processing of such cases to ensure the shortest possible duration of detention. Untried detainees should be separated from convicted juveniles.

5. *Rules for the Protection of Juveniles*, rule 18

The conditions under which an untried juvenile is detained should be consistent with the rules set out below, with additional specific provisions as are necessary and appropriate, given the requirements of the presumption of innocence, the duration of the detention and the legal status and circumstances of the juvenile. These provisions would include, but not necessarily be restricted to, the following:

(*a*) Juveniles should have the right of legal counsel and be enabled to apply for free legal aid, where such aid is available, and to communicate regularly with their legal advisers. Privacy and confidentiality shall be ensured for such communications;

(*b*) Juveniles should be provided, where possible, with opportunities to pursue work, with remuneration, and continue education or training, but should not be required to do so. Work, education or training should not cause the continuation of the detention;

(*c*) Juveniles should receive and retain materials for their leisure and recreation as are compatible with the interests of the administration of justice.

[136] A ''child'' is defined in article 1 of the Convention as ''every human being below the age of eighteen years unless, under the law applicable to the child, majority is attained earlier''.

6. *Guidelines on Prosecutors*, guideline 19

In countries where prosecutors are vested with discretionary functions as to the decision whether or not to prosecute a juvenile, special considerations shall be given to the nature and gravity of the offence, protection of society and the personality and background of the juvenile. In making that decision, prosecutors shall particularly consider available alternatives to prosecution under the relevant juvenile justice laws and procedures. Prosecutors shall use their best efforts to take prosecutory action against juveniles only to the extent strictly necessary.

C. Interpretations

Human Rights Committee

186. The Human Rights Committee disapproves of pre-trial detention for juveniles. Members of the Committee expressed concern regarding one State where there was no minimum age for pre-trial detention and where juveniles between 12 and 18 years old could be detained by the juvenile courts before trial.[137]

D. Practical guidelines

187. The decision whether or not to detain a juvenile should be made with awareness of the differences between adults and juveniles. In particular, juveniles should be separated not only from adult offenders, but also from convicted juveniles, in order to prevent detention from becoming a "school of crime".[138]

188. The use of bail or other financial guarantees in making release decisions related to juveniles seems to be inappropriate:

Because it is impossible for a large majority of juveniles to furnish financial guarantees in order to be released pending trial, legislation which requires payment of bail appears to be incompatible with the principle that juveniles should only be detained as a last resort.[139]

189. States should establish a minimum age below which young children may not be deprived of their liberty. If detention cannot be avoided, every effort should be made to place juveniles in special institutions, independent of penitentiaries and under the auspices of competent authorities, with appropriate judicial supervision. Educational and skill-training programmes should be made available to detained juveniles in accordance with their age, sex and personality.[140]

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[137] See *Official Records of the General Assembly, Forty-sixth Session, Supplement No. 40* (A/46/40), paras. 66, 69 and 99 *in fine* (Canada).

[138] "Application of international standards concerning the human rights of detained juveniles", report prepared by Mrs. Mary Concepción Bautista, Special Rapporteur of the Subcommission on Prevention of Discrimination and Protection of Minorities (E/CN.4/Sub.2/1991/24), para. 77.

[139] Ibid., para. 82.

[140] See *Arab-African Seminar Recommendations* (see footnote 29 above), p. 4.

XX. IMPLEMENTATION

A. General principles

1. *Universal Declaration*, art. 8

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

2. *Covenant on Civil and Political Rights*, art. 2 (2)

Where not already provided for by existing legislative or other measures, each State Party to the present Covenant undertakes to take the necessary steps, in accordance with its constitutional processes and with the provisions of the present Covenant, to adopt such legislative or other measures as may be necessary to give effect to the rights recognized in the present Covenant.

3. *Covenant on Civil and Political Rights*, art. 2 (3)

Each State Party to the present Covenant undertakes:

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

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

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

4. *Covenant on Civil and Political Rights*, art. 9 (5)

Anyone who has been victim of unlawful arrest or detention shall have an enforceable right to compensation.

B. Standards

1. *Principles on Detention*, principle 7

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

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

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

2. *Principles on Detention*, principle 35

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

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

C. Interpretations

European Commission of Human Rights

190. The European Commission has held that domestic authorities could in principle compensate an individual for excessive length of proceedings resulting in excessive length of detention by reducing the sentence imposed.[141] Reduction of sentence is also often a part of amicable settlements of cases alleging excessive length of proceedings and detention.

D. Practical guidelines

191. Appropriate sanctions for government agents, such as peace officers or administrators of places of detention, include suspension from duty, docking of pay, termination of employment and criminal prosecution.

192. A detained person who has been subjected to torture or other cruel, inhuman or degrading treatment, or to other serious violations of his human rights, has been dealt with more severely than would have followed from any court-imposed sanction he would have received if convicted of a crime. Consequently, detained or imprisoned persons who have been ill-treated should be entitled to such remedy, including immediate release, as justice requires.

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[141] *Eric Neubeck* v. *Federal Republic of Germany* (No. 9132/80), Report of 12 December 1983, European Commission of Human Rights, *Decisions and Reports*, vol. 41, p. 13, at p. 34, para. 131; *H.* v. *Federal Republic of Germany* (No. 10884/84), Decision of 13 December 1984, ibid., p. 252, at pp. 254-255.

XXI. SAVING CLAUSES

193. The saving clauses of the Covenant on Civil and Political Rights are presented to recall that human rights standards should never be interpreted in a restrictive way. Standards may not be used to limit the application of human rights in individual cases.

A. General principles

1. *Covenant on Civil and Political Rights*, art. 5 (1)

Nothing in the present Covenant may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms recognized herein or at their limitation to a greater extent than is provided for in the present Covenant.

2. *Covenant on Civil and Political Rights*, art. 5 (2)

There shall be no restriction upon or derogation from any of the fundamental human rights recognized or existing in any State Party to the present Covenant pursuant to law, conventions, regulations or custom on the pretext that the present Covenant does not recognize such rights or that it recognizes them to a lesser extent.

B. Standards

1. *Principles on Detention*, principle 3

There shall be no restriction upon or derogation from any of the human rights of persons under any form of detention or imprisonment recognized or existing in any State pursuant to law, conventions, regulations or custom on the pretext that this Body of Principles does not recognize such rights or that it recognizes them to a lesser extent.

2. *Tokyo Rules*, rule 4.1

Nothing in the present Rules shall be interpreted as precluding the application of the Standard Minimum Rules for the Treatment of Prisoners, the United Nations Standard Minimum Rules for the Administration of Juvenile Justice (The Beijing Rules), the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment or any other human rights instruments and standards recognized by the international community and relating to the treatment of offenders and the protection of their basic human rights.

3. *Rules for the Protection of Juveniles*, rule 9

Nothing in the Rules should be interpreted as precluding the application of the relevant United Nations and human rights instruments and standards, recognized by the international community, that are more conducive to ensuring the rights, care and protection of juveniles, children and all young persons.

C. Interpretations

European Court and *European Commission of Human Rights*

194. A State may have to restrict the rights of one person or group to prevent them from infringing the rights of other persons or groups. When a State imposes such restrictions on a person or group, it may invoke article 17 of the European Convention (same wording as article 5 (1) of the Covenant on Civil and Political Rights) as a justification for its violation of those persons' rights.[142] However, the European Court and the European Commission limit this justification. A person may use some of his rights to infringe the rights of others, but that does not justify a State's infringing all his rights. Only those rights which, if exercised, would violate the rights of others may be infringed.[143]

D. Practical guidelines

195. When two or more human rights standards apply in a situation, the individual should receive the benefit of the most protective standard. National provisions should be brought into conformity with international standards, and international norms and conventions should apply in cases in which national laws do not adequately protect the rights of the detainee.

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[142] See *J. Glimmerveen and J. Hagenbeek* v. *the Netherlands* (Nos. 8348/78 and 8406/78), Decision of 11 October 1979, ibid., vol. 18, p. 187, at pp. 194-197.

[143] See the *Lawless* case (Merits), judgement of 1 July 1961, European Court of Human Rights, *Series A*, No. 3, pp. 45-46, paras. 6-7; and *Raymond De Becker* v. *Belgium* (No. 214/56), Report of the European Commission of Human Rights of 8 January 1960, European Court of Human Rights, *Series B, 1962*, pp. 137-138, para. 279.

ANNEXES

Annex I

PRE-TRIAL RELEASE SERVICES

1. Pre-trial release services perform a vital role in the implementation of international standards in the area of pre-trial detention. One of the primary goals of those standards is encouraging the minimum use of pre-trial detention compatible with the investigation of the alleged offence and with the protection of society and the victim. The judge or other official making the decision whether to release a person suspected of a crime must try to predict whether the person will fail to appear for trial, interfere with the investigation of the crime of which he is suspected, or commit another crime while released. Several factors, such as previous criminal record and "community ties", are of predictive value in that decision and should be taken into account.

2. A pre-trial release service helps to ensure that judges or other authorities have accurate information about an accused person on which to base their decision whether and on what conditions that person should be released. Officers of the pre-trial service gather information from the accused person regarding the relevant factors, then attempt to verify that information through examining records and interviewing friends, relatives and the employer of the accused. This information is then communicated to the judge, prosecutor and defence counsel prior to a determination as to whether release is appropriate. In addition to information collection and verification, some pre-trial release services also play an active role in monitoring released persons and ensuring their appearance for trial.

A. Factors relevant to pre-trial release decisions

3. Many factors have a statistical correlation with the success of pre-trial release (success is defined as appearance for trial without having committed another crime). In many pre-trial release systems, the presence and absence of each of these factors is assigned a positive or negative weight on a numerical scale. These numerical values are then totalled, and the person is released if the total is at least a certain amount. While such a numerical system does have the advantage of consistency, the exact weight to be assigned to any particular factor is highly dependent on local culture. Accordingly, the relevant factors are listed below in no particular order with an indication of why they generally have predictive value. The development of an exact application of these factors must be left to each State's criminal justice system.

1. FACTORS REGARDING CRIMINAL HISTORY

4. *Crime charged in present arrest*: The severity of the crime with which the person is charged tends to be slightly predictive of the likelihood of that person committing another crime. More importantly, the crime charged allows the court to consider the maximum likely sentence if a conviction should occur. Where that sentence is likely to be short or non-custodial, strong consideration should be given to the release of the detainee.

5. *Number of past criminal convictions*: A repeat offender is more likely to abscond or commit other crimes, and a first-time offender is more likely to want to "clear his name", as well as being more likely to be negatively affected by detention.

6. *Number of past failures to appear for trial*: Failure to appear for trial in the past makes it more likely that the accused person will fail to appear in the present case.

2. FACTORS REGARDING COMMUNITY TIES

7. *Family ties*: A person with a spouse or children, or living with parents, may be more likely to appear for trial (depending on local culture). The family can also assist in ensuring appearance in many cases. However, if the offence charged involves abuse to family members, particular care should be taken in deciding whether the accused should be allowed to return home.

8. *Other social ties*: Other social ties have a significance similar to that of family ties and are particularly important where a person does not live with any family members or where family structure cannot be relied upon to ensure appearance for trial. Examples include religious affiliations and close friendships.

9. *Employment*: If a person has a job which he can maintain and upon which he relies for income, he is more likely to appear for trial.

10. *Financial resources and fixed assets*: Persons with greater amounts of cash can be required to surrender a sum as a surety, to be retained by the court until trial and then be returned to the accused. A person with fixed assets such as a home or a farm is less likely to abscond than a person with no fixed residence. In addition, a person receiving government assistance may be less likely to abscond, since that act would cut off such assistance.

11. *Conditions of residence*: Included here are such factors as whether a person lives alone or with others, and whether the person rents or owns property. To ensure that persons appear for criminal proceedings, factors which could be considered include whether the home has a telephone, mail delivery, or other means of communication.

12. *Length of residence*: The longer a person's residence in the same geographical area, the less likely it is that he will abscond if released from detention.

3. FACTORS REGARDING THE PERSON ACCUSED

13. *Character*: While not very reliable, a person's character and others' perceptions of his character may indicate whether he is dangerous or likely to abscond.

14. *Physical and mental condition*: Age or illness may make it less likely that a person will abscond or be a danger to others.

B. Role of the pre-trial release service

15. A pre-trial release service may verify information provided by accused persons regarding factors relevant to release; provide assistance to and supervise persons released pending trial, with a view to ensuring their appearance; or both. Similarly, individual officers of the release service may perform a single one of the above functions, or each officer may be assigned a certain number of persons for whom he will be responsible from initial contact onward.

1. VERIFICATION OF INFORMATION

16. Verification of the criminal history, community ties and personal circumstances of accused persons is the most important function of the pre-trial release service. Without the release service, a defendant may be able to tell the judge that he has a job and a place to live, but the prosecutor and police will probably not have looked into those questions, and the judge may not feel comfortable in relying solely on the word of the accused. It is the independent verification of information regarding an accused's likelihood of flight or further crime that allows a judge to rely on that information in making a decision to release.

17. Many national laws and the international standards reproduced in this handbook do not contemplate time for a lengthy investi-

gation into the circumstances of persons before their release decision is made. Persons are to be brought "promptly" before a judge, who will then decide on the necessity of continued detention. To be of any use, the pre-trial service officer's investigations must be concluded expeditiously. Often verification must be accomplished by telephone rather than in person or in writing. In many areas of the world personal interviewing is necessary, in which case collection of information will take longer. Criminal histories should be verified by checking police records; centralization and computerization of records may help speed up this process.

18. The pre-trial service officer should present his report when the court considers the question of release. The judge, prosecutor and defense counsel should have the opportunity to question the officer and clarify points as necessary. A written verification report should also be made and be circulated to the court and counsel. This report can be prepared using a form similar to that reproduced in annex II, which is used in the South Australia Bail Assessment and Supervision Programme. It contains questions to be asked, space for answers and space for remarks on the verification of that information. The exact content of the form can be modified to reflect conditions in the individual country.

2. Supervision of persons released before trial

19. This function of pre-trial service officers is similar to that of probation or parole officers, and such positions are combined in some national systems. One virtue of such combination is that probation officers are already trained in supervision of offenders and have the skills necessary to supervise persons released from detention. In addition, where a person has been on probation or parole, he may already be known to the officer.

20. Supervision may be of various levels appropriate to lower- or higher-risk persons. A person can be released on his own recognizance with only the stipulation that he contact the supervising agency once a week, or one or more times a day. Release can be conditional on maintaining a certain place of residence, which can be verified by unannounced visits, or on attending a drug- or alcohol-abuse treatment programme, with supervision through that programme. A person can be remanded to a halfway house or "bail hostel"—a centre where staff ensure that residents meet their work, school, treatment and court commitments, but where the residents are free to go about their daily business instead of being detained. Other forms of supervision, appropriate to the local culture, should be developed in each national system.

21. Pre-trial service officers may also play a role in ensuring a person's appearance at trial by sending written reminders of court dates and telephoning or visiting shortly before the date in question. They can verify that an accused person has transportation to court. Above all, they can communicate to the accused person the importance of appearing and assure him that he will get a fair hearing. In ensuring appearance, the pre-trial service officer should cooperate with the accused's attorney.

C. Professionalism

22. Pre-trial service agencies should strive to establish and maintain a good professional relationship with the other officials involved in the pre-trial process. The pre-trial service officer occupies a unique position with regard to both prosecuting authorities and the person suspected of a crime. Judges and prosecutors must be able to rely on the professionalism of pre-trial officers to provide timely, and above all accurate, information about the person. At the same time, the pre-trial officer must be able to convince the person that cooperating with him is in that person's best interest and that the officer will spare no effort in verifying information provided. While pre-trial service officers must be professional, other officials must be reminded to treat them with the respect their professionalism deserves.

Annex II

PRE-TRIAL RELEASE INFORMATION FORM[a]

PROBATION AND PAROLE SERVICE

BAIL ASSESSMENT AND SUPERVISION (BASS) PROGRAMME—INTERVIEW FORM

VERIFICATION

Y/N

M/F

A. ***PERSONAL***

LAST NAME _____ FIRST _____ MIDDLE _____

ALIASES/NICKNAMES _____

AGE _____ D.O.B. / / BIRTHPLACE _____

DATE OF ARRIVAL / / CITIZENSHIP _____

PASSPORT(S): Y/N DRIVER'S LIC.: Y/N STATE _____

MARITAL STATUS _____ DEPENDANTS? _____

B. ***BASS DETAILS***

PREVIOUS BASS INT.? Y/N DATE / / INTERVIEWER _____

TIME _____ DATE / / LOCATION _____ LANGUAGE _____

C. ***LEGAL***

CHARGE(S) _____

CO. DEFT? _____ VICTIM? _____

ARRESTED / / POLICE _____ STATION _____

WHY BAIL REFUSED _____

1ST ARREST: Y/N PRIOR ARRESTS _____

MATTERS PENDING: Y/N _____

WARRANTS? _____ FAIL TO APPEAR/ESCAPE? _____ BREACH? _____

PEPS STATUS: PSR/PROB/PAR/LIC/CSO/BASS-CURRENT/PREVIOUS _____

OFFICER _____ OFFICE _____ TEL. _____

LAWYER _____ TEL. _____

D. ***FAMILY CONTACT***

NAME _____ FREQUENCY _____

ADDRESS _____

RELATIONSHIP _____ TEL. _____

[a] This form is used in the South Australia Bail Assessment and Supervision Programme and was included in a paper presented to the conference "Bail or Remand?" held from 29 November to 1 December 1988 in Adelaide, Australia.

VERIFICATION

E. ***RESIDENCE*** Y/N

Rm./Flat No.

1. CURRENT ADDRESS _____

_____ POST CODE

_____ TEL. OR CONTACT TEL. No.

TYPE OF ACCOMM: Rm./Hostel/Hotel/Flat/House/B. House/Squat/Other

RENT _____ HOW LONG? _____ HOW LONG IN AREA _____

LIVES WITH _____ RELATIONSHIP _____

CAN RETURN Y/N _____

2. CONCURRENT ADDRESS _____

_____ TEL. _____

LIVES WITH _____ RELATIONSHIP _____

3. ALTERNATE ADDRESS _____

_____ TEL. _____

TO LIVE WITH _____ RELATIONSHIP _____

4. PRIOR ADDRESS (if relevant) _____

HOW LONG: _____ YEARS _____ MONTHS _____

F. ***EMPLOYMENT***

Employed/Unemp./Student/Sick/Disabled/Never Worked/Other _____

HOW LONG _____

EMPLOYER _____ CONTACT _____

ADDRESS _____ TEL. _____

POSITION _____ HOW LONG _____ HOURS _____

CAN RETURN: Y/N TAKE HOME PAY _____

PRIOR EMPLOYER _____

HOW LONG _____ CONTACT _____

VERIFICATION

G. ***FINANCES*** Y/N

Wage/Unem.Bens./Inv.P./Sickness/Other _____ Acct. _____

WEEKLY COMMITMENTS _____ Acct. _____

ASSETS _____ Approx. Val. _____

H. ***MEDICAL TREATMENT***

Physical/psychological/drug/alcohol/other _____

NAME (Dr. etc) _____

ADDRESS _____ TEL. _____

PREVIOUS TREATMENT? _____

DISABILITY/ILLNESS? _____

I. ***ADDITIONAL CONTACTS*** (For verification)

NAME _____ RELATIONSHIP _____

ADDRESS _____ TEL. _____

NAME _____ RELATIONSHIP _____

ADDRESS _____ TEL. _____

J. ***ACCEPTABLE PERSON***

NAME _____ RELATIONSHIP _____

ADDRESS _____ TEL. _____

KNOWN HOW LONG _____ CASH DEPOSIT AVAILABLE: Y/N $ _____

EMPLOYED _____ SOURCE OF INCOME _____

K. ***COMMENTS***

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