WHAT IS A FAIR TRIAL?

A Basic Guide to Legal Standards and Practice

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Lawyers Committee for Human Rights

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Lawyers Committee for Human Rights

Since 1978 the Lawyers Committee for Human Rights has worked to promote international human rights and refugee law and legal procedures in the United States and abroad. The Chairman of the Lawyers Committee is William Zabel. Michael H. Posner is its Executive Director. George Black is Research and Editorial Director.

This guide was originally prepared by Jelena Pejic in 1995. It was updated by Vanessa Lesnie in 1999.

Copies of this report are available from:

Lawyers Committee for Human Rights
333 Seventh Avenue, 13th floor
New York, NY 10001 USA
tel: (212) 845-5240
fax:(212) 845-5299
e-mail: comm@lchr.org

100 Maryland Avenue, NE
Suite 500
Washington, DC 20002 USA
tel: (202) 547-5692
fax:(202) 543-5999
e-mail: wdc@lchr.org

www.lchr.org
www.witness.org

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PREFACE

This guide deals with two separate but linked issues that the Lawyers Committee for Human Rights and other NGOs face in their trial monitoring activities. The first is the question of what are the basic legal standards that should be used in evaluating the fairness of a trial. The second is how a trial observation mission should be prepared and carried out in practice. Since trial observers may be—but often are not—litigation lawyers, this guide has been written and structured so as to provide brief yet clear guidelines on how to conduct a trial observation mission, in both substantive and practical terms. It does not deal with the additional issues that may arise when a trial takes place in a military tribunal.

The main purpose of this guide is to assist Lawyers Committee trial observers. We hope, however, that it will be of use to other NGOs engaged in trial monitoring, some of which have sought the assistance of the Lawyers Committee in this area. We would very much welcome any suggestions for improvements that NGOs and individuals with trial monitoring experience may wish to make.

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I. INTRODUCTION

The right to a fair trial is a norm of international human rights law designed to protect individuals from the unlawful and arbitrary curtailment or deprivation of other basic rights and freedoms, the most prominent of which are the right to life and liberty of the person. It is guaranteed under Article 14 of the International Covenant on Civil and Political Rights (ICCPR),[1] which provides that "everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law."

The fundamental importance of this right is illustrated not only by the extensive body of interpretation it has generated but, most recently, by a proposal to include it in the non-derogable rights provided for in Article 4(2) of the ICCPR.[2] The right to a fair trial is applicable to both the determination of an individual's rights and duties in a suit at law and with respect to the determination of any criminal charge against him or her. The term "suit at law" refers to various types of court proceedings—including administrative proceedings, for example—because the concept of a suit at law has been interpreted as hinging on the nature of the right involved rather than the status of one of the parties.[3] For the purposes of this guide only proceedings involving criminal charges will be considered since non-governmental organizations (NGOs) typically monitor criminal trials or, more precisely, criminal trials involving "political" offenses.[4]

Due to the specifics of each individual case and the interests of monitoring organizations, a detailed rendition of trial observation aims is not feasible. The key general goals may be summarized as follows:

- to make known to the court, the authorities of the country and to the general public the interest in and concern for the trial in question;
- to encourage a court to give the accused a fair trial. The impact of an observer's presence in a courtroom cannot be evaluated with mathematical precision. However, both observers and defense attorneys have pointed out that a monitor's

[1] International Covenant on Civil and Political Rights, UN General Assembly resolution 2200A (XXI), December 16, 1966, entered into force March 23, 1976 [hereinafter ICCPR].

[2] *See* Draft Third Optional Protocol to the ICCPR, Aiming at Guaranteeing Under All Circumstances the Right to a Fair Trial and a Remedy, Annex I, in: "The Administration of Justice and the Human Rights of Detainees, The Right to a Fair Trial: Current Recognition and Measures Necessary for Its Strengthening," Final Report, Commission on Human Rights, Sub-Commission on Prevention of Discrimination and Protection of Minorities, 46th Session, E/CN.4/Sub.2/1994/24, June 3, 1994 [hereinafter The Final Report], at 59-62. (http://www.unhchr.ch/Huridocda/Huridoca.nsf/TestFrame/d8925328e178f8748025673d00599b81?Opendocument).

[3] *See* Dominic McGoldrick, *The Human Rights Committee, Its Role in the Development of the International Covenant on Civil and Political Rights* (Clarendon Press, Oxford: 1994), at 415.

[4] There is, at present, no positive definition of what constitutes a "political offense" and therefore little guidance on which proceedings may be deemed "political" in nature. In this context it should be noted that trial observation is a very useful mechanism for the prevention of human rights abuses but one that, necessarily, depends on the willingness of a government to conduct a trial in the first place. As is well known, in many areas of the world individuals are still being arrested, imprisoned and executed without any trial at all.

presence often changes the atmosphere in the courtroom and facilitates defense by, *inter alia*, making the court more cognizant of the defense's arguments, encouraging defense counsel and the defendant to be more forceful in contesting the prosecution's claims, in attracting media attention to the trial, etc;

- to obtain more information about the conduct of the trial, the nature of the case against the accused and the legislation under which s/he is being tried; and
- to collect general background information about the political and legal circumstances leading to the trial and possibly affecting its outcome.[5]

In the broader sense, trial monitoring consists not only of an observer's physical presence in the courtroom during at least part of the proceedings but, just as importantly, of the duty promptly to prepare a report for the organization he or she represents, with conclusions on the fairness of the trial observed. The publicity which this report receives may serve in the short term to enhance a defendant's chances of having his/her case fairly reviewed on appeal. The lasting aim is to inform the government and the general public of possible irregularities in criminal procedure and to prompt action to bring practice into line with international human rights standards. The basic criteria according to which the fairness of a trial may be assessed is the first issue that will be dealt with in this review. The second is how a trial observation mission is typically carried out.

II. BASIC FAIR TRIAL CRITERIA

The standards against which a trial is to be assessed in terms of fairness are numerous, complex, and constantly evolving. They may constitute binding obligations that are included in human rights treaties to which the state is a party. But, they may also be found in documents which, though not formally binding, can be taken to express the direction in which the law is evolving.[6] In order to avoid possible challenges to the legal nature of the standards employed

[5] *See* International Commission of Jurists (ICJ), "Guidelines for ICJ Observers to Trials" (ICJ, Geneva: 1978).

[6] Non-binding documents of relevance to the conduct of criminal proceedings and to ascertaining fair trial standards include: the Basic Principles for the Treatment of Prisoners, UN General Assembly resolution 45/111, December 14, 1990 [hereinafter Basic Principles on Prisoners]; Standard Minimum Rules for the Treatment of Prisoners, UN Economic and Social Council resolution 663 C (XXIV), July 31, 1957 and resolution 2076 (LXII), May 13, 1977 [hereinafter Standard Minimum Rules]; Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, UN General Assembly resolution 43/173, December 9, 1988 [hereinafter Body of Principles]; Basic Principles on the Role of Lawyers, adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, August 27-September 7, 1990 [hereinafter Basic Principles on Lawyers]; Basic Principles on the Independence of the Judiciary, UN General Assembly resolution 40/32, November 29, 1985 and resolution 40/146, December 13, 1985 [hereinafter Basic Principles on the Judiciary]; UN Standard Minimum Rules for the Administration of Juvenile Justice, UN General Assembly resolution 40/33, November 29, 1985; Code of Conduct for Law Enforcement Officials, UN General Assembly resolution 34/169, December 17, 1979; Guidelines on the Role of Prosecutors, adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, August 27-September 7, 1990; Principles on the Effective Prevention and Investigation of Extralegal, Arbitrary and Summary Executions, UN Economic and Social Council recommended resolution 1989/65, May 24, 1989; Basic Principles on the Use of Force and Firearms by Law Enforcement Officials, adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, August 27-September 7, 1990; UN Rules for the Protection of Juveniles Deprived of Their Liberty, UN General Assembly

in evaluating the fairness of a trial, monitors should refer to norms of undisputedly legal origin. These are:

(i) the laws of the country in which the trial is being held;
(ii) the human rights treaties to which that country is a party, and
(iii) norms of customary international law.[7]

Before observing a trial, a monitor should read relevant materials pertaining to domestic legislation. Due to the various legal systems and legal orders involved, as well as the differing stages of their development, it is not possible to devise a comprehensive list of essential texts. A minimum list would comprise: i) a state's Constitution, especially its provisions on human rights and the judicial system; ii) its Criminal Code and Code of Criminal Procedure; statutes on the establishment and jurisdiction of the courts and on the public prosecutor's office, and iii) landmark court decisions pertaining to human rights, particularly in common law countries. The aim of an observer at this level of examination is to assess whether the applicable provisions of domestic law guaranteeing a fair trial have been implemented and, if so, to what extent. It is well known that while constitutions and statutes generally provide for some measure of fairness in criminal proceedings, implementation by the courts is often not adequate.

Before undertaking a trial observation mission, a monitor should find out to which human rights treaties the respective state is a party. The most important of these is the ICCPR, which contains several relevant articles in assessing the fairness of a trial.[8]

resolution 45/113, December 14, 1990; etc. Also relevant is the Draft Body of Principles on the Right to a Fair Trial and a Remedy, Annex II, in The Final Report, *supra* note 1. For trial observation in OSCE countries the human rights provisions of the final documents from review conferences would also be important as a source of standards (see www.osce.org). See the Appendix to this report: "Note on Sources" for hints on how to find these documents.

[7] The provisions of the Universal Declaration of Human Rights, (UN General Assembly resolution 217A (III), December 10, 1948 [hereinafter UDHR]), are for the most part considered declarative of customary international law and may be of paramount importance if a state has not ratified or acceded to the ICCPR, the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, (UN General Assembly resolution 39/46, December 10, 1984, entered into force June 26, 1987 [hereinafter Torture Convention]), or any regional human rights instrument. The most directly relevant articles of the UDHR are 5, 9, 10 and 11. As customary international law will most probably be used as a supplementary source of a state's obligations in ensuring the right to a fair trial, it will not be further considered.

[8] The web site of the UN High Commissioner for Human Rights has a list of those nations that have ratified the ICCPR at http://www.un.org/Depts/Treaty/final/ts2/newfiles/part_boo/iv_boo/iv_4.html. Depending on the regional human rights instrument(s) that a state is bound by, the corresponding provisions of such treaties should be taken into account as well. For European states the most important instrument would be the European Convention for the Protection of Human Rights and Fundamental Freedoms, November 5, 1950 [hereinafter European Convention] (http://www.coe.fr/eng/legaltxt/5e.htm). For Latin and North American states it would be the American Convention on Human Rights, November 22, 1969 [hereinafter American Convention] (http://www.cidh.oas.org/Básicos/Basic%20Documents/enbas3.htm), while for the African states it would be the African Charter on Human and People's Rights, adopted June 27, 1981, entered into force October 21, 1986 [hereinafter African Charter] (http://www.oau-oua.org/oau_info/rights.htm).

The right to a fair trial on a criminal charge is considered to start running not "only upon the formal lodging of a charge but rather on the date on which State activities substantially affect the situation of the person concerned."[9] This could obviously coincide with the moment of arrest, depending on the circumstances of the case. Fair trial guarantees must be observed from the moment the investigation against the accused commences until the criminal proceedings, including any appeal, have been completed. The distinction between pre-trial procedures, the actual trial and post trial procedures is sometimes blurred in fact, and the violation of rights during one stage may well have an effect on another stage. However the most relevant articles of the ICCPR can be loosely divided into those three categories and the separation is sometimes helpful for the purposes of identifying which issues will be of particular interest during different time periods of the trial process.

A. PRE-TRIAL RIGHTS

1. The prohibition on arbitrary arrest and detention

Article 9(1) of the ICCPR[10] provides that "everyone has the right to liberty and security of person." The liberty of a person has been interpreted narrowly, to mean freedom of bodily movement, which is interfered with when an individual is confined to a specific space such as a prison or a detention facility.[11] Security has been taken to mean the right to be free from interference with personal integrity by private persons. Under Article 9(1) "No one shall be subjected to arbitrary arrest or detention" and "No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law." The principle of legality embodied in the latter sentence both substantively ("on such grounds") and procedurally ("in accordance with such procedure") mandates that the term "law" should be understood as referring to an abstract norm, applicable and accessible to all, whether laid down in a statute or forming part of the unwritten, common law. The prohibition of arbitrariness mentioned in the previous sentence serves to ensure that the law itself is not arbitrary, i.e. that the deprivation of liberty permitted by law is not "manifestly unproportional, unjust or unpredictable, and [that] the specific manner in which an arrest is made must not be discriminatory and must be able to be deemed appropriate and proportional in view of the circumstances of the case."[12]

[9] Manfred Nowak, *U.N. Covenant on Civil and Political Rights, CCPR Commentary* (N.P. Engel, Arlington: 1993) [hereinafter Nowak Commentary], at 244.

[10] *See also* European Convention, *supra* note 8, Article 5(1); African Charter, *supra* note 8, Article 6; American Convention, *supra* note 8, Article 7(1)-(3); and Statute of the International Criminal Court [hereinafter ICC Statute], Article 55(1)(d). The ICC Statute establishes a permanent institution for the purposes of trying persons for the most serious international crimes (including genocide, crimes against humanity and war crimes) where a national legal system has failed to do so. The Statute was approved on July 17, 1998 but will not come into force until 60 nations have ratified. As of February 16, 2000, 94 countries had signed the Statute but only seven countries had ratified it.

[11] The ensuing interpretation of the ICCPR is primarily based on the Nowak Commentary, *supra* note 9.

[12] Nowak Commentary, *supra* note 9, at 173.

2. The right to know the reasons for arrest

Article 9(2) of the ICCPR[13] provides that "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." These provisions have been interpreted to mean that anyone who is arrested must be informed of the general reasons for the arrest "at the time of arrest," while subsequent information, to be furnished "promptly," must contain accusations in the legal sense.[14] However there must be sufficient information to permit the accused to challenge the legality of his or her detention.[15] A written arrest warrant is not unconditionally required, but the lack of a warrant may, in some cases, give rise to a claim of arbitrary arrest.

The reasons for arrest, and the explanation of any other rights (for example, the right to legal counsel), must be given in a language that the person arrested understands.[16] Accordingly, the accused has a right to a competent interpreter in the event that he or she does not understand the local language.[17] This right extends to all pre-trial proceedings.[18]

3. The right to legal counsel

The right to be provided and communicate with counsel is the most scrutinized specific fair trial guarantee in trial observation practice, because it has been demonstrated to be the one that is most often violated. Principle 1 of the Basic Principles on Lawyers states that "[a]ll persons are entitled to call upon the assistance of a lawyer of their choice to protect and establish their rights and to defend them in all stages of criminal proceedings." This right is particularly relevant in case of pre-trial detention[19] and is discussed in that context in this section. However the right to counsel is also an important element of the right to adequate

[13] *See also* European Convention, *supra* note 8, Article 5(2); American Convention, *supra* note 8, Article 7(4); Body of Principles, *supra* note 6, Principle 10; 1992 Resolution on the Right to Recourse Procedure and Fair Trial of the African Commission on Human and Peoples' Rights [hereinafter African Commission Resolution], Paragraph 2(B) (http: //www1.umn.edu/humanrts/africa/achpr11resrecourse.html).

[14] *See infra* notes 73-76 and accompanying text.

[15] For example, the European Court of Human Rights has held that Article 5(2) of the European Convention means an arrested person should "be told, in simple, non-technical language that he can understand, the essential legal and factual grounds for his arrest, so as to be able, if he sees fit, to apply to a court to challenge its lawfulness…." However, the Court also held that it was not necessary to give a full description of the charges at the moment of arrest (*Fox, Campbell and Hartley* (18/1989/178/234-236), August 30, 1990, para 40).

[16] European Convention, *supra* note 8, Article 5(2); Human Rights Committee General Comment No. 13/21 of April 12, 1984 [hereinafter General Comment 13], para 8; African Commission Resolution, *supra* note 13, Paragraph 2(B); Body of Principles, *supra* note 6, Principle 14; and ICC Statute, *supra* note 10, Article 67(1)(a).

[17] Principle 14 of the Body of Principles sets out the right to an interpreter in all legal proceedings subsequent to arrest. Article 67(1)(f) of the ICC Statute guarantees the right to a "competent" interpreter.

[18] Body of Principles, *supra* note 6, Principle 14.

[19] The Human Rights Committee has stated that "all persons who are arrested must immediately have access to counsel." (Concluding Observations of the Human Rights Committee, Georgia, UN Doc. CCPR/C/79 Add.75, April 1, 1997 para 27) [hereinafter Concluding Observations of the HRC]. *See also* the Report of the Special Rapporteur on the Independence of Judges and Lawyers regarding the Mission of the Special Rapporteur to the United Kingdom, UN Doc E/CN.4/1998/39/Add.4, March 5, 1998, para 47.

facilities for the preparation of a defense[20] and the right to a defense which will be discussed later in this paper.[21]

Principle 5 of the Basic Principles on Lawyers and Principle 17 of the Body of Principles specifically provide that when a person is arrested, charged or detained he or she must be promptly informed of the right to legal assistance of his or her choice. Article 7 of the Basic Principles on Lawyers requires governments to ensure that all persons arrested or detained should have access to a lawyer within 48 hours from arrest or detention.[22] An individual's right to choose counsel thus begins to run when a suspect or accused is first taken into custody, regardless of whether s/he is formally charged at that moment. Furthermore, if the accused cannot afford his or her own counsel, the relevant authorities must provide a lawyer free of charge if the interests of justice so require.[23] Whether or not the interests of justice require such an appointment depends primarily on the seriousness of the offence and the severity of the potential penalty.[24]

Principle 8 of the Basic Principles on Lawyers requires the authorities to ensure that all arrested, detained or imprisoned persons have adequate opportunities to be visited by and to communicate with their lawyer without delay, interception or censorship, in full confidentiality. When the lawyer and his or her client meet they may be in sight of a law enforcement official, but cannot be within hearing range.[25]

4. *The right to a prompt appearance before a judge to challenge the lawfulness of arrest and detention*

Article 9(3)[26] refers specifically to the rights of a person arrested or detained on a criminal charge, who "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." Promptness has been interpreted by the Human Rights Committee (HRC) to mean

[20] General Comment 13, *supra* note 16, para 9.

[21] *See infra* notes 77-80, 83-89 and accompanying text.

[22] Compare Principle 15 of the Body of Principles, which states that a detainee must be able to communicate with counsel within "a matter of days," with the Human Rights Committee's statement that "all persons who are arrested must immediately have access to counsel." Concluding Observations of the HRC, *supra* note 19.

[23] Principles on the Role of Lawyers, *supra* note 6, Principle 6; Body of Principles, *supra* note 6, Principle 17(2); ICC Statute, *supra* note 10, Article 55(2)(c).

[24] For further the discussion on the right to counsel during the hearing see *infra* notes 83-89 and accompanying text.

[25] *See* Principles on the Role of Lawyers, *supra* note 6, Principle 22 ("Governments shall recognize and respect that all communications and consultations between lawyers and their clients within their professional relationships are confidential;" and Body of Principles, *supra* note 6, Principles 15 and 18.

[26] *See also* European Convention, *supra* note 8, Article 5(3); American Convention, *supra* note 8, Article 7(5); African Commission Resolution, *supra* note 13, Paragraph 2(C); and ICC Statute, *supra* note 10, Article 59(2)-(3). See further Body of Principles, *supra* note 6, Principles 11, 38 and 39; and Declaration on the Protection of all Persons from Enforced Disappearance, UN General Assembly resolution 47/133, December 18, 1992, Article 10(1).

that the period of custody, before an individual is brought before a judge or other officer, may not exceed "a few days."[27]

Article 9(3) makes it clear that pre-trial detention "shall not be the general rule" and implicitly provides a detainee with a legitimate claim to release in exchange for bail or some other guarantee of appearance at the trial.[28] Furthermore, Article 9(3) states that if a trial does not occur within a reasonable period of time then the accused must be released from pre-trial detention pending trial.[29] The period of time that is considered to be "reasonable" depends on the circumstances of the case. The relevant factors include the risk of flight, the complexity of the case, the nature of the offence and the diligence of the investigating and prosecutorial authorities in pursuing the case.[30]

Without expressly mentioning it, Article 9(4)[31] provides for the right to habeas corpus, or *amparo*, that is, the right of anyone deprived of liberty by arrest or detention 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." In this context it should be noted:

i) that the term "court" signifies not only a regular court, but a special court, including an administrative, constitutional or military court as well;[32]

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[27] Human Rights Committee, General Comment No. 8, July 27, 1982, [hereinafter General Comment 8], para 2. The European Court has held that to hold a person for four days and six hours violates article 5(3) of the European Convention (*Brogan et al v United Kingdom*, 10/1987/133/184-187, November 29, 1988, para 62). The Inter-American Commission has held that a week is too long (Inter-American Commission Seventh Report on the Situation on Human Rights in Cuba, 1983 OEA Ser L/V/11 61.doc 29 rev 1, at 41).

[28] In General Comment 8, *supra* note 27, para 3, the UN Human Rights Committee stated that "[p]re trial detention should be an exception and as short as possible." Furthermore, in the case of *Van Alphen v The Netherlands*, the Human Rights Committee stated that "remand in custody must not only be lawful but necessary in all the circumstances…for example, to prevent light, interference with evidence or the recurrence of crime." Detention for the sole purpose of further interrogation is not justifiable. (Communication 305/1988, 23 July 1990, 1990 Report of the Human Rights Committee Vol. II, UN Doc. A/45/40, at 115).

[29] *See also* European Convention, *supra* note 8, Article 5(3); American Convention, *supra* note 8, Article 7(5); African Commission Resolution, *supra* note 13, Paragraph 2(C); ICC Statute, *supra* note 10, Article 60(4); and Body of Principles, *supra* note 6, Principle 38.

[30] The European Court has held that the authorities must exercise "special diligence" in the conduct of proceedings when the accused is in pre-trial detention (see *Tomasi v France*, 27/1991/279/350, 25 June 1992, para 84; *Abdoella v the Netherlands*, 1/1992/346/419, 28 October 1992, para 24).

[31] *See also* European Convention, *supra* note 8, Article 5(4); African Charter, *supra* note 8, Article 7(1)(a); American Convention, *supra* note 8, Article 7(6); and Body of Principles, *supra* note 6, Principle 32.

[32] Note that review by a superior military officer, government official or advisory panel would be insufficient. Regarding superior military officers, see *Vuolanne v Finland* (Communication 265/1987, 7 April 1989, 1989 Report of the Human Rights Committee, UN Doc.A/44/40, at 265-257) stating that review of detention of a soldier by a superior military officer does not satisfy Article 9(4). As to government officials, see the Human Rights Committee in *Torres v Finland* (Communication 291/1988, 2 April 1990, 1990 Report of the Human Rights Committee, Vol II, UN Doc.A/45/40, at 99-100), which states that the opportunity of an asylum-seeker to appeal to the Ministry of the Interior does not satisfy Article 9(4) of the ICCPR. Regarding advisory panels, see the European Court in *Chahal v United Kingdom* (70/1995/576/662, 15 November 1996, paras 130-133) which decided that an advisory panel which did not disclose its reasons for decision, had no binding decision-making power and which did not permit legal representation did not satisfy Article 5(4) of the European Convention.

ii) that the court's decision pertains only to the lawfulness of detention, and
iii) that what constitutes "delay" must be assessed with regard to the circumstances of the case.

The habeas corpus procedures must be simple, speedy and free of charge if the detainee cannot afford to pay.[33] The detainee also has the right to continuing review of the lawfulness of detention at reasonable intervals.[34]

Lastly, Article 9(5)[35] provides that "[a]nyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation." Such a claim arises when the arrest or detention has contravened the provisions of Article 9(1) to (4) and/or a provision of domestic law. The way in which a claim for compensation is to be implemented is not, however, explicitly spelled out, but is generally considered to refer to an individual's right to bring a civil law suit either against the state or the particular body or person responsible for the wrongful conduct.

5. The prohibition of torture and the right to humane conditions during pre-trial detention

Article 7 of the ICCPR prohibits torture—or cruel, inhuman or degrading treatment or punishment—and is a norm of customary international law that also belongs to the category of *jus cogens*. The definition of and protection against torture was elaborated in the 1984 Convention against Torture:

> Art 1(1): … the term "torture" means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.

The definition of torture, which is prohibited by the ICC Statute as a crime against humanity when committed on a widespread or systematic basis, is slightly broader in that Statute than in the Torture Convention. Unlike the Torture Convention, the ICC Statute definition includes acts committed independently of any public official (i.e. by private individuals with private motives).[36]

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[33] Body of Principles, *supra* note 6, Principle 32(2).

[34] *Id*., Principles 11(3), 32 and 39.

[35] *See also* European Convention, *supra* note 8, Article 5(5); American Convention, *supra* note 8, Article 25; and African Charter, *supra* note 8, Article 7(1)(a).

[36] Article 7(2)(e) of the ICC Statute defines torture as "the intentional infliction of severe pain or suffering, whether physical or mental, upon a person in the custody or under the control of the accused; except that torture

Under Article 2(2) of the Torture Convention 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.[37] States parties are obliged to take effective legislative, administrative, judicial and other measures to prevent acts of torture in any territory under their jurisdiction [Article 2(1)]. Furthermore, according to Article 2(3), superior orders may not be invoked as a justification of torture.

Article 10 of the ICCPR provides in paragraph 1 that "All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person."[38] It should be stressed that, unlike the prohibition against torture in Article 7 of the ICCPR, which demands non-interference on the part of state authorities, the right to humane treatment imposes a positive obligation on states. This obligation is intended to ensure the observance of minimum standards with regard to conditions of detention and the exercise of a detainee's rights while deprived of liberty. The line between Articles 7 and 10 is, admittedly, sometimes hard to draw, as evidenced by the case law of the HRC.

In general, it may be said that inhuman treatment as referred to in Article 10 pertains to a "lower intensity of disregard for human dignity than that within the meaning of Article 7."[39] While the prohibition of torture and other cruel, inhuman or degrading treatment or punishment covers specific attacks on personal integrity[40] and applies to all persons, whether in any form of detention or not, Article 10 relates more to the general state of a detention facility and/or the conditions of detention and is meant to encompass only the treatment of persons actually deprived of liberty. According to the HRC, States cannot invoke a lack of adequate material resources or financial difficulties as justification for inhuman treatment and are obliged to provide detainees and prisoners with services that will satisfy their essential needs.[41] For instance, detainees have a right to food,[42] to clothing,[43] to adequate medical attention[44] and to communicate with their families.[45]

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shall not include pain or suffering arising only from, inherent in or incidental to, lawful sanctions."

[37] *See also* Body of Principles, *supra* note 6, Principle 6: "No person under any form of detention or imprisonment shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. No circumstance whatever may be invoked as a justification for torture or other cruel, inhuman or degrading treatment or punishment." See further Code of Conduct for Law Enforcement Officials, *supra* note 6, Article 5: "No law enforcement official may inflict, instigate or tolerate any act of torture or other cruel, inhuman or degrading treatment or punishment, nor may any law enforcement official invoke superior orders or exceptional circumstances such as a state of war or a threat of war, a threat to national security, internal political instability or any other public emergency as a justification of torture or other cruel, inhuman or degrading treatment or punishment."

[38] *See also* American Convention, *supra* note 8, Article 5; African Charter, *supra* note 8, Articles 4-5; Basic Principles for the Treatment of Prisoners, *supra* note 6, Principle 1; and Body of Principles, *supra* note 6, Principle 1.

[39] Nowak Commentary, *supra* note 9, at 186.

[40] This would include, for example, acts that cause mental suffering. It would also include prolonged solitary confinement. *See* Human Rights Committee General Comment 20, (Forty-fourth session, 1992), [hereinafter General Comment 20], paras 5 and 6 respectively.

[41] *See* Human Rights Committee, General Comment No. 9/16, July 27, 1982.

[42] Standard Minimum Rules for the Treatment of Prisoners, *supra* note 6, Rules 20 and 87.

Generally, the Standard Minimum Rules,[46] Basic Principles on Prisoners and Body of Principles are important reference tools regarding the rights of prisoners.[47]

6. The prohibition on incommunicado detention

The HRC has found that incommunicado detention may violate Article 7 of the ICCPR which prohibits torture, inhuman, cruel and degrading treatment.[48] Principle 19 of the Body of Principles states that a "detained or imprisoned person shall have the right to be visited by and to correspond with, in particular, members of his family and shall be given adequate opportunity to communicate with the outside world, subject to reasonable conditions and restrictions as specified by law or lawful regulations." At a minimum, the right to communicate with the "the outside world" includes the right to communicate with a detainee's family, a lawyer and a doctor.

Principle 16 of the Body of Principles requires that the family of any arrested or detained person must be notified promptly of the arrest and the location of their family member. If the detainee is moved to another facility the family must be notified of that change.[49] A detainee cannot be denied the right to communicate with his family and counsel "for more than a matter of days."[50] Furthermore, where the detainee is in pre-trial detention he or she is entitled to visits by family and friends, subject only to restrictions "*necessary* in the interests of the administration of justice and of the security and good order of the institution."[51]

Regarding access to lawyers, see section II.A.3. of this report, which discusses access to legal counsel. With respect to doctors, HRC General Comment 20, the Body of Principles

[43] *Id*., Rules 17, 18, and 88; Body of Principles, *supra* note 6, Principles 15-16.

[44] Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, *supra* note 6, Principle 24; Standard Minimum Rules for the Treatment of Prisoners, *supra* note 6, Rules 22-25, 91; and Code of Conduct for Law Enforcement Officials, *supra* note 6, Article 6 (imposing a duty on officials to ensure the health of prisoners).

[45] See further *infra* notes 73-76 and accompanying text.

[46] See especially Rules 84-93 and 95 regarding persons under arrest, awaiting trial and detained without charge. Standard Minimum Rules, *supra* note 6.

[47] All of these documents can be found on the web site of the UN High Commissioner for Human Rights at http://www.unhchr.ch/html/intlinst.htm. See further the Appendix to this report, "Note on Sources."

[48] *See e.g*., Human Rights Commission Resolution 1997/38 para 20 holding that "prolonged incommunicado detention may facilitate the perpetration of torture and can in itself constitute a form of cruel, inhuman or degrading treatment." See further, the Report of the Special Rapporteur on Torture, UN Doc E/CN.4/1995/34, para 926(d) and findings of the Inter-American Commission (Report on the Situation of Human Rights in Bolivia, OEA/Ser.L/V/II.53, doc rev.2, 1 July 1981 at 41-42) and Inter American Court (*Suavez Rosero Case*, Ecuador, 12 November 1997).

[49] *See also* Standard Minimum Rules, *supra* note 6, Rule 92.

[50] Body of Principles, *supra* note 6, Principle 15.

[51] Standard Minimum Rules, *supra* note 6, Rule 92 (emphasis added).

and the Standard Minimum Rules all state that detainees must be provided prompt and regular access to medical care.[52]

Finally, if the detainee is a foreign national, he or she must be permitted to communicate with, and receive visits from, representatives of their government.[53]

B. THE HEARING

Article 14 of the ICCPR is undoubtedly the most pertinent to this review. It specifically provides for equality before the courts and for the right to a fair and public hearing by a competent, independent and impartial tribunal established by law, regardless of whether a criminal trial or a suit at law is involved (paragraph 1). The remainder of its provisions—paragraphs 2 to 7—contain a catalogue of "minimum [procedural] guarantees" belonging to an individual in the determination of any criminal charge against him/her. The following section elaborates the meaning of the rights set out in Article 14 in the order in which they arise.

1. Equal access to, and equality before, the courts

The first sentence of Article 14(1) provides that "All persons shall be equal before the courts and tribunals" and has been interpreted to signify that all persons must be granted, without discrimination, the right of equal access to a court. This, on the one hand, means that establishing separate courts for different groups of people based on their race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status would be a contravention of Article 14(1). On the other hand, the establishment of certain types of special courts with jurisdiction over all persons belonging to the same category, such as military personnel, remains a thorny issue. According to the HRC, this practice is not prohibited under Article 14(1) as long as the procedural guarantees set forth in it are observed; in addition, the HRC has not ruled across the board that military courts may never try civilians. At the same time however, there is an increasingly widespread view that the trials of civilians by military courts lack legitimacy. This interpretation, endorsed by many human rights NGOs, is also supported by the provisions of the Basic Principles on the Independence of the Judiciary. Paragraph 5 of the Basic Principles provides that "Everyone shall have the right to be tried by *ordinary courts or tribunals* using established legal procedures."[emphasis added][54]

The second sentence of Article 14(1) relates to the right to a fair and public hearing by a competent, independent and impartial tribunal established by law. It includes the basic

[52] *See* General Comment 20, *supra* note 1, para 11; Body of Principles, *supra* note 6, Principle 24; Standard Minimum Rules, *supra* note 6, Rule 24.

[53] Vienna Convention on Consular Relations, April 24, 1963, Article 36; Body of Principles, *supra* note 6, Rule 16(2); Standard Minimum Rules, *supra* note 6, Rule 38.

[54] This provision raises the question of the validity of a hearing by a military tribunal. The Human Rights Committee has raised serious questions about the validity of such tribunals. *See* General Comment 13, *supra* note 16, para 4. A detailed analysis of this issue is outside the scope of this paper.

components of due process of law which is, in criminal cases, further supplemented by the other provisions of Articles 14 and 15.[55]

2. The right to a fair hearing

The right to a fair hearing as provided for in Article 14(1) of the ICCPR encompasses the procedural and other guarantees laid down in paragraphs 2 to 7 of Article 14 and Article 15.[56] However, it is wider in scope, as can be deduced from the wording of Article 14(3) which refers to the concrete rights enumerated as "minimum guarantees." Therefore, it is important to note that despite having fulfilled all the main procedural guarantees laid out in paragraphs 2-7 of Article 14 and the provisions of Article 15, a trial may still not meet the fairness standard envisaged in Article 14(1).

The single most important criterion in evaluating the fairness of a trial is the observance of the principle of equality of arms between the defense and the prosecution. (The specific procedural rights constituting "minimum guarantees" of a fair trial will be mentioned later.) Equality of arms, which must be observed throughout the trial, means that both parties are treated in a manner ensuring their procedurally equal position during the course of a trial. It would be difficult to identify in advance all of the situations that could constitute violations of this principle. They might range from denying the accused and/or counsel time to prepare a defense to excluding the accused and/or counsel from an appellate hearing when the prosecutor is present.

3. The right to a public hearing

Article 14(1) of the ICCPR[57] also guarantees the right to a public hearing, as one of the essential elements of the concept of a fair trial. However, it also permits several exceptions to this general rule under specified circumstances. The publicity of a trial includes both the public nature of the hearings—not, it should be stressed, of other stages in the proceedings—and the publicity of the judgement eventually rendered in a case. It is a right belonging to the parties, but also to the general public in a democratic society.

The right to a public hearing means that the hearing should as a rule be conducted orally and publicly, without a specific request by the parties to that effect. The court or tribunal is, *inter alia*, obliged to make information about the time and venue of the public hearing available and to provide adequate facilities for attendance by interested members of the public, within reasonable limits. The public, including the press, may be excluded from all or

[55] For an explanation of Article 15, see *infra* notes 102-104 and accompanying text.

[56] *See also* European Convention, *supra* note 8, Article 6(1); American Convention, *supra* note 8, Article 8; and ICC Statute, *supra* note 10, Article 67(1).

[57] *See also* European Convention, *supra* note 8, Article 6(1); and American Convention, *supra* note 8, Article 8(5).

part of a trial for the reasons specified in Article 14(1), but such an exclusion must be based on a decision of the court rendered in keeping with the respective rules of procedure.

The public may be excluded for reasons of "morals, public order (*ordre public*) or national security in a democratic society, or when the interest of the private lives of the parties so requires." The public may also be excluded "to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice." Moral grounds for the exclusion of the public are usually asserted in cases involving sexual offences. The term "public order" in this specific context has been interpreted to relate primarily to order within the courtroom, while reasons of national security may be advanced so as to preserve military secrets. In both the latter cases, however, the restriction applied must correspond to the principles observed *in a democratic society*, [emphasis added], a qualification that seeks to prevent arbitrariness in decisions to close trials. The private lives of the parties has been interpreted to denote family, parental and other relations, such as guardianship, which could be prejudiced in public proceedings. Lastly, the public may be barred from a trial in the interests of justice, but only in special circumstances and to the extent strictly necessary in the opinion of the court. Emotional outburst(s) by the spectators of a trial has been cited as an example of when this provision could come into play.

While the number of instances that could merit the closing of a trial are fairly broad, this is not the case when the pronouncement of a judgement is involved.[58] Under Article 14(1) judgements "shall be made public" except where the interest of juvenile persons otherwise requires or where the proceedings concern matrimonial disputes of the guardianship of children. The possible exceptions from publicity are thus defined more narrowly and precisely. A judgement is considered to have been made public either when it was orally pronounced in court or when it was published, or when it was made public by a combination of those methods. In any event, its accessibility to all is the determining factor. The judgment must provide reasons sufficient to permit the accused to lodge an appeal,[59] and must be delivered within a reasonable time of the hearing.[60]

4. The right to a competent, independent and impartial tribunal established by law

The basic institutional framework enabling the enjoyment of the right to a fair trial is that proceedings in any criminal case (or in a suit at law) are to be conducted by a competent, independent and impartial tribunal established by law [Article 14(1)].[61] The rationale of this provision is to avoid the arbitrariness and/or bias that would potentially arise if criminal

[58] This includes the delivery of judgments of military courts and courts of appeal. *See* General Comment 13, *supra* note 16, para 4.

[59] The Human Rights Committee held that a Jamaican court violated Article 14(1) by failing to issue a reasoned written judgment (*Hamilton v Jamaica* (377/1989), 29 March 1996, Report of the HRC, vol. II (A/49/40), 1994 at 73.

[60] See *Curne v Jamaica* (377/1989), 29 March 1994, Report of the HRC, vol. II (A/49/40), 1994 at 73.

[61] *See also* European Convention, *supra* note 8, Article 6(1); American Convention, *supra* note 8, Articles 8(1) and 27(2); and African Charter, *supra* note 8, Articles 7(1) and 26.

charges were to be decided on by a political body or an administrative agency. A tribunal should be competent and established by law. Both of these attributes are in fact aspects of the same requirement: while competence refers to the appropriate personal, subject-matter, territorial or temporal jurisdiction of a court in a given case, the court as such, including the delineation of its competence, must have been established by law. The term "law" denotes legislation passed by the habitual law-making body empowered to enact statutes or an unwritten norm of common law, depending on the legal system. In either case the important feature is that the law must be accessible to all who are subject to it. The general aim of this provision is to assure that criminal charges are heard by a court set up in advance and independently of a particular case—and not prior to and specifically for the offense involved. In order to be independent, a tribunal must have been established by law to perform adjudicative functions, i.e. to determine matters within its competence on the basis of rules of law (substantive) and in accordance with proceedings conducted in a prescribed manner (procedural).[62]

Independence presupposes a separation of powers in which the judiciary is institutionally protected from undue influence by, or interference from, the executive branch and, to a lesser degree, from the legislative branch. The Basic Principles on the Judiciary set out in some detail the need for and mechanisms necessary to achieve that independence. Some of the practical safeguards of independence include the specification of qualifications necessary for judicial appointment, the terms of appointment, [63] the need for guaranteed tenure,[64] the requirement of efficient, fair and independent disciplinary proceedings regarding judges,[65] and the duty of every State to provide adequate resources to enable the judiciary to properly perform its functions[66] (for example adequate salaries[67] and training[68]). Depending on the circumstances of a case, a court's independence may also be assessed on the basis of its relationship with prominent social groups such as political parties, the media and various lobbies.

While independence primarily rests on mechanisms aimed at ensuring a court's position externally, impartiality refers to its conduct of, and bearing on, the final outcome of a specific case. Bias (or a lack thereof) is the overriding criterion for ascertaining a court's impartiality. It can, thus, be *prima facie* called into question when a judge has taken part in the proceedings in some prior capacity, or when s/he is related to the parties, or when s/he has a personal stake in the proceedings. It is also open to suspicion when the judge has an evidently preformed opinion that could weigh in on the decision-making or when there are other reasons giving rise to concern about his/her impartiality.

[62] The Final Report, *supra* note 2, at 67.

[63] Basic Principles on the Independence of the Judiciary, *supra* note 6, Principle 10.

[64] *Id*., Principle 12.

[65] *Id*., Principles 17-20.

[66] *Id*., Principle 7.

[67] *Id*., Principle 11.

[68] *Id*., Principle 10.

5. The right to a presumption of innocence

According to Article 14(2) of the ICCPR "Everyone charged with a criminal offense shall have the right to be presumed innocent until proved guilty according to law."[69] As a basic component of the right to a fair trial, the presumption of innocence, *inter alia*, means that the burden of proof in a criminal trial lies on the prosecution and that the accused has the benefit of the doubt.[70] Despite the fact that Article 14(2) does not specify the standard of proof required, it is generally accepted that guilt must be proved "to the intimate conviction of the trier of fact or beyond a reasonable doubt, whichever standard of proof provides the greatest protection for the presumption of innocence under national law."[71] The presumption of innocence must, in addition, be maintained not only during a criminal trial *vis á vis* the defendant, but also in relation to a suspect or accused throughout the pre-trial phase. It is the duty of both the officials involved in a case as well as all public authorities to maintain the presumption of innocence by "refrain[ing] from prejudging the outcome of a trial."[72] It may also be necessary to pay attention to the appearance of an accused during a trial in order to maintain the presumption of innocence, for instance, it may be prejudicial to require the accused to wear handcuffs, shackles or a prison uniform in the courtroom.

6. The right to prompt notice of the nature and cause of criminal charges

In the determination of any criminal charge against him/her everyone shall be entitled, in full equality "to be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him."[73] This duty to inform relates to an exact legal description of the offense ("nature") and of the facts underlying it ("cause") and is thus broader than the corresponding rights granted under Article 9(2) of the ICCPR applicable to arrest.[74] The rationale is that the information provided must be sufficient to allow the preparation of a defense.

When information may be deemed to have been "promptly" supplied, has not been uniformly interpreted, but has generally been taken to coincide with the "lodging of the charge or directly thereafter, with the opening of the preliminary judicial investigation or with the setting of some other hearing that gives rise to clear official suspicion against a specific person."[75] The information must also be provided to the accused in a language which s/he understands, meaning that translation is mandated and that its form, oral or written, will depend on the manner in which the "charge" is initially conveyed. An indictment must, obviously, be translated in writing.[76]

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[69] *See also* European Convention, *supra* note 8, Article 6(2); American Convention, *supra* note 8, Article 8(2); African Charter, *supra* note 8, Article 7(1)(b); and ICC Statute, *supra* note 10, Article 66(1).

[70] *See e.g.*, ICC Statute, *supra* note 10, Article 66.

[71] The Final Report, *supra* note 2, at 76. *See also* General Comment 13, *supra* note 16, para 7; ICC Statute, *supra* note 10, Article 66.

[72] General Comment 13, *supra* note 16, para 7.

[73] ICCPR, *supra* note 1, Article 14(3)(a).

[74] See *supra* notes 13-15 and accompanying text.

[75] Nowak Commentary, *supra* note 9, at 255.

[76] *See supra* notes 16-18 and accompanying text on the right to an interpreter.

7. The right to adequate time and facilities for the preparation of a defense

Article 14(3)(b) of the ICCPR provides that in the determination of any criminal charge against him or her everyone is entitled "To have adequate time and facilities for the preparation of his defense and to communicate with counsel of his own choosing."[77] The right to adequate time and facilities for the preparation of a defense applies not only to the defendant but to his or her defense counsel as well[78] and is to be observed in all stages of the proceedings.

What constitutes "adequate" time will depend on the nature of the proceedings and the factual circumstances of a case. Factors to be taken into account include the complexity of a case, the defendant's access to evidence, the time limits provided for in domestic law for certain actions in the proceedings, etc.

The term "facilities" has, among other things, been interpreted to mean that the accused and defense counsel must be granted access to appropriate information, files and documents necessary for the preparation of a defense and that the defendant must be provided with facilities enabling communication, in confidentiality, with defense counsel.[79] An individual's right to communicate with counsel of his or her own choosing, is the most important element of the right to adequate facilities for the preparation of a defense.[80]

8. The right to a trial without undue delay

In the determination of any criminal charge against him/her, everyone shall be entitled "To be tried without undue delay" [Article 14(3)(c)]. This provision has been interpreted to signify the right to a trial that produces a final judgement and, if appropriate, a sentence without undue delay. The time limit "begins to run when the suspect (accused, defendant) is informed that the authorities are taking specific steps to prosecute him."[81] The assessment of what may be considered undue delay will depend on the circumstances of a case, i.e. its complexity, the conduct of the parties, whether the accused is in detention, etc. The right is, however, not contingent on a request by the accused to be tried without undue delay.

Note that a person who is in pre-trial detention may be entitled to release prior to the commencement of the trial even if there has not been undue delay.[82]

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[77] *See also* European Convention, *supra* note 8, Article 6(3)(b); American Convention, *supra* note 8, Article 8(2)(c); African Commission Resolution, *supra* note 13, Article 2(E)(1); and ICC Statute, *supra* note 10, Articles 67(1)(b) and 67(2).

[78] *See* Basic Principles on the Role of Lawyers, *supra* note 6, Principle 21.

[79] General Comment 13, *supra* note 16, para 9. Basic Principles on Lawyers, *supra* note 6, Principle 21. The European Commission has stated that this right permits the defense to have reasonable access to the prosecutions files (*X v Austria* (7138/75), 5 July 1977, 9 DR 50) but this may be subject to reasonable security restrictions (*Haase v Federal Republic of Germany* (7412/76, 12 July 1977, 11 DR 78).

[80] *See supra* notes 16-18 and *infra* notes 83-89 and accompanying text.

[81] Nowak Commentary, *supra* note 9, at 257.

[82] *See supra* notes 10-12, 26-35 and accompanying text.

9. The right to defend oneself in person or through legal counsel

The right to counsel in the pre-trial stages of a criminal trial, as discussed earlier in this paper,[83] is clearly linked to the right to a defense during trial as set out in Article 14(3)(d) of the ICCPR. The provision states that everyone shall be entitled, in the determination of any criminal charge against him/her "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." This provision includes the following specific rights:

(i) the right to be tried in one's presence. This is one of the more controversial rights in terms of its interpretation. A literal reading would not permit trials in absentia, which is a view consistently held by most international human rights NGOs and, more recently, supported by the Statute of the International Criminal Court.[84] However, according to the HRC, trials in absentia are permissible in certain circumstances if the state makes "sufficient efforts with a view to informing the [accused] about the impending court proceedings, thus enabling him to prepare his defense."[85]
(ii) to defend oneself in person;
(iii) to choose one's own counsel;
(iv) to be informed of the right to counsel; and
(v) to receive free legal assistance.

Their operation may be summed up as follows: "Everyone charged with a criminal offense has a primary, unrestricted right . . . to defend himself. However, he can forego this right and instead make use of defense counsel, with the court being required to inform him of the right to counsel. In principle, he may select an attorney of his own choosing so long as he can afford to do so. Should he lack the financial means, he has a right to appointment of defense counsel by the court at no cost, insofar as this is necessary in the administration of justice. Whether the interests of justice require the state to provide for effective representation by counsel depends primarily on the seriousness of the offense and the potential maximum punishment."[86]

[83] *See supra* notes 19-25 and accompanying text.

[84] ICC Statute, *supra* note 10, Article 67(1)(d).

[85] *See Daniel Monguya Mbenge et al. v. Zaire* (16/1977) (March 25, 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, at 78.

[86] Nowak Commentary, *supra* note 9, at 259-260. For instance, the Human Rights Committee has held that any person charged with a crime punishable by death must have counsel assigned (*Henry and Douglas v Jamaica* (571/1994), 26 July 1996, UN Doc CCPR/C/57/D/571/1994, para 9.2.). However, a person accused of speeding would not necessarily be entitled to have counsel appointed at the expense of the state (*OF v Norway* (158/1983), 26 October 1984, 2 Sel. Dec.44). In the Inter-American system, counsel must be provided if it is necessary to ensure a fair hearing (Inter-American Court, Advisory Opinion of August 1990, OC 11/90, Exceptions to the

According to the prevailing reading of the ICCPR, the right to counsel applies to all stages of criminal proceedings, including the preliminary investigation and pre-trial detention.[87] Assignment of counsel by the court contravenes the principle of fair trial if a qualified lawyer of the accused's own choice is available and willing to represent him or her.[88] Court–appointed counsel must be able effectively to defend the accused, that is, to freely exercise his/her professional judgement and to actually advocate in favor of the accused.[89]

10. The right to examine witnesses

In the determination of any criminal charge against him/her, everyone is entitled "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" [Article 14(3)(e)].[90] This right is an essential element of the principle of equality of arms. The terms "to examine, or have examined" should be read as a recognition of the two main systems of criminal justice, the inquisitorial and accusatorial one. It should be noted that, according to the text itself, the defense does not have an unlimited right to obtain the compulsory attendance of witnesses on the defendant's behalf, but only "under the same conditions" as witnesses against him/her. No such restriction applies to the prosecution. While a court is thereby given a fairly free hand in summoning witnesses, it must do so in keeping with the principle of fairness and equality of arms. This, in turn, mandates that the parties be equally treated with respect to the introduction of evidence by means of interrogation of witnesses.[91]

In addition, Article 14(3)(e) has been concretely interpreted to mean that the prosecution must inform the defense of the witnesses it intends to call at trial within a reasonable time prior to the trial so that the defendant may have sufficient time to prepare his/her defense. The defendant also has the right to be present during the testimony of a witness and may be restricted in doing so only in exceptional circumstances, such as when the witness reasonably fears reprisal by the defendant.

In order to avoid violations of a defendant's right to examine and have examined witnesses against him or her, courts should particularly scrutinize claims of possible reprisals and allow the removal of defendants from the courtroom only in truly valid instances.

Exhaustion of Domestic Remedies, OAS/Ser.L/V/III23 Doc 12 rev 1991, paras 25-28).

[87] *See* Nowak Commentary, *supra* note 9, at 256 and The Final Report, *supra* note 2, at 71. *See also Henry and Douglas v Jamaica* (571/1994), 26 July 1996, UN Doc CCPR/C/57/D/571/1994, para 9.2. *See* further *supra* notes 19-25 and accompanying text.

[88] *See e.g*., the case of *Estrella v Uruguay* (74/180) 29 March 1983, at 95 where the Human Rights Committee held that a military court had violated the defendant's right to choose counsel by limiting him to a choice between two appointed attorneys. *See also* Basic Principles on the Role of Lawyers, *supra* note 6, Principle 5.

[89] General Comment 13, *supra* note 16, para 9. *See also* Principle 6 of the Basic Principles on the Role of Lawyers, *supra* note 6, which refers to the right to "effective legal assistance."

[90] *See also* European Convention, *supra* note 8, Article 6(3)(d); American Convention, *supra* note 8, Article 8(2)(f); African Commission Resolution, *supra* note 13, Paragraph 2(e)(3); and ICC Statute, *supra* note 10, Article 67(1)(e).

[91] Nowak Commentary, *supra* note 9, at 262.

However, in no case may a witness be examined in the absence of both the defendant and counsel. Similarly, the use of the testimony of anonymous witnesses at trial is considered impermissible, as it would represent a violation of the defendant's right to examine or have examined witnesses against him/her.[92]

11. The right to an interpreter

In the determination of any criminal charge against him/her everyone is entitled "To have the free assistance of an interpreter if he cannot understand or speak the language used in court" [Article 14(3)(f)].[93] The main issue raised by this provision is what interpretation should be given to the words "used in court." While the phrase could obviously be said to refer to oral proceedings, the right to translation of written documents is not expressly provided for. Both in scholarly writings and in the practice of human rights bodies, however, the view has consistently been held that the right to an interpreter includes the translation of all the relevant documents.[94] As already mentioned, the right to an interpreter may also be claimed by a suspect or an accused being interrogated by the police or by an investigating judge in the pre-trial phase.[95]

The right to an interpreter applies equally to nationals and aliens,[96] but cannot be demanded by a person who is sufficiently proficient in the language of the court.[97] When granted, the right to the assistance of an interpreter is free and can in no way be restricted by seeking payment from the defendant upon conviction.

12. The prohibition on self-incrimination

In the determination of any criminal charge against him/her, everyone is entitled "Not to be compelled to testify against himself or to confess guilt" [Article 14(3)(g)].[98] This

[92] The Final Report, *supra* note 2, para 60(j), at 77. *See e.g*., Human Rights Committee's Concluding Observations on Colombia, UN Doc. CCPR/c/79/Add. 76 1 April 1997, paras. 21, 40 (criticism of the Colombian practice of suppressing the names of judges, prosecutors and witnesses in regional courts dealing with certain drug, terrorism, rebellion and weapons crimes). Note however that the European Court permits anonymous witnesses in some limited cases such as during the investigative stage of a case. See *Doorson v. The Netherlands*, 26 March 1996, 2 Ser A 470, para 69. Compare the decision of the ICTY in *Prosecutor v. Tadic, Prosecutor's motion Requesting Protective Measures for Victims and Witnesses* 10 Aug. 1995.

[93] *See also* European Convention, *supra* note 8, Article 6(3)(e); American Convention, *supra* note 8, Article 8(2)(a); African Commission Resolution, *supra* note 13, Paragraph 2(E)(4); and ICC Statute, *supra* note 10, Article 67(1)(f).

[94] For example, the Inter-American Commission considers the right to translation of documents as fundamental to due process (Report on the Situation of Human Rights of a Segment of the Nicaraguan Population of Miskito Origin, OEA Ser.L/V/11.62, doc.10, rev. 3, 1983.

[95] *See supra* notes 16-18 and accompanying text.

[96] General Comment 13, *supra* note 16, para 13.

[97] *See, e.g*., *Cadoret and Bihan v France* (221/1987 and 323/1988), April 11, 1991, Report to the HRC (A/46/40), 1991 at 219.

[98] *See also* American Convention, *supra* note 8, Articles 8(2)(g) and 8(3); ICC Statute, *supra* note 10, Articles 55(1)(a) (pre-trial) and 67(1)(g).

provision aims to prohibit any form of coercion, whether direct or indirect, physical or mental, and whether before or during the trial, that could be used to force the accused to testify against him/herself or to confess guilt. Although the exclusion of evidence obtained by such means is not expressly covered by this provision, it is a well-established interpretation that such evidence is not admissible at trial.[99] The judge must have the authority to consider an allegation of coercion or torture at any stage of the proceedings.[100] In addition, silence by the accused may not be used as evidence to prove guilt and no adverse consequences may be drawn from an accused's exercise of the right to remain silent.[101]

13. The prohibition on retroactive application of criminal laws

Although set forth as last in the sequence of the ICCPR's provisions relating to criminal justice, Article 15(1) of the ICCPR which embodies the principle *nullum crimen sine lege* (a crime must be provided for by law) [102], can in fact be taken as a point of departure in any consideration of the fairness of a trial. In the broad sense, it expresses the principle of legality, according to which "No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed" [Article 15(1)]. In the narrow sense, it is aimed at prohibiting the retroactive application of substantive criminal law and thus chronologically precedes a determination of the procedural fairness of a trial pursuant to Article 14. It is one of the few non-derogable rights provided for in Article 4(2) of the ICCPR.

The principle of legality obliges states to define criminal offences by law, that is, in the form of abstract norms laid down in statutes or belonging to the body of unwritten common law accessible to all. It is important to note that the prohibition of retroactivity applies to all criminal offenses, which may be provided for either in domestic legislation or international law, both treaty-based and customary.[103] The reference to international law was included to prevent individuals from escaping international justice by claiming that an act or omission did not constitute an offense under national law. On the other hand, it is also meant to protect individuals against the retroactive application of international law. Just as no one can be found

[99] See the prohibition on the use of evidence in Article 15 of the Convention against Torture and Article 10 of the Inter-American Convention on Torture. *See also* General Comment 13, *supra* note 16, para 14. See also the European Court in *Murray v United Kingdom* 41/1994/488/570, 8 February 1996, para 45.

[100] General Comment 13, *supra* note 16, para 15.

[101] The Final Report, *supra* note 2, Article 58(b), at 76. Article 14(4) of the ICCPR pertaining to the rights of juvenile persons has been omitted from this review.

[102] *See also* European Convention, *supra* note 8, Article 7; American Convention, *supra* note 8, Article 9; African Charter, *supra* note 8, Article 7(2); and ICC Statute, *supra* note 10, Article 22.

[103] The one exception to the prohibition of retroactive domestic criminal legislation is contained in Article 15(2) of the ICCPR: "Nothing in this Article shall prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognized by the community of nations." This provision has been interpreted to mean that certain violations of customary international law, such as war crimes, torture, slavery, etc. may be punished by states applying retroactive domestic criminal laws. However, in effect, this provision simply restates the position that persons may held accountable for violations of international customary law: it merely facilitates the ability of States to legislate to this effect. ICCPR, *supra* note 1, Article 15(2).

guilty of a criminal offense which was not laid down as such at the time an act or omission took place, so also, under Article 15(1) a penalty cannot be imposed if it was not provided for under national or international law at the time the offense was committed (*nulla poena sine lege*). Moreover, under Article 15(1), a penalty heavier than the one that was prescribed at the time of commission for a specific offense may not be imposed. In keeping with a contemporary understanding of the role of criminal sanctions, Article 15(1) also provides that states are obliged to retroactively apply a lighter penalty if it is subsequently provided for by law.[104]

14. The prohibition on double jeopardy

"No one shall be liable to be tried or punished again for an offence for which he has already been finally convicted or acquitted in accordance with the law and penal procedure of each country" [Article 14(7)].[105] The prohibition of *ne bis in idem* or of double jeopardy is aimed at preventing a person from being tried—and punished—for the same crime twice. The issue here is what is the relevant jurisdiction. According to some interpretations, including that of the HRC, double jeopardy applies only to prohibit a subsequent trial for the same offense within the jurisdiction of one state, but is not valid with regard to the national jurisdiction of two or more states.[106] On the other hand, some hold the view that this is "too general and too absolute."[107] An interesting question raised by the establishment of the International Criminal Tribunals for the Former Yugoslavia and Rwanda, and by the Statute of the future International Criminal Court is whether retrials of persons by those tribunals after the completion of proceedings in a national jurisdiction, permitted under certain circumstances, violate the principle of double jeopardy.[108] The prevailing view is that they do not.

C. POST-TRIAL RIGHTS

1. The right to appeal

"Everyone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law" [Article 14(5)].[109] The right to appeal is aimed at ensuring at least two levels of judicial scrutiny of a case, the second of which must take place before a higher tribunal. The review undertaken by such a tribunal must be genuine.

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[104] The right to retroactive application of a lighter penalty generally applies only in cases where a penalty is irreversible, however some exceptions include cases where the sentence is for life, the death penalty or corporal punishment. *See* Nowak Commentary, *supra* note 9, at 279-280.

[105] *See also* Article 4 of Protocol 7 to the European Convention and Article 20 of the ICC Statute. Note that Article 8(4) of the American Convention is different in that the prohibition applies only if the accused has been previously *acquitted*, but then the prohibition is not limited to retrial on the same charge—no charge arising out of the same facts ("the same cause") may be pursued.

[106] *See* Nowak Commentary, *supra* note 9, at 273.

[107] *Id*.

[108] *See* ICC Statute, *supra* note 10, Article 20; Statute of the International Criminal Tribunal for Yugoslavia, Article 10; and Statute of the International Criminal Tribunal for Rwanda, Article 9.

[109] *See also* European Convention, *supra* note 8, Article 2 of Protocol 7; American Convention, *supra* note 8, Article 8(2)(h); and African Commission Resolution, *supra* note 13, para 3.

This, among other things, means that appeal proceedings confined only to a scrutiny of issues of law raised by a first instance judgement might not always meet that criterion.[110] Appeal proceedings must also be timely. The immediate effect of the exercise of the right to appeal is that a court has to stay the execution of any sentence passed in the first instance until appellate review has been concluded. This principle applies unless the convicted person voluntarily accepts that the sentence be implemented earlier. The right to appeal belongs to all persons convicted of a crime regardless of the severity of the offense and of the sentence pronounced in the first instance.[111] The guarantees of a fair trial must be observed in all appellate proceedings.

2. The right to compensation for miscarriage of justice

"When a person has by a final decision been convicted of a criminal offence and when subsequently his conviction has been reversed or he has been pardoned on the ground that a new or newly discovered fact shows conclusively that there has been a miscarriage of justice, the person who has suffered punishment as a result of such conviction shall be compensated according to law, unless it is proved that the non-disclosure of the unknown fact in time is wholly or partly attributable to him" [Article 14(6)].[112] It should be noted that compensation for miscarriage of justice may be granted only after a conviction has become final and that the claim may be brought regardless of the severity of the offense involved. There are three additional conditions that must be cumulatively met: i) a miscarriage of justice must have been subsequently officially acknowledged by a reversal of the conviction or by pardon; ii) the delayed disclosure of the pertinent fact(s) must not be attributable to the convicted person, and iii) the convicted person must have suffered punishment as a result of the miscarriage of justice. The phrase "according to law" does not mean that states can ignore the right to compensation by simply not providing for it, but rather that they are obliged to grant compensation pursuant to a mechanism provided for by law.[113]

III. TRIAL OBSERVATION

Regardless of the considerable experience in trial observation accumulated by international and local NGOs over the past few decades, there are no ironclad rules as to how monitoring should be carried out. It is unlikely that such norms can ever be developed because monitoring is an activity that needs to be tailored to each particular case. Monitors need a certain flexibility and must use their own judgement in responding to the different situations they may encounter. This is not to say that a set of basic directions for trial observation

[110] See for example the concerns of the UN Special Rapporteur on extrajudicial, summary or arbitrary executions in his 1993 Report (7 December 1993, UN Doc E/CN.4/1994/7 at paras 113 and 404).

[111] General Comment 13, *supra* note 16, para 17.

[112] *See also* European Convention, *supra* note 8, Article 3 of Protocol 7; and American Convention, *supra* note 8, Article 10.

[113] See General Comment 13, *supra* note 16, para 18.

completely lacking: the ensuing section is based on guidelines pertaining to the practice of trial monitoring developed and applied by organizations with extensive expertise in this area.[114]

1. Choice of Trials

The choice of a trial to be observed will primarily depend on the sending organization's general field of activity and the interest it might have in a particular case. Factors which may influence a decision to send trial observers are: the stature of the person on trial, the political or human rights significance of the proceedings, the historical relevance of the trial, the media attention generated by the case, anticipated irregularities in the proceedings, etc., or any combination of these and other concerns. There simply can be no exhaustive enumeration.

2. Selection of Trial Observer

Regardless of the underlying reasons for observing a trial, crucial to the success of every mission will be the monitor's independence, impartiality and qualifications. The different factors most often taken into account when selecting an observer are: the individual's prestige, reputation for impartiality, knowledge of domestic law and international human rights standards, familiarity with a case, language skills, trustworthiness, availability at short notice, etc. If an observer is being sent to monitor a trial abroad, his or her nationality, ethnicity or gender may be relevant criteria. His or her ability to enter a particular country with or without a visa will also be significant. In the selection of observers, NGOs are faced with the option of either sending a staff member or engaging an independent expert outside the organization. The advantage of the former is that a staff member will most likely be familiar with the case and can be trusted to present a reliable and timely report. However, the presence of a prestigious independent expert outside the organization will often have more impact on the proceedings. Similarly, an issue that needs to be considered is the utility of engaging local lawyers—whether staff members or outside experts—to observe domestic trials. While such lawyers may know the legal system and background of a case very well, this may in fact be perceived as potentially tainting their assessment of the fairness of the proceedings and give rise to claims of bias. Because of their prestige and lack of national affiliation, foreign lawyers are initially less open to such charges. It should be noted that several international human rights NGOs, among them Amnesty International, have explicit rules against the practice of engaging local lawyers as trial observers.

3. Informing the Government

The sponsoring organization should supply an observer with several copies of an Order of Mission (Letter of Credentials) stating the purpose of the mission, the identity and qualifications of the observer and requesting the cooperation of the authorities. It is standard practice to also inform the appropriate bodies, such as the Ministry of Justice, by letter or other

[114] Among others, The International Commission of Jurists (ICJ), Amnesty International (AI), The International Federation of Human Rights (FIDH), and The American Bar Association (ABA). This sections also draws heavily on Professor David Weissbrodts's seminal article "International Trial Observers," *Stanford Journal of International Law*, Volume 18, Issue 1, Spring 1982.

means, of the nomination of an observer and to request that s/he be extended the usual facilities.

4. Briefing

Before undertaking an observer mission, a monitor should be briefed by the sending organization on i) the approach, policies and methods of the sending organization; ii) the background of the case, including the relevant domestic and international legal framework applicable in the proceedings; iii) the names, addresses and background of lawyers, translators and other contacts during the proceedings, as the situation may necessitate; and iv) the means of a monitor's communication with the organization while on the mission.

5. Translators

An observer should, among other things, be chosen for his/her command of the language in which the proceedings will be conducted. When such a person cannot be found the observer should, ideally, be provided with an interpreter who will sit next to him/her in the courtroom and give a simultaneous translation sotto voce. The selection of an interpreter is important because an observer's impartiality could be discredited if the interpreter is perceived as being affiliated with the parties or participants in the proceedings. An interpreter should, ideally, have the requisite legal knowledge, be trustworthy and independent.

6. Travel and Housing Arrangements; Visa and Entry Formalities

If the trial to be observed is taking place outside the seat of the sending organization or abroad, arrangements should be made for the monitor to be assisted upon arrival by a person not involved in the proceedings who could provide him/her with an initial briefing. The observer should preferably stay in a hotel, or other mode of accommodation, close to the court. S/he should not take up offers to be hosted by persons involved in the proceedings or their supporters, as that could discredit his/her impartiality.

If a trial is being observed abroad, it would be logical to select as an observer a person who does not need a visa to enter the country of destination or who already has one. If a visa is required, an Order of Mission (Letter of Credentials) should be furnished along with the visa application, stating that the purpose of the visit is to attend the trial in question on behalf of the sponsoring organization.

7. Public Statements Before, During and After a Mission

There is little uniformity of practice among NGOs as regards statements made by an observer prior to, during and after a mission. While some organizations will announce a mission precisely in order to attract attention to a case, others will decline to do so for fear of making it harder for the observer to attend the trial. In each instance of advance announcement the expected benefits must be weighed against the possible drawbacks. There is also no common stand among NGOs with respect to an observer's statements during a mission. On the one hand, statements might jeopardize the mission, the appearance of neutrality or even the

safety of the observer but, on the other hand, the impact of public comments is usually the greatest while the trial is still taking place or immediately upon its conclusion. On a cautionary note, it can be said that an observer should generally refrain from commenting on a trial that is still unfolding unless there are exceptional events—such as a breakdown of the judicial process—which merit immediate response. Similarly, if an observer is not specifically authorized to issue a statement after the end of his/her mission he or she should generally refrain from doing so unless there is an issue requiring momentary reaction. Practice has shown that it is often better both for the observer and for the appearance of his/her impartiality if a statement is issued after the observer has returned home and has had time for reflection, rather than if s/he comments on the trial while at the trial site. A case by case approach is necessary in this phase as well. Throughout the proceedings, however, a monitor should be free to inform the press about his/her presence, the purpose of the mission and about the report to be drawn up following the end of trial observation. S/he should also be prepared to explain his/her authority to make statements during and after the trial or to decline from comments.

8. Contacts and Interviews during the Mission

An observer should, if possible, try to make contact with the parties to the trial and with the presiding judge before the proceedings begin. If helpful, s/he should also arrange to be introduced in open court by a neutral party so as to enable the participants and the public to take note of his/her presence. Depending on the scope of the observer's mission, the circumstances of the case and the observer's stature, he or she may also try to establish contact with other government officials in order to collect more background information and to enhance his or her impact on the proceedings. An observer should also leave him/herself time for collecting documents related to the trial and other information of relevance to an assessment of fairness. Last, but not least, if possible, a monitor should try to interview the defendant, in full confidentiality, in order to observe his/her physical and mental condition and the circumstances of detention.

9. Seating in the Courtroom; Notes

With the primary aim of preserving an appearance of neutrality, an observer should ideally follow the proceedings from a prominent but neutral position in the courtroom. The seating arrangement should not lead to an observer's being identified with persons participating in the proceedings or attending it in some other capacity, such as defense attorneys or the press. Nor should it detract from his/her prestige, which would be the case if s/he were to sit in the section of the courtroom reserved for the general public. While following the trial the observer should be seen taking extensive notes. This action not only signifies the close attention being paid to the trial but, also, the creation of a record that will be used in compiling the final report.

10. Observer's Report

Preparing a report upon the completion of a trial observation mission is the second half of an observer's task. If the mission is to be successful, the report should be drawn up as quickly as possible so that the sponsoring organization may issue it while the government and the general public are still responsive to the findings. Promptness is vital.

NGOs with extensive practice in trial observation recommend that a trial observation report be composed to include the following headings (the list is not exhaustive and will obviously depend on the circumstances of the case):[115]

(i) the observer's instructions;
(ii) the background of the case;
(iii) the facts of the case as revealed at trial and by independent fact-finding, with particular emphasis on the prosecution and defense evidence;
(iv) the charges, applicable laws, pre-trial procedures, trial process, judgment (if any) and subsequent proceedings;
(v) the mental and physical condition of the defendant and the conditions of confinement;
(vi) an evaluation of the fairness of the proceedings, applicable laws and treatment of the defendant under national and international standards; and
(vii) a conclusion.

In addition a report should, if possible, include the following information:

(i) a copy of the Order of Mission;
(ii) copies of relevant procedural rules, court decisions and laws;
(iii) copies of charges, transcripts and the court's judgment;
(iv) a description of the observer's methodology, including material studied and persons interviewed;
(v) sensitive material which should be omitted from the published report;
(vi) copies of newspaper articles referring to the trial or the observer's presence, with the names of the newspapers and the dates of publication;
(vii) additional information not strictly within the observer's mission (such as information about other prisoners, other trials and recent laws); and
(viii) practical observations for the guidance of future observers.

When there is a protracted trial the observer will usually attend only part of the proceedings. In such a case s/he should send an immediate report to the sponsoring organization and add to it later, in the form of a supplement commenting on the decision rendered at the end of the trial. S/he should therefore make arrangements for the official text of the judgment and the sentence of the court to be sent to the sponsoring organization either directly or through the observer him/herself.

Observers may include recommendations to the government concerned or to the sending organization on how to overcome the irregularities noted in the trial procedure and/or on the action the sponsoring organization should take in pursuing this goal, depending, of course on the sender's mandate.

[115] This list is reproduced from Weissbrodt, *supra* note 114, at 93-94.

Finally, an issue that also needs to be resolved by the sponsoring organization is whether the report will be conveyed to the government in question for comment and response before it is made public. This is a matter of policy that will hinge on the circumstances of a case, the purpose and focus of the report and the government's anticipated reaction to it. If the report is first sent to the government it should contain precise time limits for a response before publication.

IV. CONCLUSION

An examination of the customary international law status of trial observation is outside the scope of this review. However, the practice of sending and receiving trial observers is today so widespread and accepted that it may already constitute a norm of customary international law. The rapid development of the institution of trial observation over the past several decades can be attributed largely to the knowledge and integrity of the individuals who have served as observers. In order for this method of human rights monitoring to expand further, the high standards achieved so far must be maintained and continuously refined. This, among other things, means that the monitors themselves should increasingly be individuals familiar with the intricacies of domestic and international fair trial standards. In practice, they should bring to the performance of their task the very qualities they monitor: fairness and humanity.

APPENDIX: NOTE ON SOURCES

The section describes the different categories of sources used in this report, and sets out the primary instruments, the abbreviations used to refer to those instruments in this report, and the Internet references. Many of the instruments may also be found in *Human Rights: A Compilation of International Instruments*, vol. I (2 parts), Universal Instruments, United Nations Publication, Sales No. E.93.XIV.1 and corrigenda. Please contact us if you have difficulty obtaining a copy of any of these materials.

A. TREATIES

When a State has ratified a treaty it is bound to comply with its provisions, subject to any reservations it has made at the time of ratification. It is therefore important to check whether the State in question has ratified the relevant treaties.

TREATY NAME	ABBREVIATION	REFERENCE
International Covenant on Civil and Political Rights	ICCPR	http://www.unhchr.ch/html/menu3/b/a_ccpr.htm
African Charter on Human and Peoples Rights	African Charter	http://www.oau-oua.org/oau_info/rights.htm
American Convention on Human Rights	American Convention	http://www.cidh.oas.org/Básicos/Basic%20Documents/enbas3.htm
European Convention for the Protection of Human Rights and Fundamental Freedoms	European Convention	http://www.coe.fr/eng/legaltxt/5e.htm
Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment	Torture Convention	http://www.unhchr.ch/html/menu3/b/h_cat39.htm

B. OTHER INTERNATIONAL STANDARDS

Even if a State has not ratified the ICCPR, Torture Convention or relevant regional instruments its treatment of its citizens must be in accordance with the norms of customary international law. The provisions of Universal Declaration of Human Rights are, for the most part, considered to be declaratory of customary international law and therefore may be of paramount importance.

In addition, there are many other international instruments that develop and elucidate the minimum basic standards set out in the human rights treaties and the Universal Declaration of Human Rights. Although these instruments are not strictly speaking binding on any one State, they have all been adopted by political bodies of the UN, usually by consensus, and are

therefore important normative documents. They form part of the general body of international human rights law and, as can be seen in this report, they are an extremely important tool for explaining the precise content of the right to a fair trial.

INSTRUMENT NAME	ABBREVIATION	REFERENCE
Universal Declaration of Human Rights	UDHR	http://www.unhchr.ch/udhr/lang/eng.htm
Standard Minimum Rules for the Treatment of Prisoners	Standard Minimum Rules	http://www.unhchr.ch/html/menu3/b/h_comp34.htm
Basic Principles for the Treatment of Prisoners	Basic Principles on Prisoners	http://www.unhchr.ch/html/menu3/b/h_comp35.htm
Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment	Body of Principles	http://www.unhchr.ch/html/menu3/b/h_comp36.htm
Basic Principles on the Role of Lawyers	Basic Principles on Lawyers	http://www.unhchr.ch/html/menu3/b/h_comp44.htm
Basic Principles on the Independence of the Judiciary	Basic Principles on the Judiciary	http://www.unhchr.ch/html/menu3/b/h_comp50.htm

C. JURISPRUDENCE

The judgments and findings of regional and international courts, commissions and bodies also help interpret and elucidate the meaning of both treaty provisions and customary international law. The General Comments of the Human Rights Committee are especially important interpretations of the ICCPR, as are the Committee's decisions on individual communications under the First Optional Protocol to the ICCPR. Decisions of the regional courts and commissions are authoritative interpretations of the particular treaties, however the jurisprudence of each regional institution may be more broadly applied. For example, while a decision of the European Court of Human Rights might not be binding on an African State, that court's pronouncements on the meaning of "undue delay," for instance, may be a useful tool in examining lengthy detentions in Africa.

INSTITUTION NAME	ABBREVIATION	REFERENCE
Human Rights Committee, General Comments	HRC	http://www.unhchr.ch/tbs/doc.nsf (see Document Type: "General Comments" of Treaty Body: "Human Rights Committee")

Human Rights Committee, Individual Communications	HRC	http://www.unhchr.ch/tbs/doc.nsf (see Document Type: "Jurisprudence" of Treaty Body: "Human Rights Committee")
European Court of Human Rights	European Court	http://www.echr.coe.int/
Inter-American Court of Human Rights	Inter-American Court	http://corteidh-oea.nu.or.cr/ci/home_ing.htm
Inter-American Commission on Human Rights	Inter-American Commission	http://www.cidh.oas.org/commission.htm
African Commission on Human Rights	African Commission	Limited materials can be found: http://www1.umn.edu/humanrts/africa/comision.html

D. INTERNATIONAL CRIMINAL TRIBUNALS

Although the International Criminal Court has not yet been established, its statute offers a wealth of innovative provisions on protecting the rights of the accused as well as victims and witnesses. It also contains definitions of international crimes. The statute is located at http://www1.umn.edu/humanrts/instree/Rome_Statute_ICC/Rome_ICC_toc.html. Similarly, although the statutes of the International Criminal Tribunal for Yugoslavia (http://www.un.org/icty/basic/statut/statute.htm) and the International Criminal Tribunal for Rwanda (http://www.un.org/ictr/) are not generally binding, they offer useful guidance on procedural rules in international criminal law.

E. OTHER REFERENCE MATERIALS

The most authoritative interpretation of the ICCPR is Manfred Nowak, *U.N. Covenant on Civil and Political Rights, CCPR Commentary*, N.P. Engel, Kehl-Strasbourg-Arlington, 1993 ("Nowak Commentary"). For further detail about fair trial standards, the 1999 Amnesty International "Fair Trials Manual" is also useful (http://www.amnesty.org/ailib/themes/fairtria.htm).

Since 1978, the Lawyers Committee for Human Rights has worked to protect and promote fundamental human rights. Its work is impartial, holding all governments accountable to the standards affirmed in the International Bill of Human Rights. Its programs focus on building the legal institutions and structures that will guarantee human rights in the long term. Strengthening independent human rights advocacy at the local level is a key feature of its work.

The Committee also seeks to influence the U.S. government to promote the rule of law in both its foreign and domestic policy, and presses for greater integration of human rights into the work of the UN and other international bodies. The Committee works to protect refugees through the representation of asylum seekers and by challenging legal restrictions on the rights of refugees in the United States and around the world.

If you would like more information about the Lawyers Committee, write us at:

Communications Department
Lawyers Committee for Human Rights
333 Seventh Avenue, 13th Floor
New York, NY 10001

Tel: (212) 845-5200
Fax: (212) 845-5299
E-mail: comm@lchr.org

http://www.lchr.org
http://witness.org