



# United Nations Counter-Terrorism Implementation Task Force

CTITF Working Group on Protecting Human Rights  
while Countering Terrorism

## **Basic Human Rights Reference Guide: Right to a Fair Trial and Due Process in the Context of Countering Terrorism**

October 2014



*With the support of*

Special Rapporteur on the promotion and protection of human rights  
and fundamental freedoms while countering terrorism

United Nations Office on Drugs and Crime

Counter-Terrorism Committee Executive Directorate

Office of Legal Affairs

United Nations Interregional Crime and Justice Research Institute

International Maritime Organization

International Criminal Police Organization

1267/1988 Analytical Support and Sanctions Monitoring Team

And the participation of the International Committee of the Red Cross, the Office

for the Coordination of Humanitarian Affairs and the

United Nations High Commissioner for Refugees as observers

The Basic Human Rights Reference Guides series is made possible  
by the contribution of the United Nations Counter-Terrorism Centre (UNCCT).



United Nations  
New York, 2015

## About the United Nations Counter-Terrorism Implementation Task Force

The Counter-Terrorism Implementation Task Force (CTITF), established by the Secretary-General in 2005, is chaired by the Under Secretary-General of the Department of Political Affairs, Mr. Jeffrey Feltman, and is comprised of 34 UN and international entities. CTITF works to ensure overall coordination and coherence in the counter-terrorism activities of the United Nations system and to support Member States efforts in the implementation of the UN Global Counter-Terrorism Strategy (A/RES/60/288) adopted in 2006. CTITF provides for the delivery of this focused and coherent assistance mainly through its Working Groups and other initiatives, and strives to ensure that the Secretary-General's priorities are integrated in its work, including respect for human rights, as expressed in the "Human Rights up front" action plan. CTITF also seeks to foster constructive engagement between the United Nations system and international and regional organizations, civil society and the private sector, where appropriate, on the implementation of the Strategy.

The United Nations Global Counter-Terrorism Strategy brings together into one coherent framework United Nations counter-terrorism policy and legal responses emanating from the General Assembly, the Security Council and relevant United Nations specialized agencies.

The Strategy sets out a plan of action for the international community based on four pillars:

- (i) Measures to address the conditions conducive to the spread of terrorism;
- (ii) Measures to prevent and combat terrorism;
- (iii) Measures to build States' capacity to prevent and combat terrorism and to strengthen the role of the United Nations system in this regard; and
- (iv) Measures to ensure respect for human rights for all and the rule of law as the fundamental basis of the fight against terrorism.

In accordance with the Strategy, which welcomed the institutionalization of CTITF within the United Nations Secretariat, the Secretary-General in 2009 established the CTITF Office within the Department of Political Affairs to provide support for the work of the CTITF. The CTITF Office derives its mandate and policy guidance from the Global Counter-Terrorism Strategy and its subsequent review outcome resolutions. The CTITF Office seeks to enhance coordination and coherence on UN counter terrorism activities and to support Member States efforts to implement the Strategy through a number of capacity building programmes and initiatives

## The United Nations Counter-Terrorism Centre (UNCCT)

The United Nations Counter-Terrorism Centre (UNCCT) was established in September 2011, within the CTITF Office, to promote international counter-terrorism cooperation and support Member States in the implementation of the Global Counter-Terrorism Strategy. The Under-Secretary-General for Political Affairs and Chairman of the CTITF, Mr. Jeffrey Feltman, is the Executive Director of UNCCT.

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## About the Basic Human Rights Reference Guide Series

The Basic Human Rights Reference Guide series is an initiative of the Counter-Terrorism Implementation Task Force (CTITF) Working Group on Protecting Human Rights while Countering Terrorism.

The United Nations Global Counter-Terrorism Strategy (General Assembly resolution 60/288) was adopted by consensus by all Member States on 8 September 2006 and has since then been reaffirmed on a biannual basis, lastly by General Assembly resolution 68/276 of 13 June 2014. The Strategy reaffirms respect for human rights and the rule of law as the fundamental basis for the fight against terrorism. In particular, Member States reaffirmed that the promotion and protection of human rights for all and respect for the rule of law are essential to all components of the Strategy, and recognized that effective counter-terrorism measures and the protection of human rights are not conflicting goals, but complementary and mutually reinforcing.

In order to assist States in this regard, the Task Force formed the Working Group on Protecting Human Rights while Countering Terrorism, which is led by the Office of the United Nations High Commissioner for Human Rights (OHCHR). Members include the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, the United Nations Office on Drugs and Crime (UNODC), the Counter-Terrorism Committee Executive Directorate (CTED), the Office of Legal Affairs (OLA), the United Nations Interregional Crime and Justice Research Institute (UNICRI), the International Maritime Organization (IMO), the International Criminal Police Organization (INTERPOL), and the 1267/1988 Monitoring Team. The International Committee of the Red Cross (ICRC), the Office for the Coordination of Humanitarian Affairs (OCHA) and the United Nations High Commissioner for Refugees (UNHCR) participate as observers.

The Guides have been prepared to assist Member States in strengthening the protection of human rights in the context of countering terrorism. They aim to provide guidance on how Member States can adopt human rights-compliant measures in a number of counter-terrorism areas. The Guides also identify the critical human rights issues raised in these areas and highlight the relevant human rights principles and standards that must be respected.

Each Guide comprises an introduction and a set of guiding principles and guidelines, which provide specific guidance to Member States based on universal principles and standards, followed by an explanatory text containing theoretical examples and descriptions of good practices. Each Guide is supported by reference materials,\* which include references to relevant international human rights treaties and conventions, United Nations standards and norms, as well as general comments, jurisprudence and conclusions of human rights mechanisms and reports of United Nations independent experts, best practice examples and relevant documents prepared by United Nations entities and organizations.\*

The Guides are intended for: State authorities, including legislators; law enforcement and border officials; national and international non-governmental organizations; legal practitioners; United Nations agencies; and individuals involved in efforts to ensure the protection and promotion of human rights in the context of counter-terrorism.

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\* For a brief overview of the broader international law framework, including an introduction which aims to give a quick insight into the general principles of international law as well as the basic elements of international criminal law, humanitarian law, refugee law and human rights law which may be relevant in a counter-terrorism context, see United Nations Office on Drugs and Crime, Frequently Asked Questions on International Law Aspects of Countering Terrorism, United Nations, Vienna, 2009.

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## Principles and guidelines

For the purpose of assisting legislators, decision makers in the areas of policy and practice, judges, lawyers and prosecutors, and law enforcement officials, this document identifies and explains 12 guiding principles and guidelines concerning the right to a fair trial and due process in the context of countering terrorism:

1. Regardless of nationality, statelessness, or other status, all individuals must have effective access to justice.
2. Criminal charges, or a person's rights and obligations in a suit at law, must be determined by a competent, independent and impartial tribunal established by law. Trial by military or special tribunals must comply with human rights standards in all respects, including legal guarantees for the independent and impartial functioning of such tribunals.
3. The right to a fair trial involves the right to a public hearing. Any restrictions on the public nature of a trial, including for the protection of national security, must be both necessary and proportionate, as assessed on a case-by-case basis. Any such restrictions should be accompanied by adequate mechanisms for observation or review to guarantee the fairness of the hearing.
4. Everyone charged with a criminal offence has the right to be presumed innocent until proved guilty according to the law.
5. Anyone charged with a criminal offence cannot to be compelled to testify against herself or himself, or to confess guilt.
6. The right to a fair hearing, in both criminal and non-criminal proceedings, involves the right to a trial 'without delay' or 'within a reasonable time'. The right to a timely hearing includes the right to a timely judgment.
7. Everyone charged with a criminal offence, including a terrorist offence, has the right to be tried in his or her presence. Trials in absentia should occur only in exceptional circumstances and only if all due steps have been taken to inform the accused of the proceedings sufficiently in advance.
8. All persons have the right to representation by competent and independent legal counsel of their choosing, or to self-representation. The right to representation by legal counsel applies to all stages of a criminal process, including the pre-trial



phase. Any restrictions on the right to communicate privately and confidentially with legal counsel must be for legitimate purposes, must be proportional, and may never undermine the overall right to a fair hearing.

9. In criminal proceedings and other proceedings initiated by the State, every person shall have the right to adequate time and facilities to prepare his or her case. In criminal proceedings the prosecution must disclose any relevant material in its possession, or to which it may gain access, including exculpatory material. Restrictions on the disclosure of information may be justified in certain cases and subject to conditions that sufficiently guarantee the right of the person to respond to the case.
10. Every person shall have the right to call and examine witnesses, including expert witnesses. The use of anonymous witnesses must be restricted to cases where this is necessary to prevent intimidation of witnesses or to protect their privacy or security and must in all cases be accompanied by sufficient safeguards to ensure a fair trial.
11. Any person convicted of a terrorist offence shall have the right to a genuine review of the conviction and/or sentence by a higher tribunal established by law.
12. Violation of fair trial rights must result in the provision of effective remedies to the person whose rights have been violated. Compensation must be provided where a conviction has resulted from a miscarriage of justice.

## I. Introduction

1. States have an obligation in international law to protect the public from acts of terrorism and to bring to justice persons who commit, or prepare or assist the commission of acts of terrorism. Among other things, Security Council resolution 1373 (2001) requires States to “ensure that any person who participates in the financing, planning, preparation or perpetration of terrorist acts or in supporting terrorist acts is brought to justice”.<sup>1</sup> The United Nations Global Counter-Terrorism Strategy resolves that UN Member States will take “urgent action to prevent and combat terrorism in all its forms and manifestations”.<sup>2</sup> Various mechanisms are adopted by States to those ends, some involving criminal and non-criminal proceedings, or measures in respect of which access to judicial procedures are applicable and where the right to a fair trial and due process therefore relate.

### A. Purpose of the guide

2. This Guide is not intended to cover all issues concerning, and component rights under, the right to a fair trial and due process. Its main purpose is to assess the key challenges to the enjoyment of the right to a fair trial and due process resulting from the fight against terrorism and to provide Member States with legal and practical guidance to assist them in ensuring that counter-terrorism measures comply with international human rights law. The Guide is aimed at legislators, decision makers in the areas of policy and practice, judges, lawyers and prosecutors, and law enforcement officials.
3. This document should be read in conjunction with other Basic Human Rights References Guides of the CTITF Working Group on protecting human rights while countering terrorism, especially those on “*Conformity of National Counter-Terrorism Legislation with International Human Rights Law*” (which includes a brief description of the sources of international law and of the UN human rights mechanisms that are referred to in this document)<sup>3</sup> and on “*Detention in the Context of Countering Terrorism*”; and Fact Sheet No. 32 of the Office of the High Commissioner for Human Rights, on *Human Rights, Terrorism and Counter-Terrorism*.

## B. Definitions

4. In the present document, the right to a ‘fair trial’ is treated as corresponding to the overarching right to a “fair and public hearing by a competent, independent and impartial tribunal established by law” (as expressed in article 14(1) of the International Covenant on Civil and Political Rights (ICCPR)); the provisions of articles 14 and 15 of the ICCPR that are expressly applicable to criminal proceedings, alongside parallel guarantees for proceedings in a ‘suit at law’ arising from the overarching right to a fair trial and equality of arms; as well as law and standards under customary international law and as identified in documents such as the UN Human Rights Committee’s General Comment on the right to a fair trial, which stands as an authoritative interpretation of the meaning and application of article 14 of the ICCPR.<sup>4</sup> Broadly speaking, a ‘suit at law’ refers to various civil (private law) or administrative proceedings before a judicial body.<sup>5</sup> For the purposes of this document, reference is made to ‘non-criminal proceedings’ to capture this category and types of proceedings.
5. In its broadest setting, ‘due process’ is the legal requirement that the State must respect all of the legal rights that are owed to a person. In the present document, ‘due process’ is treated as meaning the process that is due to be respected in the context of the specific setting—whether concerning the detention, trial or expulsion of a person—and required to ensure fairness, reasonableness, absence of arbitrariness and the necessity and proportionality of any limitation imposed on rights of the individual in question.
6. Several elements are required by the principle of fair trial: the right of the accused to know the criminal charges against her or himself and the evidence on which such criminal charges are based, including exculpatory evidence; the entitlement to respond to such evidence and any submissions made by the alternate party; the right to legal representation; and the right to call one’s own witnesses and cross-examine opposing witnesses.<sup>6</sup>

## C. Key issues

7. The protection and promotion of human rights while countering terrorism is both an obligation of States and a condition for an effective and sustainable counter-terrorism strategy.<sup>7</sup> All counter-terrorism measures must comply fully with States’ international human rights obligations, including the right to a fair trial.<sup>8</sup> Despite this, the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism (hereafter the Special Rapporteur on human rights while countering terrorism) has several

times noted with concern that fair trial rights have not always been respected in the fight against terrorism.<sup>9</sup>

8. In establishing a list of principles applicable to the detention of persons in the framework of counter-terrorism measures, the UN Working Group on Arbitrary Detention has stated that:

*“In the development of judgments against them, the persons accused of having engaged in terrorist activities shall have a right to enjoy the necessary guarantees of a fair trial, access to legal counsel and representation, as well as the ability to present exculpatory evidence and arguments under the same conditions as the prosecution...”*<sup>10</sup>



## II. Nature and application of fair trial rights

9. The right to a fair trial is one of the fundamental guarantees of human rights and the rule of law, aimed at ensuring the proper administration of justice. It comprises various interrelated attributes and is often linked to the enjoyment of other rights, such as the right to life and the prohibition against torture and other forms of cruel, inhuman or degrading treatment or punishment. All persons must have equal rights of access to the courts and tribunals, including access to remedies and reparations, which is relevant not only to persons subject to criminal and non-criminal proceedings but also to the victims of terrorism.<sup>11</sup> Justice must be administered in a way that achieves fairness for all, regardless of the identity of the parties to the proceedings or the nature of the proceedings themselves. Criminal charges, or a person's rights and obligations in a 'suit at law', must be determined by a competent, independent and impartial tribunal established by law. Justice must be administered openly and in accordance with specific guarantees applicable to the determination of criminal charges, and parallel guarantees in the determination of non-criminal matters that may be applicable as a result of the overarching need to ensure fairness and equality of arms.

### A. Sources of law

#### International human rights law

10. Fair trial standards under the ICCPR are found principally within article 14. They are supplemented by procedural guarantees applicable to proceedings concerning the expulsion of aliens (article 13 of the ICCPR) and the principle of non-retroactivity of criminal/penal law (article 15 of the ICCPR).<sup>12</sup> The various elements of the right to a fair trial codified in the ICCPR are also to be found within the Universal Declaration of Human Rights, customary international law norms and other international treaties, including treaties pertaining to international humanitarian law, international criminal law or to the countering of terrorism. In similar terms to article 14 of the ICCPR, the right to a fair trial is guaranteed by article 6 of the European Convention on Human Rights, article 8 of the American Convention on Human Rights and, in somewhat lesser detail, article 7 of the African Charter on Human and Peoples' Rights, article 13 of the Revised Arab Charter on Human Rights and article 20 of the ASEAN Human Rights Declaration.

### International humanitarian law and international criminal law

11. Under international humanitarian law, the Third and Fourth Geneva Convention of 1949 provide judicial guarantees for prisoners of war and civilians detained for criminal offences in relation to international armed conflict. Article 75(4) of Additional Protocol I to the Geneva Convention provides additional fair trial rights, applicable to any person facing criminal charges in relation to this type of armed conflict. Common article 3(1)(d) of the Geneva Conventions governing non-international armed conflicts prohibits the passing of sentences and the carrying out of executions “without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples...”, considered to reflect customary international law.<sup>13</sup> Specific additional fair trial guarantees relevant to non-international armed conflicts are to be found in article 6 of Additional Protocol II. Fair trial guarantees under human rights treaties continue to apply during armed conflict, subject to the rare instances where a State permissibly derogates from the fair trial clauses in the human rights treaties in question. Denial of the right to a fair trial can constitute a war crime in certain circumstances.<sup>14</sup>
12. The Rome Statute of the International Criminal Court also includes the basic requirements for a fair trial in the context of international criminal law.<sup>15</sup>

### Universal terrorism-related treaties

13. Provisions within many universal terrorism-related conventions also require compliance with the right to a fair trial and the rule of law. In the context of the International Convention for the Suppression of the Financing of Terrorism, for example, article 17 requires the fair treatment of any person taken into custody, including enjoyment of all rights and guarantees under applicable international human rights law, and article 21 sets out a ‘catch-all’ provision making it clear that the Convention does not affect the enjoyment of other human rights, obligations and responsibilities of States parties.

## B. Non-derogable fair trial rights

14. Although the right to a fair trial is not listed as a non-derogable right under article 4(2) of the ICCPR, the Human Rights Committee has treated the right to a fair trial as one which may not be subject to derogation where this would circumvent the protection of non-derogable rights.<sup>16</sup> Even in situations when derogation from article 14 is permissible, the principles of legality and the rule of law require that the fundamental requirements of fair trial must be respected.<sup>17</sup> This means

that: only a court of law may try and convict a person for a criminal offence; the presumption of innocence must always be respected; and the right to take proceedings before a court to decide without delay on the lawfulness of detention must not be diminished by any derogation from the Covenant.<sup>18</sup> As explained in Section II(A) above, fair trial guarantees under human rights treaties continue to apply during armed conflict, subject to the rare instances where a State permissibly derogates from the fair trial clauses in the human rights treaties in question.

15. Under international humanitarian law, there can be no derogation from the relevant fair trial rights provisions of the Geneva Conventions or their Additional Protocols.

## C. Application of fair trial rights to criminal and non-criminal proceedings

### Application of fair trial rights to criminal and non-criminal proceedings

16. The overarching right to a fair and public hearing by a competent, independent and impartial tribunal established by law is encompassed within article 14(1) of the ICCPR and is expressly applicable to both criminal and non-criminal proceedings. There is a clear division in the structure of article 14 in its treatment of criminal and non-criminal proceedings. Paragraphs (2) to (4) of article 14 expressly apply to criminal proceedings only, although there is case law which provides for parallel guarantees for non-criminal proceedings in particular as a result of the principle of equality of arms and the overarching right to a fair trial, as elaborated, where relevant, in the Guidelines herein. Notwithstanding, there are some rights within the paragraphs (2) to (4) of article 14 that apply only to criminal proceedings, such as the right to be presumed innocent.

### Fair trial and due process guarantees in expulsion proceedings

17. In the case of expulsion proceedings concerning an alien or foreign national, who is lawfully within the territory of a country, article 14 of the ICCPR does not apply, but certain due process guarantees in article 13 of the ICCPR do apply. Article 13 of the ICCPR regulates the procedure, but not the substantive grounds, for expulsion. It requires any decision concerning the expulsion of an alien who is lawfully in the territory of a State to be made pursuant to the law. Unless prevented by compelling national security concerns, it also requires that the subject of the expulsion proceedings must be provided with the opportunity: (a) to submit reasons against the expulsion; (b) to have the case reviewed by the authority competent to determine whether or not the expulsion should proceed



(or the person or persons designated by the competent authority to conduct such a review); and (c) to be represented in such a review.<sup>19</sup>

18. Article 13 of the ICCPR applies only to aliens lawfully within the territory of a State. This means that irregular migrants, and aliens that have stayed longer than the law or their permit allows, are not afforded protection under these provisions.<sup>20</sup> However, if the legality of an alien's entry or stay is in dispute, any decision on this point leading to expulsion or deportation must be taken in accordance with the guarantees under article 13.<sup>21</sup>

#### **D. Primacy of the criminal justice system**

19. The Special Rapporteur on human rights while countering terrorism has emphasized the importance of maintaining a separation between the roles and functions of intelligence agencies and of law enforcement officials.<sup>22</sup> Despite this, there has been an increase over recent years in reliance on intelligence-led law enforcement in the countering of terrorism. The result has been a blurred distinction between traditional roles in the gathering of intelligence and law enforcement's gathering of evidence for criminal proceedings. This has sometimes led to intelligence agencies being given powers normally reserved for law enforcement. Where this is the case, powers of intelligence agencies must be exercised with the same safeguards applicable to law enforcement, especially with regard to international human rights law.<sup>23</sup>

#### **E. Equality of arms**

20. The principle of equality of arms requires that procedural conditions be similarly provided to all parties at trial and sentencing, unless distinctions are "based on law and can be justified on objective and reasonable grounds, not entailing actual disadvantage or other unfairness to the defendant".<sup>24</sup> It at times requires a fair balance should be struck, so that each party has a reasonable opportunity to present the case. This principle is inherent within the right to a fair trial and finds expression within article 14(1) of the ICCPR and also, specifically relating to criminal proceedings, within the chapeau of article 14(3), which refers to the enjoyment of fair trial rights "in full equality".<sup>25</sup> Because this principle is applicable to criminal and non-criminal proceedings alike,<sup>26</sup> it is particularly relevant in the context of terrorism, especially because the character of proceedings in criminal trials or in State-led administrative proceedings often involves an inherent inequality of the parties, where the State is the party initiating proceedings and with resources not accessible to an 'individual' party to proceedings.

### III. Guiding principles and guidelines

1. *Regardless of nationality, statelessness, or other status, all individuals must have effective access to justice.*

#### 1.1 Right to a fair trial

21. Article 14(1) of the ICCPR guarantees that all persons must have equal access to courts and tribunals in respect of the determination of any criminal charge(s) against a person, including terrorism charges, or the determination of a person's rights and obligations in non-criminal proceedings (as properly defined—see Section II(C) herein), including non-criminal proceedings related to terrorism that are brought by the State. Equality before courts and tribunals, including equal access to justice, has been described by the Human Rights Committee as key to the protection of human rights and the safeguarding of the rule of law.<sup>27</sup>

#### 1.2 Competence of courts and tribunals to hear and determine cases

22. For effective enjoyment of the right to access to justice, courts and tribunals must have the competence to hear cases where questions arise concerning a person's legal rights or obligations. The Human Rights Committee has explained that:

*“The failure of a State party to establish a competent tribunal to determine... rights and obligations or to allow access to... a tribunal in specific cases would amount to a violation of article 14 if such limitations are not based on domestic legislation, are not necessary to pursue legitimate aims such as the proper administration of justice, or are based on exceptions from jurisdiction deriving from international law such, for example, as immunities, or if the access left to an individual would be limited to an extent that would undermine the very essence of the right.”<sup>28</sup>*

23. Without undermining the potentially significant role of non-judicial mechanisms, especially in countries where judicial proceedings are known to be exceedingly long or ineffective, it is crucial that recourse to judicial mechanisms is always available, even as a last resort and complementary to other non-judicial mechanisms.<sup>29</sup> The right of access to justice includes the right to seek and obtain effective remedies and reparation, as a matter specifically guaranteed under article 2(3) of the ICCPR. The right to remedy and reparation is considered in more detail in the Basic Human Rights Reference Guide on “*Conformity of National Counter-Terrorism Legislation with International Human Rights Law*”.<sup>30</sup>

24. The right of access to courts and tribunals with respect to counter-terrorism measures taken by States is not limited to citizens of the country in which the court or tribunal operates. As explained by the Human Rights Committee, the right of access must be available to “all individuals, regardless of nationality or statelessness, or whatever their status, whether asylum seekers, refugees, migrant workers unaccompanied children or other persons, who may find themselves in the territory or subject to the jurisdiction of the State”.<sup>31</sup> This means that persons accused of terrorist offences, or persons subject to national administrative or other counter-terrorism procedures, must always have access to judicial mechanisms that are capable of determining the person’s rights and obligations. For example, article 9(4) of the ICCPR guarantees that all detained persons (whether or not detained pursuant to criminal charges) are entitled to take proceedings before a court to have the court decide whether or not the person’s detention is lawful (also known as the right to *habeas corpus*).<sup>32</sup>
25. Despite this, the Special Rapporteur on human rights while countering terrorism has noted a growing number of complaints that legislation introduced to combat terrorism, or legislation on national security or asylum, precludes or limits recourse to an independent tribunal:

*“Typically, such laws suspend habeas corpus or amparo, and establish an internal review or appeal mechanism devoid of any judicial involvement. In this regard, the Special Rapporteur is equally concerned about the frequent abuse of immunity or indemnity clauses in counter-terrorism laws and in the broad invoking of national security concerns as a blanket bar to access to justice.”<sup>33</sup>*

### 1.3 Access to justice for victims of terrorism

26. Effective access to justice is also of particular relevance to victims of terrorism. The Special Rapporteur on human rights while countering terrorism has noted an increased recognition by States of the need for victims of terrorism to be provided with legal status and with protection of their human rights at all times, including their rights to health, legal assistance, justice, truth and adequate, effective and prompt reparation.<sup>34</sup> These are matters considered in further detail in the Basic Human Rights Reference Guide on “*Conformity of National Counter-Terrorism Legislation with International Human Rights Law*”.<sup>35</sup>
27. There is also an increasing trend toward recognizing a right of victims to participate in both investigations and proceedings, and the right to be informed of evidence and findings.<sup>36</sup> For example, article 68 of the Rome Statute of the International Criminal Court establishes that victims of crimes may participate in proceedings before the International Criminal Court, even if they are not appearing as witnesses.<sup>37</sup> Effective participation in criminal proceedings may take the form of assisting the prosecutor or drafting victim impact statements,

which allow victims to describe the effects of the crime or to present their concerns independently of the prosecutor.<sup>38</sup> These statements may allow victims a greater measure of involvement and may lead to a feeling of reconciliation or obtaining justice. Such involvement may also assist with satisfying the victim's right to truth.<sup>39</sup> The right to truth applies to both the victim and the public, and allows concerned individuals to seek and obtain all relevant information concerning alleged human rights violations.<sup>40</sup>

Every person must have equal access to courts and tribunals where questions arise concerning the person's legal rights or obligations.

- Courts and tribunals must have the competence to hear such cases.
- Individuals must have effective access to courts and tribunals in such cases, even if as a last resort and complementary to other non-judicial mechanisms.
- The right of access to courts and tribunals must be available to all individuals, regardless of nationality or statelessness, or whatever their status, whether asylum seekers, refugees, migrant workers unaccompanied children or other persons, who may find themselves in the territory or subject to the jurisdiction of the State.
- Access to justice includes access to effective remedies and reparation, including in the case of victims of terrorism.

2. *Criminal charges, or a person's rights and obligations in a suit at law, must be determined by a competent, independent and impartial tribunal established by law. Trial by military or special tribunals must comply with human rights standards in all respects, including legal guarantees for the independent and impartial functioning of such tribunals.*

#### 2.1 Competent, independent and impartial tribunal established by law

28. Article 14(1) of the ICCPR provides that: "In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law". This requirement applies to both criminal and non-criminal proceedings brought by a State. The Human Rights Committee describes the notion of a 'tribunal' as "a body, regardless of its denomination, that is established by law, is independent of the executive and the legislative branches of government or enjoys in specific cases judicial independence in deciding legal matters in proceedings that are judicial in nature".<sup>41</sup>
29. The right to a trial before an independent and impartial tribunal established by law engages three principal considerations.
- a) Firstly, the tribunal must be established by law, which requires that the judicial system is established and sufficiently regulated by law emanating from

the legislature and that the composition of each tribunal is in all cases in accordance with the legal requirements for such composition.

- b) Secondly, the tribunal must be ‘competent’ to decide matters brought before it. Although this expression is not defined within the ICCPR, it is understood as involving three requirements: that individual judicial officers are suitably qualified and experienced to act as judicial officers;<sup>42</sup> that the tribunal is able to make a binding decision that cannot be altered by a non-judicial authority to the detriment of an individual party;<sup>43</sup> and that the tribunal has sufficient jurisdictional competence to ensure effective access to justice (see Guideline 1 herein).<sup>44</sup>
- c) As a central pillar of the right to a fair trial, a tribunal must be both independent and impartial. The requirements of independence and impartiality are absolute and not capable of limitation.<sup>45</sup>

## 2.2 Independence

- 30. Independence means that a tribunal must be free from any form of direct or indirect influence, whether this comes from the government, from the parties in the proceedings or from third parties such as the media.<sup>46</sup> In determining whether a tribunal can be considered to be independent, regard should be had to the manner in which judicial officers are appointed; the security of tenure of judicial officers, i.e., the duration of their term of office and the general principle that they should not be subject to removal; and the existence of adequate guarantees protecting the tribunal and its members from external pressures.<sup>47</sup> The Human Rights Committee has clearly stated that: “A situation where the functions and competencies of the judiciary and the executive are not clearly distinguishable or where the latter is able to control or direct the former is incompatible with the notion of an independent tribunal”.<sup>48</sup> The High Commissioner for Human Rights has emphasized that:

*“The independence of the judiciary is critical to its credibility, legitimacy and effectiveness in ensuring fair trials in the counter-terrorism context. A judiciary that is, and is seen by the population to be, independent is more likely to be able to administer justice fairly and credibly, and to have the confidence of populations in the quality of its decisions. A counter-terrorism strategy that lacks this key check and balance will be sharply diminished in its effectiveness.”<sup>49</sup>*

## 2.3 Impartiality

- 31. Impartiality means that everyone should be treated the same, involving two features. First, that judicial officers exercise their functions without personal bias, prejudice or preconceptions about the particular case before them (referred to as ‘subjective impartiality’); and, secondly, that the tribunal acts in a manner that offers sufficient guarantees to exclude any legitimate doubt of impartiality (referred to as ‘objective impartiality’).<sup>50</sup>

Criminal charges, or a person's rights and obligations in a suit at law, must be determined by a competent, independent and impartial tribunal established by law.

- The tribunal must be established by law.
- The tribunal must be competent to decide matters brought before it.
- The tribunal must be independent, such that it is free from any form of direct or indirect influence.
- Members of the tribunal must exercise their functions without personal bias, prejudice or preconceptions; and in a manner that offers sufficient guarantees to exclude any legitimate doubt of impartiality.

#### 2.4 'Faceless judges'

32. A practice that has occurred in some countries within measures taken to fight terrorist activities has been the use of tribunals of “faceless judges”, meaning tribunals composed of anonymous judges. The initial approach of the Human Rights Committee to such cases was to treat trials before faceless judges as automatically failing to guarantee the independence and impartiality of the judges.<sup>51</sup> An individual opinion of a Human Rights Committee member has recognized that trial by tribunals of faceless judges might be necessary for the protection of judges and of the administration of justice because of serious threats to their security caused by terrorism or other forms of organized crime.<sup>52</sup> When States are faced with such an extraordinary situation, however, he concluded that the State should in such circumstances take steps to derogate from applicable rights under article 14 of the ICCPR, but only to the extent strictly required by the exigencies of the situation. However, recognizing that the requirements of independence and impartiality are absolute and not capable of limitation,<sup>53</sup> the Human Rights Committee has pointed out that, even if the identity of judges is independently verified, tribunals of faceless judges often suffer from other irregularities undermining the independence and impartiality of such courts.<sup>54</sup> Noting similar irregularities, the Inter-American Court of Human Rights has treated trial by faceless judges as a “blatant violation of the right to a public hearing”.<sup>55</sup> The Special Rapporteur on human rights while countering terrorism has identified the abolition of faceless judges as an example of best practice.<sup>56</sup>

#### 2.4 Military or special courts or tribunals

33. Although the ICCPR does not prohibit the establishment or use of military courts and tribunals (or special courts or tribunals constituted outside the ordinary court system for particular purposes), the Special Rapporteur on human rights while countering terrorism has called for caution in allocating terrorism cases to military or special courts:

*“In many countries, the cumulative effect of simplified provisions for dismissal of judges sitting in military or special courts, the lack of security of tenure of judges, the fact that often judges are serving (military) officers appointed by the executive, and the broad discretionary power of the executive to refer cases to such courts, lead to serious questions concerning the independence and impartiality of such courts, even where instructions are given to members of a court that they are to act independently... The Special Rapporteur is especially concerned about cases where the executive has broad discretionary powers either to refer terrorist suspects to military or special courts, or to review or confirm the decisions of these courts, which gives the executive the ultimate control over the accused and the outcome of the trial. Individuals accused of the same or similar offences should not be treated with different standards of justice at the whim of the executive.”<sup>57</sup>*

34. As reaffirmed by the Human Rights Committee and the Special Rapporteur on the independence of judges and lawyers, human rights standards apply fully to any cases that are disposed of by military courts.<sup>58</sup> In many countries, military tribunals form part of the ‘ordinary’ judiciary and sometimes constitute a specialized branch within the general judicial system. In other countries, military tribunals fall outside the scope of ordinary jurisdiction and are attached to the executive branch. Whatever model applies, military and special courts must fully adhere with the requirements of independence and impartiality, and fair trial rights must be guaranteed for the accused. The Special Rapporteur has therefore recommended that: “The independence of military tribunals must be legally guaranteed at the highest possible level”.<sup>59</sup>
35. A challenge frequently impacting upon the independent functioning of military justice mechanisms is the role and functions of ‘convening’ military officers. The Special Rapporteur on human rights while countering terrorism has noted with concern, for example, the situation where judges and members in a military commission are selected for each trial by a convening authority who, as a former judge, is now considered a civilian but is employed by the military branch of the executive. He concluded that the resulting appearance of impartial selection by the convening authority of members of individual commissions was undermined.<sup>60</sup> He also noted the ability of the convening authority to intervene in the conduct of trials before a military commission.<sup>61</sup>
36. Taking note of a decision of the European Court of Human Rights concerning “fundamental flaws” in a courts-martial system because of the role of the convening military officer,<sup>62</sup> the Special Rapporteur on the independence of judges and lawyers has concluded that “the role and functions of convening officers, and safeguards against any such interference, must be clearly defined by legislation so that, on the one hand, convening officers can act independently from external pressure and, on the other, they are prevented from acting in ways that might hinder the independent and impartial administration of justice”.<sup>63</sup>

37. A further challenge to the independence of military courts concerns the selection of members of military courts or commissions who fall within the same chain of command. This interference with independence can be both subjective (as potentially influencing individual members of military courts or commissions) and/or objective (as impacting on their outward appearance of impartiality). The Special Rapporteur on human rights while countering terrorism has concluded that, despite any advice to the contrary, more junior members of a military commission may therefore be directly or indirectly influenced in their consideration of the facts.<sup>64</sup>
38. Although the ICCPR does not explicitly address the trial of civilians by military tribunals, a number of instruments and the jurisprudence of international and regional mechanisms show the existence of a trend against extending the criminal jurisdiction of military tribunals over civilians.<sup>65</sup> The Special Rapporteur on the independence of judges and lawyers, amongst other Special Procedures of the UN Human Rights Council, has noted the “regrettably common practice” of using military or emergency courts to try civilians in the name of national security, a state of emergency or counter-terrorism.<sup>66</sup> Where recourse to military courts is made, such courts should try only military personnel accused of military offences or breaches of military discipline.<sup>67</sup>
39. The Basic Principles on the Independence of the Judiciary state that: “Everyone shall have the right to be tried by ordinary courts or tribunals using established legal procedures”.<sup>68</sup> They also stipulate that: “Tribunals that do not use the duly established procedures of the legal process shall not be created to displace the jurisdiction belonging to the ordinary courts or judicial tribunals”.<sup>69</sup> Consistent with this, the draft Principles Governing the Administration of Justice through Military Tribunals, elaborated by a former Special Rapporteur of the Sub-Commission on the Promotion and Protection of Human Rights in consultation with human rights experts, jurists and military personnel from throughout the world, state that: “Military courts should, in principle, have no jurisdiction to try civilians. In all circumstances, the State shall ensure that civilians accused of a criminal offence of any nature are tried by civilian courts.”<sup>70</sup>
40. Where military courts are used to try civilians, the Human Rights Committee has determined that their use will only be legitimate if “the regular civilian courts are unable to undertake the trials... [and] other alternative forms of special or high-security civilian courts are inadequate to the task and... recourse to military courts is unavoidable”.<sup>71</sup> The High Commissioner for Human Rights has further stressed that: “Where the regular criminal justice system is considered to be



inadequate to meet the challenges of trying terrorist cases, efforts should be made to strengthen these rather than to establish special courts”.<sup>72</sup>

41. In her report focusing on military tribunals, the Special Rapporteur on the independence of judges and lawyers has concluded that the trial of civilians by military tribunals should be prohibited, save in strictly exceptional cases concerning civilians assimilated to the military<sup>73</sup> who have allegedly perpetrated a criminal offence outside the territory of the State and where regular courts are unable to undertake the trial.<sup>74</sup> She has clarified that:

*“The burden of proving the existence of such exceptional circumstances rests with the State. Such reasons must be substantiated in each specific case, since it is not sufficient for national legislation to allocate certain categories of offence to military tribunals in abstracto. Such cases should be expressly provided for by the law.”<sup>75</sup>*

The establishment of military or special courts with jurisdiction over terrorist offences, including tribunals of faceless judges, must never involve any limitation on the requirements of independence and impartiality. Human rights standards apply fully to cases that are disposed of by such courts and tribunals.

Military or special courts established, or with the competence, to hear terrorism cases, must operate in a manner that ensures the right to a fair and public hearing by a competent, independent and impartial tribunal established by law, including the need to ensure that:

- The independence of such tribunals and their inclusion within the general administration of justice system is legally guaranteed at the highest possible level;
- The functions and competencies of the tribunal are not under the control or direction of the executive;
- The role and functions of ‘convening’ authorities are clearly defined by law so that they may act independently from external pressure and are themselves prevented from acting in ways that might hinder the independent and impartial administration of justice;
- Members of such tribunals do not fall within the same chain of command; and
- Such tribunals do not have jurisdiction over civilians, save in strictly exceptional cases concerning civilians assimilated to the military who have allegedly perpetrated a criminal offence outside the territory of the State and where regular courts are unable to undertake the trial.

3. *The right to a fair trial involves the right to a public hearing. Any restrictions on the public nature of a trial, including for the protection of national security, must be both necessary and proportionate, as assessed on a case-by-case basis. Any such restrictions should be accompanied by adequate mechanisms for observation or review to guarantee the fairness of the hearing.*

### 3.1 Open administration of justice

42. Another of the central pillars of a fair trial is the open administration of justice, important to ensure the transparency of proceedings and thus providing an important safeguard for the interest of the individual and of society at large.<sup>76</sup>

Article 14(1) of the ICCPR, applicable to both criminal and non-criminal proceedings, entitles every person to a public hearing. In criminal proceedings, the Human Rights Committee has reaffirmed that the accused is entitled to a public and oral hearing.<sup>77</sup> The Inter-American Court of Human Rights has also found that a public hearing is a requirement of due process guarantees in criminal cases.<sup>78</sup>

43. The right to a public hearing is a qualified right, reflected in article 14(1) of the ICCPR, which states:

*“...The press and the public may be excluded from all or part of a trial 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, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice; but any judgment rendered in a criminal case or in a suit at law shall be made public except where the interest of juvenile persons otherwise requires or the proceedings concern matrimonial disputes or the guardianship of children.”*

### 3.2 Restrictions on public access to proceedings

44. Restrictions on the public nature of proceedings involve the exclusion of the public and press from the hearing and are referred to as ‘closed’ or ‘in-camera’ hearings.<sup>79</sup> Exclusion of the press and public from a trial can only take place in the exceptional circumstances set out in article 14(1) of the ICCPR. In the context of proceedings relating to terrorism, exclusion may be justified if this is necessary for the protection of a witness (see further Guideline 10 herein) or in the interest of national security.<sup>80</sup> The starting point for any exclusion of the public or media is that such a restriction must be both necessary and proportionate. This must be assessed on a case-by-case basis and means that any restriction, including any publication ban, must only be ordered if:

*“... this is necessary to prevent a serious risk to the proper administration of justice, because reasonable alternative measures will not prevent the risk [of harm caused by publication of the holding of a public hearing], and when the salutary effects of the publication ban outweigh the deleterious effects on the rights and interests of the parties and the public, including the effects on the right to free expression, the right of the accused to a fair and public trial, and the efficacy of the administration of justice”.*<sup>81</sup>

45. The European Court of Human Rights has concluded that restrictions on the right to a public hearing have been necessary and proportionate where imposed to ensure the efficacy of a secret surveillance regime, bearing in mind the importance of such measures to the fight against terrorism and serious crime in the country in question.<sup>82</sup> Any exclusion of the press and public for reasons of national security should nevertheless be accompanied by adequate mechanisms for observation or review to guarantee the fairness of the hearing<sup>83</sup> and any restrictions

must be limited to those portions of the hearing in which there is a necessary and proportional need to exclude the press and the public.<sup>84</sup>

4. *Everyone charged with a criminal offence has the right to be presumed innocent until proved guilty according to the law.*

#### 4.1 Presumption of innocence

46. Article 14(2) of the ICCPR highlights the fact that the “right to be presumed innocent until proved guilty according to law” (the presumption of innocence) is essential to upholding the right to a fair trial.<sup>85</sup> It involves questions of the burden and standard of proof in criminal proceedings as well as the treatment of an accused person that may undermine the presumption of innocence. The right applies to all stages of criminal proceedings, from the time a person is suspected of having committed a criminal offence until and if convicted.<sup>86</sup>

#### 4.2 Burden of proof

47. The presumption of innocence imposes a burden of proof on the prosecution, i.e. a burden to prove the guilt of a person accused of a criminal offence. To discharge this burden, the prosecution must prove the guilt of the accused person beyond reasonable doubt.<sup>87</sup>

#### 4.3 Standard of proof

48. The presumption of innocence guarantees that no guilt can be presumed until the charge has been proved beyond reasonable doubt. It requires that the accused has the benefit of doubt, and is treated in accordance with this principle.<sup>88</sup> The Human Rights Committee has commented that a hearing would not be fair, for example, if a defendant was faced with “the expression of a hostile attitude from the public or support for one party in the courtroom that is tolerated by the court, thereby impinging on the right to defence”.<sup>89</sup> Prolonged pre-trial detention, for example, may also result in a violation of the presumption of innocence, particularly where it has the effect of punishing the accused prior to trial.<sup>90</sup>

#### 4.4 Conduct prejudicial to the presumption of innocence

49. The presumption of innocence is also linked to the requirement that the court determining a criminal case must act impartially, without bias and without prejudging the case (see Guideline 2 herein). The presumption of innocence will be violated if a judge, or jury member, reflects an opinion that an accused person is guilty before the trial has proceeded to the stage of determining whether or not the accused person is guilty of the offence charged.<sup>91</sup>

50. The presumption of innocence also binds third parties, which means refraining from expressing views as to the guilt of the accused that would serve to prejudice a case.<sup>92</sup> In the context of counter-terrorism, media coverage can have a particularly adverse impact on this principle. While freedom of expression must always be upheld, media coverage must not become inflammatory so as to negatively impact upon an accused's presumed innocence.<sup>93</sup>

Everyone charged with a criminal offence, including a terrorism offence, has the right to be presumed innocent until proved guilty according to the law. This means that:

- The prosecution must prove the guilt of the accused person beyond reasonable doubt;
- The accused must be treated in accordance with the presumption that she or he is innocent until the charge has been proved beyond reasonable doubt;
- Third parties must refrain from expressing views as to the guilt of an accused that would serve to prejudice the case; and
- The court or tribunal charged with determining the case must act impartially, without bias and without prejudging the case.

5. *Anyone charged with a criminal offence cannot to be compelled to testify against herself or himself, or to confess guilt.*

#### 5.1 Privilege against self-incrimination

51. Article 14(3)(g) of the ICCPR requires that, as a minimum guarantee in the determination of any criminal charge, every person is entitled “not to be compelled to testify against himself or to confess guilt”. This ‘privilege against self-incrimination’ is closely linked to the presumption of innocence (see Guideline 4 herein) and is of relevance in three contexts:

- a) The right to silence of an accused person, along with the presumption against any adverse inference to be drawn from the exercise by an accused person of this right;<sup>94</sup>
- b) The absolute prohibition of the use of any information obtained through methods violating the prohibition of torture or other forms of ill-treatment; and
- c) Through the conduct of a hearing, or the production of a warrant for questioning, where a person is compelled to answer questions.

#### 5.2 Statement or confessions obtained in violation of the prohibition of torture and other ill-treatment

52. Domestic law must ensure that statements or confessions obtained in violation of the absolute prohibition of torture or other forms of ill-treatment are

inadmissible and excluded from the evidence, including during a state of emergency.<sup>95</sup> The only exception to this rule is that such material may be used as evidence that torture or other ill-treatment has occurred.<sup>96</sup> Where it is alleged that a statement or confession was obtained in violation of the prohibition of torture or other forms of ill-treatment, the burden is on the State to prove that statement made by the accused was given of his or her own free will.<sup>97</sup> The prohibition of torture or other forms of ill-treatment is considered in more specific detail in the Basic Human Rights Reference Guide on “*Detention in the Context of Countering Terrorism*”.<sup>98</sup>

### 5.3 Investigative hearings compelling persons to answer questions

53. In certain circumstances, States have adopted procedures where a person may be required by law to answer questions by intelligence services, including in the context of the gathering of intelligence concerning terrorist threats. Where such measures exist, it is essential to ensure that any information obtained through such questioning does not violate the privilege against self-incrimination. Emphasizing the general requirements of fairness and the privilege against self-incrimination, the European Court of Human Rights has stated that: “The public interest cannot be invoked to justify the use of answers compulsorily obtained in a non-judicial investigation to incriminate the accused during the trial proceedings”.<sup>99</sup> This means that the information provided by the person must not be capable of being used as evidence in criminal proceedings against the person compelled to answer questions.<sup>100</sup> This principle is referred to in some countries as the application of ‘use immunity’ to information obtained by compulsion.
54. It is equally important in such circumstances that there is no ‘derivative use’ of the information. The Special Rapporteur on human rights while countering terrorism has taken the view, for example, that law enforcement officers should not be present during intelligence-gathering hearings. In his view, this is important to ensure that information provided during the hearing cannot steer police officers who are present at the hearing towards a particular line of inquiry that would not otherwise have been pursued. If police officers are present during such hearings, any evidence obtained through such a line of inquiry should not be used in criminal proceedings against the person giving the information.<sup>101</sup> As expressed by the Special Rapporteur: “A clear demarcation should exist and be maintained between intelligence gathering and criminal investigations”.<sup>102</sup>

6. *The right to a fair hearing, in both criminal and non-criminal proceedings, involves the right to a trial ‘without delay’ or ‘within a reasonable time’. The right to a timely hearing includes the right to a timely judgment.*

#### 6.1 Trial without undue delay in criminal and non-criminal proceedings

55. Judicial proceedings must be timely. In the case of criminal proceedings, article 14(3)(c) of the ICCPR entitles an accused person, as a minimum guarantee, to be “tried without undue delay”. Although article 14 only expressly refers to this guarantee in the context of the determination of criminal charges, the Human Rights Committee has treated the right to be heard within a reasonable time as applicable to both criminal and non-criminal proceedings, as an aspect of the overarching right to a fair trial in article 14(1) of the ICCPR.<sup>103</sup> States may not justify delays in proceedings based on a lack of resources.<sup>104</sup> In practical terms, this means that a person must be brought before the courts without undue delay (see Guideline 1 herein) and that proceedings, including any appeal arising from them, must be disposed of promptly.<sup>105</sup>

#### 6.2 Timely hearing in criminal proceedings

56. The right to a timely hearing in criminal proceedings relates to the time from when a person is charged or arrested until judgment is rendered and any applicable appeals or reviews are completed.<sup>106</sup> Delays in the trial process could result in a violation of the rights of an accused person under article 9(3) of the ICCPR, i.e. the right to be brought promptly before a judge,<sup>107</sup> the right to a trial within a reasonable time, or to release;<sup>108</sup> and the length of an accused person’s detention awaiting trial.<sup>109</sup> Delays may also heighten the risk of indefinite detention, contrary to international human rights law.<sup>110</sup>
57. In the case of any person arrested or detained for the alleged commission of a terrorist offence, article 9(3) of the ICCPR complements article 14(3)(c) by confirming that the person is entitled to trial within a reasonable time, or to release.<sup>111</sup> In cases involving serious charges such as terrorism, and where an accused is denied bail or other measures short of detention by the court, this means that an accused person must be tried in an expeditious manner as possible.<sup>112</sup>

#### 6.3 Timely hearing in non-criminal proceedings

58. The right to a timely hearing in non-criminal proceedings relates to the time from when the proceedings are instituted until when the determination of the court becomes final and the judgment has been executed.<sup>113</sup>

#### 6.4 Timely judgment

59. The right to a hearing without undue delay also includes a right to a timely judgment, meaning that a court's decision must also be pronounced without undue delay.<sup>114</sup> Although judgment need not answer every argument put to a court during the course of a trial, a judgment must publicly pronounce “the essential findings, evidence and legal reasoning” of the court's decision.<sup>115</sup> Article 14(1) of the ICCPR also requires that any judgment must be made public, unless the interests of juvenile persons otherwise require, or the proceedings concern matrimonial disputes or the guardianship of children. This is important not only for adherence with the overall right to a fair hearing, but also to allow effective exercise of the right to appeal by allowing a convicted person to make a fully informed decision on whether or not to appeal (see Guideline 12 herein on appeal rights).

What constitutes ‘reasonable time’ or ‘undue delay’ in criminal and non-criminal proceedings, including in the counter-terrorism context, must be assessed in the circumstances of each case.<sup>116</sup> International and regional mechanisms have had regard to the following factors as being relevant to the reasonableness or otherwise of any delay in the disposal of proceedings, although this list should not be treated as exhaustive:<sup>117</sup>

- The complexity of the legal issues being determined;<sup>118</sup>
- The nature of the facts to be established;<sup>119</sup>
- The number of accused persons, or parties in civil proceedings, and witnesses giving evidence;<sup>120</sup>
- The conduct of the accused or any of the parties to civil proceedings, including whether or not adjournments were requested by them or delay tactics adopted;<sup>121</sup>
- The length of each individual stage of the proceeding;<sup>122</sup>
- The need for law enforcement authorities to obtain mutual legal assistance;<sup>123</sup>
- Any detrimental effect caused by the delay on the individual's legal position;<sup>124</sup>
- The availability of remedies to accelerate the proceedings, and whether these were called upon;<sup>125</sup>
- The outcome of any appellate proceedings;<sup>126</sup>
- The link the case has with any other proceeding and whether the interests of justice call for stages in the two proceedings to be co-ordinated or to await steps or decisions to be taken in the other proceedings;<sup>127</sup> and
- The repercussions the case may have on the future application of national law.<sup>128</sup>

7. *Everyone charged with a criminal offence, including a terrorist offence, has the right to be tried in his or her presence. Trials in absentia should occur only in exceptional circumstances and only if all due steps have been taken to inform the accused of the proceedings sufficiently in advance.*

#### 7.1 Criminal trials in the presence of the accused

60. Article 14(3)(d) guarantees that everyone charged with a criminal offence has the right to be tried in his or her presence so that she or he can hear and challenge the prosecution case and present a defence.<sup>129</sup>

#### 7.2 Criminal trials *in absentia*

61. Conducting a trial in the absence of an accused person (trial *in absentia*) is, in principle, at odds with the general requirements of due process and the right to participate in one's own defence.<sup>130</sup> Article 14 does not invariably render proceedings *in absentia* as inadmissible and the Human Rights Committee has acknowledged that exceptional circumstances may apply allowing for trial *in absentia* to proceed in the interest of the proper administration of justice.<sup>131</sup> The Committee has only given one example of where this might be the case, namely where a defendant declines to exercise his or her right to be present at the hearing despite having been informed of the proceedings sufficiently in advance.<sup>132</sup> The Committee has also emphasized that such trials will only be compatible with article 14 of the ICCPR if all due steps have been taken to inform the accused person in a timely manner beforehand of the date and place of the person's trial and of the person's need to attend the trial.<sup>133</sup> The European Court of Human Rights has added that trial *in absentia* might also be permissible if the accused has unequivocally waived his or her right to appear, or if it is established that the accused was seeking to evade justice.<sup>134</sup> However, at the international level, the Special Tribunal for Lebanon allows for the possibility of holdings trials in absentia, albeit under strict conditions, "namely when the accused: (a) has expressly and in writing waived his or her right to be present; (b) has not been handed over to the Tribunal by the State authorities concerned; (c) has absconded or otherwise cannot be found and all reasonable steps have been taken to secure his or her appearance before the Tribunal and to inform him or her of the charges confirmed by the Pre-Trial Judge."<sup>135</sup>
62. The Human Rights Committee has further explained that when such trials occur in exceptional circumstances, strict observance of the rights of the defence is all the more necessary.<sup>136</sup> When a trial *in absentia* has taken place, there must be an opportunity for a fresh determination of the merits of the case in the presence of the accused once the accused has found out about the proceedings and is willing and able to take part in fresh proceedings.<sup>137</sup> If the person convicted seeks



to challenge the conviction on grounds that the trial should not have proceeded *in absentia*, the State then has the burden of proving that it took all reasonable steps to notify the defendant of the charges and the details of the proceedings.<sup>138</sup>

Representing good practice, the following criteria should be applied to the conduct of trials *in absentia*.<sup>139</sup>

- The accused must be served with a summons to appear and to prepare his or her defence;
- The consequences of the failure to appear are clearly explained in the summons;
- An adjournment of the proceeding is granted if there are reasons to believe that the accused has been prevented from appearing;
- Trials are not conducted *in absentia* if it is possible and desirable to transfer the proceeding to another State, or to apply for extradition of the accused;
- The convicted person is notified of the judgment;
- The time-limit for appeal does not begin to run until the convicted person has had effective notice of the judgment, except when it is established that she or he has sought to evade justice;
- A person tried *in absentia* in circumstances where a summons has not been served in due and proper form must be provided with a remedy enabling her or him to have the judgment annulled; and
- A person tried *in absentia*, where a summons has been properly served, is entitled to a retrial, in the ordinary way, if that person can prove that absence from the trial and that failure to inform the judge of the absence was due to reasons beyond his or her control.

8. *All persons have the right to representation by competent and independent legal counsel of their choosing, or to self-representation. The right to representation by legal counsel applies to all stages of a criminal process, including the pre-trial phase. Any restrictions on the right to communicate privately and confidentially with legal counsel must be for legitimate purposes, must be proportional, and may never undermine the overall right to a fair hearing.*

#### 8.1 Self-representation and representation by counsel in criminal and non-criminal proceedings

63. Article 14(3)(d) of the ICCPR guarantees the right of any accused person to representation at trial. Some international human rights bodies consider this also applicable to non-criminal proceedings as part of the overarching right to a fair hearing.<sup>140</sup>

The right under article 14(3)(d) of the ICCPR to representation at a criminal trial includes the following elements:

- The right to defend oneself in person;
- The right to representation by legal counsel of one's choosing;
- The right to be informed, in cases where the accused is not represented by legal counsel, of the right to legal representation;

- The right to legal aid, in cases where the interests of justice so require.
- The right to legal representation incorporates the following further requirements:
- The right to representation by legal counsel at all stages of the criminal process, including the pre-trial phase:
- The right to representation by legal counsel that is independent and competent;
- The right to confidential communications with legal counsel.

## 8.2 Self-representation

64. The right to self-representation means that, in principle, a person cannot be forced to accept State-appointed counsel.<sup>141</sup> There may be objective and serious reasons, however, where the interests of justice require, in the case of a specific trial, the assignment of a lawyer against the wishes of the accused.<sup>142</sup>
65. In the context of criminal proceedings where an accused person seeks to represent him or herself, article 14(3)(d) of the ICCPR requires that the person be informed of the right to be represented by legal counsel.<sup>143</sup> For effective enjoyment of the rights under article 14(3)(d) of the ICCPR, such a person should be asked whether or not she or he understands the entitlement to legal assistance of one's choosing and the fact that, should the person have insufficient means to pay for legal assistance, there may also be an entitlement to legal aid.<sup>144</sup>

## 8.3 Representation by counsel of choice

66. In addition to self-representation, every person is entitled to legal representation by counsel of his or her choosing, in both criminal and non-criminal proceedings.<sup>145</sup> The right to counsel of choice may be limited, however, where legal aid counsel is appointed.<sup>146</sup> The wording of article 14(3)(d) of the ICCPR clarifies that the right to legal aid is dependent on two conditions: first, that the person concerned does not have sufficient means to pay for the legal assistance; and, second, that the interests of justice require that legal counsel be assigned to represent the person.<sup>147</sup>
67. In the context of the fight against terrorism, limitations upon representation by counsel of choice are sometimes imposed out of fear that legal counsel may be used as a vehicle for the flow of improper information between counsel's client and a terrorist organization. This fear is being addressed by States either excluding or delaying the availability of counsel; requiring consultations between counsel and client to be electronically monitored, or to take place within the sight and hearing of a police officer; or appointing counsel chosen by the State in place of the person's counsel of choice.<sup>148</sup> The Special Rapporteur on human rights while countering terrorism has in this regard stated:

*“Generally speaking, there must be a reasonable and objective basis for any alterations from the right to choose one’s counsel, capable of being challenged by judicial review. Any delay or exclusion of counsel must not be permanent; must not prejudice the ability of the person to answer the case; and, in the case of a person held in custody, must not create a situation where the detained person is effectively held incommunicado or interrogated without the presence of counsel.”<sup>149</sup>*

#### 8.4 Communications with legal counsel

68. Article 14(3)(b) of the ICCPR guarantees the right of an accused person to communicate with legal counsel. Legal counsel must be available at all stages of criminal proceedings, including during the pre-trial phase,<sup>150</sup> and especially in capital cases, where the Human Rights Committee has affirmed that it is clear that legal representation must be made available.<sup>151</sup> The Committee has determined, for example, that a trial judge should not have proceeded with the deposition of witnesses during a preliminary hearing without allowing the applicant an opportunity to ensure the presence of his lawyer.<sup>152</sup> The Committee has treated this as an obligation, imputable to the State, even where it is solely the fault of legal counsel that she or he fails to attend a hearing.<sup>153</sup>
69. Although not expressly stated within article 14 of the ICCPR, legal counsel must be able to meet with his or her client in private and to communicate in conditions that fully respect the confidentiality of their communications.<sup>154</sup> For example, the Human Rights Committee has found violations of the right to communicate with legal counsel (article 14(3)(b)) where meetings between a lawyer and the accused person have been required to be held in the presence of investigators.<sup>155</sup> The Committee has also treated a lack of privacy between lawyer and client as a violation of the right to legal representation (article 14(3)(d)).<sup>156</sup> Confidentiality of detainee-lawyer communications must be guaranteed from the outset of any deprivation of liberty, regardless of whether the State intends to use at trial any information obtained in breach of the confidentiality.<sup>157</sup> This means that interviews between legal counsel and a detained person may be within sight, but not within the hearing, of a law enforcement official.<sup>158</sup>
70. The European Court of Human Rights has accepted that the right to confidential communications may be subject to restrictions for good cause.<sup>159</sup> This means that any restriction must be necessary to achieve a legitimate aim and must be proportional to that end, so long as the restriction does not deprive the accused person of a fair trial when considering the entirety of the proceedings.<sup>160</sup> A decision to prosecute someone for a terrorist offence should never on its own have the consequence of excluding or limiting confidential communication with counsel.<sup>161</sup>
71. States have taken measures to monitor communications between legal counsel and persons suspected of involvement in terrorist acts, justifying such steps to be for the purpose of preventing information being passed from the accused person

to counsel and in turn from counsel to suspects still at large. While acknowledging that this is a legitimate aim, the European Court of Human Rights has found that, in the case considered before it, there was no allegation that counsel was, in fact, likely to collaborate in such an attempt and that it was unclear to what extent a police officer would have been able to spot a coded message if one was, in fact, passed between client and lawyer. At most, the presence of the officer may have inhibited any improper communication of information, assuming that there was a risk of this occurring. The Court found the measure to be disproportionate and concluded that there had therefore been a violation of the right to communicate with legal counsel in private (corresponding to the right under article 14(3)(b) of the ICCPR).<sup>162</sup> The Special Rapporteur on human rights while countering terrorism has concluded that, if restrictions are justified in a specific case, communication between lawyer and client should be in sight but not in hearing of the authorities.<sup>163</sup> He has explained:

*“Where measures are taken to monitor the conduct of consultations between legal counsel and client, strict procedures must be established to ensure that there can be no deliberate or inadvertent use of information subject to legal professional privilege. Due to the importance of the role of counsel in a fair hearing, and of the chilling effect upon the solicitor-client relationship that could follow the monitoring of conversations, such monitoring should be used rarely and only when exceptional circumstances justify this in a specific case.”<sup>164</sup>*

### 8.5 Independent legal counsel

72. For the effective guarantee of the overall right to a fair trial, it is implicit that counsel must be independent and competent. The Human Rights Committee has clarified that a State is not to be held responsible for the conduct of a defence lawyer unless it was, or should have been, “manifest” to the judge that the lawyer’s behaviour or level of competence was incompatible with the interests of justice.<sup>165</sup> Manifest misbehaviour or incompetence that is incompatible with the interests of justice has been found to exist, for example, where counsel has withdrawn an appeal in a death penalty case without consulting with the convicted person,<sup>166</sup> or where counsel has been absent during the giving of evidence by a witness.<sup>167</sup> As to the independence of counsel, the Human Rights Committee has commented that “lawyers should be able to advise and to represent persons charged with a criminal offence in accordance with generally recognized professional ethics without restrictions, influence, pressure or undue interference from any quarter”.<sup>168</sup>

### 8.6 ‘Special advocates’

73. In some countries, ‘special advocates’ (security-cleared legal counsel) are used in criminal and non-criminal proceedings involving the use of classified information (see further Guideline 9 herein). The role of the special advocate is to take

full instructions from the person who is the subject of the proceedings, following which the advocate has the opportunity to view the full, un-redacted, file. Generally speaking, the special advocate may then: (a) challenge the admissibility of, and/or weight to be given to, the non-disclosed classified evidence; (b) challenge the non-disclosure itself, on the basis that the non-disclosure is either unnecessary or disproportionate; and/or (c) advocate on behalf of the person in a closed hearing.<sup>169</sup> These functions are undertaken additional to any legal representation held by the person who is the subject of the proceedings, since the special advocate does not ‘act’ for the person.<sup>170</sup> The Special Rapporteur on human rights while countering terrorism has said, however, that a special advocate cannot always be a cure to the disadvantages of a person not being made aware of the case against her or him.<sup>171</sup> The High Commissioner for Human Rights has emphasized the problematic nature of limitations on the ability of special advocates to fully discharge their functions and act as a sufficient counterbalance to non-disclosure of information, particularly when these advocates are not able to obtain post-disclosure instructions and are not permitted to communicate with non-security cleared persons after the disclosure of evidence.<sup>172</sup> Additionally, a lack of adequate resources can result in ineffective action by special advocates. According to one national court, the use of special advocates raised significant issues and has to be decided on a case-by-case basis in order to secure protection of the accused’s right to a fair trial.<sup>173</sup>

9. *In criminal proceedings and other proceedings initiated by the State, every person shall have the right to adequate time and facilities to prepare his or her case. In criminal proceedings, the prosecution must disclose any relevant material in its possession, or to which it may gain access, including exculpatory material. Restrictions on the disclosure of information may be justified in certain cases and subject to conditions that sufficiently guarantee the right of the person to respond to the case.*

9.1 Right to adequate time and facilities to prepare the case in criminal and non-criminal proceedings

74. The right to adequate time and facilities in the preparation of a defence is an essential safeguard to ensuring the principle of equality of arms (see Section II(E) herein on the equality of arms). Article 14(3)(b) of the ICCPR provides that, in the determination of any criminal charge, an accused person shall be entitled to “adequate time and facilities for the preparation of his defence”. What constitutes “adequate time” will depend on the specific circumstances of the case.<sup>174</sup> Without the ability to adequately prepare a defence, the equality of arms will be severely diminished. The right to adequate facilities must include access to documents

and other information the accused requires to prepare his or her case.<sup>175</sup> In line with Article 14(1) of the ICCPR, any non-criminal proceedings must also live up to the standard of a fair trial.

## 9.2 Disclosure of information by the State

75. In criminal proceedings, the right to adequate facilities to prepare a defence includes an obligation on the prosecution or State to disclose any material in its possession, or to which it may gain access. The Human Rights Committee has explained that disclosure must include documents and other evidence that the prosecution plans to offer in court against the accused or that are exculpatory.<sup>176</sup> Exculpatory material includes not only material establishing innocence but also other evidence that could assist the defence, such as indications that a confession was not voluntary.<sup>177</sup> The case-law of the European Court of Human Rights has found that disclosure obligations apply in non-criminal proceedings as part of the right to a fair trial where such information manifestly aims at influencing the decision of a court or other decision-making body.<sup>178</sup>

## 9.3 Restrictions on disclosure of information

76. Restricted disclosure of information may be justified if this is required to pursue a legitimate aim such as: (a) protecting national security;<sup>179</sup> (b) preserving the fundamental rights of another individual, such as the protection of witnesses who are at risk of reprisals;<sup>180</sup> or (c) safeguarding an important public interest, such as allowing police to keep secret their methods of investigating crimes.<sup>181</sup> In the counter-terrorism context, the increased use of intelligence and secret information as evidence creates a juxtaposition with fair trial rights. Whereas intelligence services do not disclose information, unless in some cases this is absolutely necessary, trials rely on the basis of full disclosure.<sup>182</sup> Evidentiary standards in criminal proceedings also involve higher thresholds than for the gathering of intelligence information.<sup>183</sup> States have therefore been urged to ensure that any measures taken to protect sensitive information are compatible with the right to a fair hearing.<sup>184</sup>
77. In any situation where non-disclosure occurs, the trial court must assess whether or not this is necessary and proportional.<sup>185</sup> An assessment of proportionality requires a balance to be struck between how well the non-disclosure protects the legitimate aims being pursued and the negative impact this has on the ability of the person to respond to the case.<sup>186</sup> This means that if a less restrictive measure can achieve the legitimate aim (such as providing redacted summaries of evidence, for example) then that measure should be applied.<sup>187</sup>

78. Besides the need to ensure that any restricted disclosure of information is necessary and proportionate, any difficulties caused to a party in the proceedings must be “sufficiently counterbalanced” by the judicial authorities in order to ensure that the person is able to respond to the case and that the trial is fair overall.<sup>188</sup> This might involve, for example, an *ex parte* evaluation by the trial judge of whether all or part of the information should be withheld and whether a redacted summary of the information should be provided. An accused person must always be provided with sufficient information so as to be adequately prepared for the case.<sup>189</sup>

Where a State seeks to impose any restriction on the disclosure of classified information:

- The restriction must be strictly necessary to pursue a legitimate aim.
- The restriction must be proportional, by striking a balance between how well it achieves the aim being pursued and the negative impact this has on the ability of the person to respond to the case.
- The trial court, or other competent judicial authorities, must assess the necessity and proportionality of the restrictions on disclosure of the information.
- Any difficulties caused to the person in respect of whom information is restricted must be sufficiently counterbalanced.
- The person must in all cases be in a position to answer the case.
- If the latter qualifications cannot be met, the State must choose between: disclosing the information; proceeding in the case without relying on the information; or withdrawing the proceedings.

#### 9.4 Summaries of information redacted for security reasons

79. The question of summaries of information redacted for security reasons has been considered by the Human Rights Committee in a case concerning the reasonableness of a security certificate issued against the author (a certificate issued by the executive branch that the author was deemed to pose a threat to national security). The Committee noted that the court had taken steps to ensure that the applicant was aware of, and was able to respond to, the case made against him and that he was also able to, and did, present his own case and cross-examine witnesses. In the circumstances of national security involved and the safeguards introduced by way of providing the person with a redacted summary of the information, the Committee was persuaded that this process was fair to the applicant and thus found no violation of Article 14 of the ICCPR.<sup>190</sup>

#### 9.5 ‘Special advocates’ and non-disclosure

80. ‘Special advocates’ (see Guideline 8 herein) have in some countries been used as a means of attempting to provide sufficient counterbalances to difficulties faced by a party as a result of the non-disclosure of classified information. Their use has been considered by the European Court of Human Rights, which has in this

context distinguished between three situations of restricted disclosure of information and the ability of the respondent to answer the case. The first situation is where the evidence is to a large extent disclosed. Where this open material formed the predominant basis of the trial court's decision, the European Court concluded that the opportunity to effectively respond to the case is available. The European Court of Human Rights also accepted as capable of being consistent with the right to a fair trial a second situation where, notwithstanding that most or all of the underlying evidence remains undisclosed, it will be possible for the person to provide his or her representatives and the special advocate with sufficient instructions. This situation will arise if the allegations contained in the open material are sufficiently specific so that, even without knowing the detail or sources of the evidence that formed the basis of the allegations, the thrust of the case is effectively conveyed through the open information. In the third scenario, where the open material consists purely of general assertions and the determination of the judicial authority is based solely or to a decisive degree on closed material, the European Court concluded that the procedural requirements of a fair hearing will not be satisfied, even with the use of special advocates.<sup>191</sup>

10. *Every person shall have the right to call and examine witnesses, including expert witnesses. The use of anonymous witnesses must be restricted to cases where this is necessary to prevent intimidation of witnesses or to protect their privacy or security and must in all cases be accompanied by sufficient safeguards to ensure a fair trial.*

#### 10.1 Right to call and examine witnesses in criminal and non-criminal proceedings

81. Article 14(3)(e) of the ICCPR ensures that a person facing criminal charges will be able 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 the witnesses against him”. The right to call and examine witnesses also applies to non-criminal proceedings according to international human rights bodies, including the European Court of Human Rights and the Inter-American Court of Human Rights.<sup>192</sup>
82. While this principle is not absolute, a violation of the right to a fair trial may result if the attendance of a witness is called for and refused.<sup>193</sup> Depending on the relevance of a witness to the proceedings, the court may be required to take additional measures to ensure the attendance of a witness.<sup>194</sup>



### 10.2 Expert testimony

83. Expert evidence is particularly important in terrorism trials. Where terrorist acts involve the use of explosive devices or other forms of armaments, forensic evidence is often critical to the prosecution case and the knowledge of experts regarding such evidence will be critical to the outcome of the case. The refusal of expert testimony to examine such evidence, or the testimony of State witnesses, can constitute a violation of fair trial rights.<sup>195</sup>

### 10.3 Measures to protect witnesses

84. The right to examine witnesses does not necessarily mean that a witness must provide testimony in court. Although this is preferable, witness protection measures may be required, especially where there is a risk of intimidation or reprisals. Alternate options can include testimony by teleconference, the use of a screen or voice distortion to protect the identity of the witness, or by deposition prior to the hearing.<sup>196</sup> These measures will be particularly pertinent where vulnerable witnesses such as children are involved in the proceedings.
85. It is also essential to recognize that an overarching objective of witness protection is to combat impunity.<sup>197</sup> This means that guarantees of non-repetition, alongside other forms of reparation, must be afforded to victims of terrorist acts.<sup>198</sup> The Special Rapporteur on human rights while countering terrorism has pointed out that the protection of future victims of terrorist acts requires “an equally resolute commitment to the principles of international human rights law in the conception and implementation of counter-terrorism strategies”.<sup>199</sup>

### 10.4 Anonymous witnesses

86. Where the threat of reprisals is high and no other measures offer adequate protection to a witness, it may also be exceptionally permissible to allow anonymous witness testimony. National security concerns may justify the use of anonymous witnesses, but this use must adhere to the principle of proportionality.<sup>200</sup> The European Court of Human Rights has recognized that the right to a fair hearing does not preclude reliance on anonymous informants at the investigative stage of proceedings.<sup>201</sup> However, the Court has treated the subsequent use of anonymous statements as evidence in a trial with great caution.<sup>202</sup> The Human Rights Committee has also expressed its concern regarding the practice of hearing witnesses solely in preliminary examinations, without the presence of the accused, counsel, or the prosecutor.<sup>203</sup> This should be distinguished from the situation of witnesses that are not “key” witnesses, i.e. where conviction is not based solely or to a decisive degree on the statement of the witness.<sup>204</sup>

87. The use of anonymous witnesses at trial will normally present handicaps for the defence. Any disadvantages caused to the defence must be sufficiently counterbalanced by procedures followed by the judicial authorities, including proper cautioning of the finder of fact (the trial judge or jury).<sup>205</sup> Three principal concerns are raised by the use of anonymous witnesses:
- a) An accused person must be given an adequate opportunity to challenge and question a witness, either at the time that the witness gave his or her statement to investigating authorities, or at some later stage in the proceedings, such as at the trial itself.<sup>206</sup> In a case before the European Court of Human Rights, the statements and subsequent testimony of anonymous witnesses were given in the absence of the accused and his counsel. By way of counterbalance, the defence was able to submit written questions to one of the anonymous witnesses indirectly through the examining magistrate. However, because the nature and scope of the questions were considerably restricted by reason of the decision to anonymize the statements of the witnesses, the European Court found this to be an insufficient counterbalance to the right to cross-examine witnesses.<sup>207</sup>
  - b) If the defence is not aware of the identity of the person being questioned, it may thereby be deprived of the ability to demonstrate that the witness is prejudiced, hostile, or unreliable.<sup>208</sup> This is a problematic feature that will almost always exist when use of an anonymous witness is made.
  - c) Where a witness does not give evidence in person, the trial court is thereby not given the opportunity to observe the demeanour of an anonymous witness. This prevents the finder of fact from forming its own impression of the reliability of the witness.<sup>209</sup> This may be counterbalanced by the screening off of witnesses in an area visible only to the judge, and jury where applicable.
88. In the case of witnesses that are members of the police force, the approach of the European Court of Human Rights has been even more restrictive. Although the interests of police officers and their families deserve protection, the European Court has said that their use as anonymous witnesses should be resorted to in exceptional circumstances only.<sup>210</sup> The Court has recognized, however, that it may be legitimate for the police authorities to seek to preserve the anonymity of an officer deployed in undercover activities.<sup>211</sup> This principle may be particularly relevant in the context of the protection of undercover intelligence operatives, and potentially also of informants.

11. *Any person convicted of a terrorist offence shall have the right to a genuine review of the conviction and/or sentence by a higher tribunal established by law.*

#### 11.1 Right to appeal

89. Article 14(5) of the ICCPR guarantees the right of everyone convicted of a crime to have his or her conviction and sentence reviewed. The right to appeal is equally applicable to persons convicted by a court of having carried out terrorist acts.<sup>212</sup> Any review of conviction or sentence must be genuine, meaning that the appeal tribunal must be able to conduct a thorough analysis or examination of all the issues debated and analyzed in the lower court.<sup>213</sup> For the effective access to appeal rights, decisions on conviction or sentence must be reasoned (see Guideline 6 on the right to a timely and reasoned judgment).<sup>214</sup> The mere existence of a higher court than the one that tried and convicted the accused to which the accused may not have recourse to is not sufficient.<sup>215</sup>
90. Although the right to appeal is only expressly applicable to the review of decisions in criminal proceedings, the Human Rights Committee has taken the view that, if a State provides for review or appeal rights in respect of non-criminal proceedings, the guarantees of a fair trial implicit in article 14 of the ICCPR and applicable to non-criminal proceedings must also be respected in any such appeal or review process.<sup>216</sup>

#### 11.2 Application of fair trial standards to appeal proceedings

91. To comply with the overall right to a fair hearing in article 14(1) of the ICCPR, an appeal must be conducted in a fair manner and with due process. This means, for example, that an appellant must be provided with adequate facilities for the preparation of the appeal; the appeal must be undertaken in a timely manner; and the appellant must enjoy the right of self-representation, or representation by counsel at the appeal hearing.<sup>217</sup>

#### 11.3 Right to appeal in capital cases

92. In the case of trials that may lead to the imposition of the death penalty, the Human Rights Committee has emphasized that scrupulous respect for the guarantees of fair trial is particularly important, including in the context of the right to appeal and the exercise of that right.<sup>218</sup> Due to the complexity and severity of death penalty cases, any person sentenced to death must be provided with legal aid for the purpose of pursuing an appeal against the sentence.<sup>219</sup>

12. *Violation of fair trial rights must result in the provision of effective remedies to the person whose rights have been violated. Compensation must be provided where a conviction has resulted from a miscarriage of justice.*

#### 12.1 Right to an effective remedy

93. Wherever a person's rights or freedoms are violated, including with respect to his or her rights to a fair trial and due process, article 2(3) of the ICCPR obliges States to ensure that such a person is provided with an effective remedy.<sup>220</sup> The right to remedy and reparation is considered in more detail in the Basic Human Rights Reference Guide on "*Conformity of National Counter-Terrorism Legislation with International Human Rights Law*".<sup>221</sup>

#### 12.2 Violation of the right to the presumption of innocence

94. Where the presumption of innocence is violated (see Guideline 4 herein), such violation can be subsequently remedied through the judicial process. This might be given effect to through steps taken to retry the person, for example, or steps to reinstate a person where she or he has been unlawfully dismissed from public service based on a presumption of guilt.<sup>222</sup>

#### 12.3 Compensation to persons convicted as a result of a miscarriage of justice

95. Article 14(6) of the ICCPR requires that compensation be provided to any person convicted of a criminal offence as a result of a miscarriage of justice. This obligation arises where: (a) there has been a final decision convicting a person of a criminal offence; (b) the convicted person has suffered punishment as a consequence of the conviction; (c) the conviction is subsequently reversed, or the person is pardoned, "on the ground that a new or newly discovered fact shows conclusively that there has been a miscarriage of justice"; and (d) non-disclosure of the unknown fact was neither partly nor wholly attributable to the convicted person. Where this is the case, article 14(6) of the ICCPR requires that the convicted person be compensated "according to the law". This means that the domestic law must provide for compensation for the miscarriage of justice and that this law in fact allows for the payment of appropriate compensation within a reasonable time.<sup>223</sup> Although the expression 'miscarriage of justice' is not defined in the ICCPR, it has been treated to mean a serious failure in the judicial process involving grave prejudice to the convicted person.<sup>224</sup> The Human Rights Committee has taken the view that no compensation is due if a conviction is set aside by a pardon that is humanitarian or discretionary in nature or motivated by considerations that do not imply a miscarriage of justice.<sup>225</sup>



## **Annex: Fair Trial Provisions in the International Covenant on Civil and Political Rights**

### **Article 9**

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

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

### **Article 13**

An alien lawfully in the territory of a State Party to the present Covenant may be expelled therefrom only in pursuance of a decision reached in accordance with law and shall, except where compelling reasons of national security otherwise require, be allowed to submit the reasons against his expulsion and to have his case reviewed by, and be represented for the purpose before, the competent authority or a person or persons especially designated by the competent authority.

### **Article 14**

1. All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. The press and the public may be excluded from all or part of a trial 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, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice; but any judgement rendered in a criminal case or in a suit at law shall be made public except where the

interest of juvenile persons otherwise requires or the proceedings concern matrimonial disputes or the guardianship of children.

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

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

- a) To be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him;
- b) To have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing;
- c) To be tried without undue delay;
- d) To be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it;
- e) To examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;
- f) To have the free assistance of an interpreter if he cannot understand or speak the language used in court;
- g) Not to be compelled to testify against himself or to confess guilt.

4. In the case of juvenile persons, the procedure shall be such as will take account of their age and the desirability of promoting their rehabilitation.

5. Everyone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law.

6. 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.

7. 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 15**

1. 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. Nor shall a heavier penalty be imposed than the one that was applicable at the time when the criminal offence was committed. If, subsequent to the commission of the offence, provision is made by law for the imposition of the lighter penalty, the offender shall benefit thereby.
2. 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.





## Notes

- 1 Security Council resolution 1373 (2001), para. 2(e).
- 2 The United Nations Global Counter-Terrorism Strategy, adopted under General Assembly resolution 60/288 (2006), para. 2.
- 3 See further the Basic Human Rights References Guide on *Conformity of National Counter-Terrorism Legislation with International Human Rights Law*, Part I(C).
- 4 Human Rights Committee, General Comment 32 (*Article 14: Right to equality before courts and tribunals and to a fair trial*) (hereafter General Comment 32).
- 5 General Comment 32, para. 16.
- 6 *Al Rawi and others v. Security Service and Others* [2011] UKSC 34, para. 12.
- 7 See further the Basic Human Rights Reference Guide on *Conformity of National Counter-Terrorism Legislation with International Human Rights Law*, especially Guidelines 1 and 2. See also: UN Global Counter-Terrorism Strategy, Annex, Pillar IV, which reaffirms that the promotion and protection of human rights for all and the rule of law is essential to all components of the Strategy; Security Council resolution 1963 (2010), para. 10; Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Martin Scheinin (A/HRC/16/51), para. 12; Report of the United Nations Secretary-General, *Uniting against terrorism: recommendations for a global counter-terrorism strategy*, A/60/825 (2006), para. 5; Report of the United Nations High Commissioner for Human Rights on the protection of human rights and fundamental freedoms while countering terrorism, A/HRC/8/13 (2008); and Statement by the President of the Security Council of 27 September 2010 (S/PRST/2010/19), un-numbered para. 8.
- 8 Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Martin Scheinin (A/61/267), para. 10; Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Martin Scheinin (A/63/223), para. 45; General Assembly resolution 66/178 (2013), para. 6f.
- 9 Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Martin Scheinin (A/63/223), para. 7.
- 10 Report of the Working Group on Arbitrary Detention (A/HRC/10/21), para. 54(g).
- 11 See further: Basic Human Rights Reference Guide on *Conformity of National Counter-Terrorism Legislation with International Human Rights Law* Guideline 8; Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Ben Emmerson (A/HRC/20/41); and Report of the Special

- Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Martin Scheinin (A/HRC/16/51), para. 24.
- 12 On the principle of non-retroactivity, see also article 11(2) of the Universal Declaration of Human Rights.
  - 13 Inter-American Commission on Human Rights, Report on Terrorism and Human Rights, OEA/Ser.L/V/II.116 (2002), paras. 257–259.
  - 14 In the context of an international armed conflict, article 8(2)(a)(vi) of the Rome Statute of the International Criminal Court explicitly states that the wilful deprivation of “a prisoner of war or other protected person [by the Geneva Conventions] of the rights of fair and regular trial” constitutes a war crime. The Rome Statute also recognises that serious violations of common article 3 of the Geneva Conventions, applicable to non-international armed conflicts, may constitute war crimes. This includes the “passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all guarantees which are generally recognized as indispensable” (article 8(2)(c)(iv)).
  - 15 Article 67(1) of the Rome Statute identifies as basic requirements: the presumption of innocence; privilege against self-incrimination; the right to communicate with legal representatives freely and in confidence; the right to remain silent without such silence being a consideration in the determination of innocence or guilt; the right not to make an unsworn oral or written statement in one’s own defence; and the right not to have imposed upon the accused any reversal of the burden of proof or onus of rebuttal.
  - 16 General Comment 32, paras 6 and 59; and Human Rights Committee, General Comment 29 (States of Emergency), UN Doc CCPR/C/21/Rev.1/Add.11 (2001), paras. 7 and 15. The Revised Arab Charter of Human Rights, in force since 15 March 2008, expressly treats the right to fair trial under article 16 of the Charter as non-derogable in times of emergency (article 4(2)).
  - 17 Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Martin Scheinin (A/63/223), para. 12.
  - 18 General Comment 32, para. 16.
  - 19 See, for example: Human Rights Committee, *Karker v. France*, Communication No. 833/1998, UN Doc CCPR/C/70/D/833/1998 (2000); and Human Rights Committee, *Ahani v. Canada*, Communication No. 1051/2002, UN Doc CCPR/C/80/D/1051/2002 (2004).
  - 20 General Comment 32, para. 9.
  - 21 General Comment 32, para. 9.
  - 22 Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Martin Scheinin (A/HRC/10/3), para. 69.
  - 23 Report of the United Nations High Commissioner for Human Rights on the protection of human rights and fundamental freedoms while countering terrorism (A/HRC/22/26), para. 37.
  - 24 General Comment 32, para. 13; Report of the United Nations High Commissioner for Human Rights on the protection of human rights and fundamental freedoms while countering terrorism (A/HRC/22/26), para. 36.

- 25 In similar terms, article 10 of the Universal Declaration of Human Rights (hereafter UDHR), adopted by the UN General Assembly under its resolution 217 (III) of 10 December 1948, guarantees that: “Everyone is entitled in full equality to a fair and public hearing... in the determination of his rights and obligations and of any criminal charge against him”.
- 26 General Comment 32, para. 13.
- 27 General Comment 32, para. 2.
- 28 General Comment 32, para. 18.
- 29 General Comment 32, para. 9.
- 30 Guideline 8.
- 31 General Comment 32, para. 9.
- 32 See further the Basic Human Rights Reference Guide on *Detention in the Context of Countering Terrorism*, Guideline 7.
- 33 Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Martin Scheinin (A/63/223), para. 13. Also concerning the weakening of the right to *habeas corpus*, see Report of the Working Group on Arbitrary Detention (A/HRC/13/30), paras. 79–80.
- 34 See: Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Ben Emmerson (A/HRC/22/52), especially paras. 23–26 and 29; Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Ben Emmerson (A/HRC/20/14), especially paras. 12, 37–38 and 46–62; and Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Martin Scheinin (A/HRC/16/51), para. 24.
- 35 Guideline 6.
- 36 Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Ben Emmerson (A/HRC/20/14), paras. 37–38; Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Ben Emmerson (A/HRC/22/52), para. 29; European Council Guidelines on the Protection of Victims of Terrorist Acts (2005), Guideline V; European Council Framework Decision 2001/220/JHA of 15 March 2001 on the Standing of Victims in Criminal Proceedings, article 4.
- 37 See also the Report of the International Criminal Court to the General Assembly (A/65/313), para. 3.
- 38 Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Ben Emmerson (A/HRC/20/14), para. 38.
- 39 See, for example: UN Convention on the Protection of All Persons from Enforced Disappearances, article 24(2); UN Basic Principles and Guidelines on a Right to Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law (2005), Principle 24; Human Rights Council resolution 12/122 (2009), para. 1; Human Rights Council resolution 9/11 (2007), para. 1; Working Group on Enforced and Involuntary Disappearances, *General Comment on the*

*Right to the Truth in Relation to Enforced Disappearances* (A/HRC/16/48), para. 39; Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Manfred Nowak (A/HRC/7/3/Add.3), para. 82; Report of the Special Rapporteur on the promotion and protection of the right to freedom of expression, Frank La Rue (A/HRC/14/23), para. 24; Report of the Special Rapporteur on the independence of judges and lawyers, Leandro Despouy (A/61/384), para. 16; Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Ben Emmerson (A/HRC/22/52), para. 24.

- 40 Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Ben Emmerson (A/HRC/22/52), para. 24.
- 41 General Comment 32, para. 18.
- 42 Principle 10 of the UN Basic Principles on the Independence of the Judiciary provides that: “Persons selected for judicial office shall be individuals of integrity and ability with appropriate training or qualifications in law”—the Basic Principles were adopted under General Assembly resolution 40/32 (1985). See also European Court of Human Rights, *Findlay v. United Kingdom*, Application No. 22107/93 (1997), para. 19.
- 43 European Court of Human Rights, *Van de Hurk v. Netherlands*, Application No. 16034/90 (1994), para. 45; European Court of Human Rights, *Findlay v. United Kingdom*, Application No. 22107/93 (1997), para. 77; and European Court of Human Rights, *Morris v. United Kingdom*, Application No. 38784/97 (2002), para. 73.
- 44 General Comment 32, para. 18.
- 45 General Comment 32, para. 19. See, for example, Human Rights Committee, *Gonzalez del Rio v. Peru*, Communication No. 263/1987, UN Doc CCPR/C/46/D/263/1987 (1992), para. 5.2.
- 46 General Comment 32, para. 25.
- 47 General Comment 32, para. 19.
- 48 General Comment 32, para. 19. See, for example, Human Rights Committee, *Oló Bahamonde v. Equatorial Guinea*, Communication No. 468/1991, UN Doc CCPR/C/49/D/468/1991 (1993), para. 9.4.
- 49 Report of the United Nations High Commissioner for Human Rights on the protection of human rights and fundamental freedoms while countering terrorism (A/HRC/22/26), para. 40.
- 50 General Comment 32, para. 21.
- 51 See, for example: Human Rights Committee *De Polay v. Peru*, Communication No. 577/1994, UN Doc CCPR/C/61/D/577/1994 (1997), para. 8.8; Human Rights Committee, *Vivanco v. Peru*, Communication No. 678/1996, UN Doc CCPR/C/74/D/678/1996 (2002), para. 7.1; and Human Rights Committee, *Gomez v Peru*, Communication No. 981/2001, UN Doc CCPR/C/78/D/981/2001 (2003), para. 7.3; Human Rights Committee, *Alegre v. Peru*, Communication No. 1126/2002, UN Doc CCPR/C/85/D/1126/2002 (2005), para. 7.5; and Human Rights Committee, *Concluding Observations: Third periodic report of Peru*, UN Doc CCPR/C/79/Add.67 (1996), para. 25.

- 52 See the individual opinion of Committee member Ivan Shearer in Human Rights Committee, *De Polay v. Peru*, Communication No. 577/1994, UN Doc CCPR/C/61/D/577/1994 (1997) and Human Rights Committee, *Vivanco v. Peru*, Communication No. 678/1996, UN Doc CCPR/C/74/D/678/1996 (2002).
- 53 General Comment 32, para. 19. See, for example, Human Rights Committee, *Gonzalez del Rio v. Peru*, Communication No. 263/1987, UN Doc CCPR/C/46/D/263/1987 (1992), para. 5.2.
- 54 General Comment 32, para. 23.
- 55 See, for example: Inter-American Court of Human Rights, *Castillo Petruzzi et al v. Peru*, Ser. C No. 52 (1999), paras. 172–173 and 221; and Inter-American Court of Human Rights, *Lori Berenson-Mejia v. Peru*, Ser. C No. 119 (2004), paras. 147, 150, 167–168 and 188–189. The Inter-American Commission on Human Rights has also identified “faceless” justice systems as depriving a defendant of the basic guarantees of justice. See Inter-American Commission on Human Rights, Report on Terrorism and Human Rights OEA/Ser.L/V/II.116 (2002), para. 233.
- 56 Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Martin Scheinin (A/HRC/16/51/Add.3), para. 21. See also Report of the Special Rapporteur on the independence of judges and lawyers, Param Cumaraswamy (E/CN.4/1998/39/Add.1), paras. 69–81.
- 57 Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Martin Scheinin (A/63/223), paras. 23 and 25–26. See also the Report of the UN High Commissioner for Human Rights on protecting human rights and fundamental freedoms while countering terrorism (A/HRC/16/50), para. 31.
- 58 Report of the Special Rapporteur on the independence of judges and lawyers, Gabriela Knaul (A/68/285), para. 16. See also General Comment 32, para. 22; and Human Rights Committee, *Akwanga v. Cameroon*, Communication No. 1813/2008, UN Doc CCPR/C/101/D/1813/2008 (2011), para. 75.
- 59 Report of the Special Rapporteur on the independence of judges and lawyers, Gabriela Knaul (A/68/285), para. 93.
- 60 Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Martin Scheinin (A/HRC/6/17/Add.3), para. 24.
- 61 Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Martin Scheinin (A/HRC/6/17/Add.3), para. 25.
- 62 European Court of Human Rights, *Findlay v. United Kingdom*, Application No. 22107/93 (1997), para. 78.
- 63 Report of the Special Rapporteur on the independence of judges and lawyers, Gabriela Knaul (A/68/285), paras. 42 and 96.

- 64 Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Martin Scheinin (A/HRC/6/17/Add.3), para. 24.
- 65 Report of the Special Rapporteur on the independence of judges and lawyers, Gabriela Knaul (A/68/285), para. 47.
- 66 Report of the Special Rapporteur on the independence of judges and lawyers, Gabriela Knaul (A/68/285), para. 46. See also Report of the Special Rapporteur on the independence of judges and lawyers, Leandro Despouy (E/CN.4/2004/60), para. 60.
- 67 Human Rights Committee, *Kholodova v. Russian Federation*, Communication No. 1548/2007, UN Doc CCPR/C/106/D/1548/2007 (2012), para. 10.5; Human Rights Committee, *Concluding Observations: Third periodic report of Peru*, UN Doc CCPR/C/79/Add.67 (1996), para. 12; Report of the Special Rapporteur on the independence of judges and lawyers, Gabriela Knaul (A/68/285), para. 100; *An updated framework draft of principles and guidelines concerning human rights and terrorism*, A/HRC/Sub.1/58/30 (2006), para. 46. See also Inter-American Court of Human Rights, *Castillo Petruzzi et al.*, Ser. C No. 52 (1999), paras. 127–34, Inter-American Court of Human Rights, *Durand v. Ugarte*, Ser. C No. 68 (2000), paras. 115–131, Inter-American Court of Human Rights, *Cantoral Benavides*, Ser. C No. 69 (2000), paras. 110–115, and, more recently, Inter American Court of Human Rights, *Cabrera Garcia v. Montiel Flores*, Series C No. 220 (2010), paras. 194–201
- 68 Basic Principles on the Independence of the Judiciary, adopted at the Seventh United Nations Congress on the Prevention of Crime and Treatment of Offenders (1985), Principle 5.
- 69 Basic Principles on the Independence of the Judiciary, adopted at the Seventh United Nations Congress on the Prevention of Crime and Treatment of Offenders (1985), Principle 5.
- 70 Report of the Special Rapporteur of the Sub-Commission on the Promotion and Protection of Human Rights, Emmanuel Decaux (E/CN.4/2006/58), Principle 5.
- 71 Human Rights Committee, *Madani v. Algeria*, Communication No. 1172/2003, UN Doc CCPR/C/89/D/1172/2003 (2007), para. 8.7. See also: Human Rights Committee, *Benhadj v. Algeria*, Communication No. 1173/2003, UN Doc CCPR/C/90/D/1173/2003 (2007), para. 8.8; and Human Rights Committee, *Akwanga v. Cameroon*, Communication No. 1813/2008, UN Doc CCPR/C/101/D/1813/2008 (2011), para. 7.5.
- 72 Report of the United Nations High Commissioner for Human Rights on the protection of human rights and fundamental freedoms while countering terrorism (A/HRC/22/26), para. 46.
- 73 In referring to civilians ‘assimilated to the military’, the Special Rapporteur refers in para. 31 of her report to the assimilation of civilians: “by virtue of their function and/or geographical presence or the nature of the alleged offence. These may include civilians who are employed by the armed forces or are stationed at or in proximity of a military installation, persons who have committed crimes that are treated as military offences and persons who have committed crimes in complicity with military personnel.” See Report of the Special Rapporteur on the independence of judges and lawyers, Gabriela Knaul (A/68/285), para. 31.
- 74 Report of the Special Rapporteur on the independence of judges and lawyers, Gabriela Knaul (A/68/285), paras. 46–56, 101–102. See also: General Comment 32, para. 22; and Report of

- the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Martin Scheinin (A/63/223), para. 28.
- 75 Report of the Special Rapporteur on the independence of judges and lawyers, Gabriela Knaul (A/68/285), para. 103.
  - 76 General Comment 32, para. 67.
  - 77 See, for example, Human Rights Committee, *Espriella v. Colombia*, Communication No. 1623/2007, UN Doc CCPR/C/98/D/1623/2007 (2010), para. 9.3. See also the Report of the Special Rapporteur on the protection and promotion of human rights and fundamental freedoms while countering terrorism, Martin Scheinin (A/HRC/6/17/Add.2), paras. 32 and 73.
  - 78 Inter-American Court of Human Rights, *Castillo Petruzzi et al.*, Series C No. 52 (1999), para. 172.
  - 79 The latter expression is most commonly used to refer to a judicial proceeding that is heard before the judge in his or her private chambers.
  - 80 Contrast with Human Rights Committee, *Sultanova et. al. v. Uzbekistan*, Communication No. 915/2000, UN Doc CCPR/C/86/D/915/2000 (2006), para. 75: where, although the accused was charged with acts that threatened public security and public order, it was found that conducting the trial largely *in camera* was not justified, particularly because the judge did not provide any justification for the denial of several requests for a public hearing.
  - 81 *R v. Mentuck* (2001) 3 SCR 442, para. 22. See also *Dagenais v. Canadian Broadcasting Corporation* (1994) 3 SCR 835. In criminal proceedings concerning juveniles, the European Court of Human Rights has held that proceedings should be held “in such a way as to reduce as far as possible his or her feelings of intimidation and inhibition”, which includes conducting proceedings *in camera*, preferably in specialised youth courts: see European Court of Human Rights, *T. v. United Kingdom*, Application No.24724/94 (1999), para. 85.
  - 82 European Court of Human Rights, *Kennedy v. United Kingdom*, Application No. 26839/05 (2010), paras. 184–191.
  - 83 Report of the Sub-Commission Special Rapporteur on terrorism and human rights, Kalliopi Koufa (A/HRC/Sub.1/58/30), para. 45; Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Martin Scheinin (A/63/223), para. 30.
  - 84 Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Martin Scheinin (A/63/223), para. 30; Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Martin Scheinin (A/HRC/6/17/Add.2), para. 32.
  - 85 See also article 11(1) of the Universal Declaration of Human Rights.
  - 86 European Court of Human Rights, *Alenet de Ribemont v. France*, Application No. 15175/89 (1995), para. 37; Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, adopted under General Assembly resolution 43/173 (1998), Principle 36(1).



- 87 General Comment 32, para. 30. See, for example: Human Rights Committee, *J.O. v. France*, Communication No. 1620/2007, UN Doc CCPR/C/101/D/1620/2007/Rev.2 (2011), para. 9.6; European Court of Human Rights, *Nachova and Others v. Bulgaria*, Application Nos. 43577/98 and 43579/98 (2005), para. 147; and *Woolmington v. DPP* [1935] AC 462. See further Organisation for Security and Cooperation in Europe (OSCE) Office for Democratic Institutions and Human Rights (ODIHR), *Legal Digest of International Fair Trial Rights* (Warsaw, OSCE/ODIHR, 2012) (hereafter *Legal Digest of International Fair Trial Rights*), pp. 92–93.
- 88 General Comment 32, para. 30.
- 89 General Comment 32, para. 25. See, for example, Human Rights Committee, *Gridin v. Russian Federation*, Communication No. 770/1997, UN Doc CCPR/C/770/1997 (2000), para. 8.2. See further *Legal Digest of International Fair Trial Rights*, pp. 94–95.
- 90 Report of the United Nations High Commissioner for Human Rights on the protection of human rights and fundamental freedoms while countering terrorism (A/HRC/22/26), para. 35; Human Rights Committee, *Cagas v. Philippines*, Communication No. 788/1999, UN Doc CCPR/C/73/D/788/1999 (2001), para. 7.2; Report of the Working Group on Arbitrary Detention (E/CN.4/2006/7), para. 59.
- 91 European Court of Human Rights, *Minelli v. Switzerland*, Application No. 8660/79 (1983), para. 37; European Court of Human Rights, *Allenet de Ribemont v. France*, Application No. 15175/89 (1995), para. 35.
- 92 General Comment 32, para. 30; Human Rights Committee, *Gridin v. Russian Federation*, Communication No. 770/1997, UN Doc CCPR/C/770/1997 (2000), para. 8.3; Report of the United Nations High Commissioner for Human Rights on the protection of human rights and fundamental freedoms while countering terrorism (A/HRC/22/26), para. 35. See further *Legal Digest of International Fair Trial Rights*, pp. 95–97.
- 93 See for example: Human Rights Committee, *Gridin v. Russian Federation*, Communication No. 770/1997, UN Doc CCPR/C/770/1997 (2000), para. 8.3; Human Rights Committee, *Mwamba v. Zambia*, Communication No. 1520/2006, UN Doc CCPR/C/98/D/1520/2006 (2010), para. 6.5; and Human Rights Committee, *Kovalev v. Belarus*, Communication No. 2120/2011, UN Doc CCPR/C/106/D/2120/2011 (2012), para. 11.4.
- 94 See further *Legal Digest of International Fair Trial Rights*, pp. 99–102.
- 95 General Comment 32, paras. 6 and 41; General Comment 29, para. 11; Report of the UN High Commissioner for Human Rights on the protection of human rights and fundamental freedoms while countering terrorism (A/HRC/16/50), para. 39.
- 96 General Comment 32, paras. 6 and 41. See also article 15 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.
- 97 General Comment 32, para. 41. See, for example: Human Rights Committee, *Singarasa v. Sri Lanka*, Communication No. 1033/2001, UN Doc CCPR/C/81/D/1033/2001 (2004), para. 7.4; and Human Rights Committee, *Kelly v. Jamaica*, Communication No. 253/1987, UN Doc CCPR/C/41/D/253/1987 (1991), para. 7.4.
- 98 Guideline 5.

- 99 European Court of Human Rights, *Saunders v. United Kingdom*, Application No. 19187/91 (1996), para. 74.
- 100 Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Martin Scheinin (A/HRC/4/26/Add.3), para. 31; Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Martin Scheinin (A/63/223, para. 45 (*d*)).
- 101 Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Martin Scheinin (A/HRC/4/26/Add.3), para. 32. See also *R v. S (R.J.)* [1995] 1 SCR 451, 454.
- 102 Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Martin Scheinin (A/HRC/4/26/Add.3), para. 32; Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Martin Scheinin (A/63/223, para. 45 (*d*)).
- 103 General Comment 32, para. 27. See, for example: Human Rights Committee, *Hermoza v Peru*, Communication No. 203/1986, UN Doc CCPR/C/34/D/203/1986 (1988), para. 11.3, and Human Rights Committee, *Fei v. Colombia*, Communication No. 514/1992, UN Doc CCPR/C/53/D/514/1992 (1995), para. 8.4.
- 104 See, for example, Human Rights Committee, *Lubuto v. Zambia*, Communication No. 390/1990, UN Doc CCPR/C/55/D/390/1990/Rev.1 (1995), paras. 5.2 and 7.3.
- 105 General Comment 32, para. 35; as confirmed, in the counter-terrorism context, by the former Special Rapporteur on counter-terrorism: Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Martin Scheinin (A/63/223), para. 14.
- 106 General Comment 32, para. 35. See, for example: Human Rights Committee, *Taright, Touadi, Remli and Yousfi v. Algeria*, Communication No. 1085/2002, UN Doc CCPR/C/86/D/1085/2002 (2006), para. 8.5; Human Rights Committee, *Rouse v. the Philippines*, Communication No. 1089/2002, UN Doc CCPR/C/84/D/1089/2002 (2005), para. 7.4; and Human Rights Committee, *Sobhraj v. Nepal*, Communication No. 1870/2009, UN Doc CCPR/C/99/D/1870/2009 (2010), para. 7.4; and European Court of Human Rights, *Deweert v. Belgium*, Application No. 6903/75 (1980), para. 42.
- 107 See the Basic Human Rights Reference Guide on *Detention in the Context of Countering Terrorism*, Guideline 7.
- 108 See the Basic Human Rights Reference Guide on *Detention in the Context of Countering Terrorism*, Guideline 7.
- 109 See the Basic Human Rights Reference Guide on *Detention in the Context of Countering Terrorism*, Guideline 4.
- 110 Report of the United Nations High Commissioner for Human Rights on the protection of human rights and fundamental freedoms while countering terrorism (A/HRC/22/26), para. 43.

- 111 See also Principle 38 of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, adopted under General Assembly resolution 43/173 (1998).
- 112 See the Basic Human Rights Reference Guide on *Detention in the Context of Countering Terrorism*, Guideline 4.
- 113 European Court of Human Rights, *Scopelliti v. Italy*, Application No. 15511/89 (1993), para. 18. See further *Legal Digest of International Fair Trial Rights*, pp. 130–132.
- 114 See, for example: Human Rights Committee, *Gonzalez v. Republic of Guyana*, Communication No. 1246/2004, UN Doc CCPR/C/98/D/1246/2004 (2010), para. 14.2; European Court of Human Rights, *Obermeier v. Austria*, Application No. 11761/85 (1990), para. 72; European Court of Human Rights, *Caleffi v Italy*, Application No. 11890/95 (1991), para. 17; European Court of Human Rights, *Caillot v. France*, Application No. 36932/97 (1999), para. 27 (available in French only); European Court of Human Rights, *Frydlender v. France*, Application No. 30979/96 (2000), paras. 44–45; and European Court of Human Rights, *Rash v. Russia*, Application No. 28954/02 (2005), para. 25.
- 115 General Comment 32, para. 29.
- 116 General Comment 32, para. 35. Confirmed in: Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Martin Scheinin (A/63/223), para. 14. See also Inter-American Court of Human Rights, Genie Lacayo, Ser. C No. 30 (1997), para. 77.
- 117 See *Legal Digest of International Fair Trial Rights*, pp. 127–128.
- 118 General Comment 32, para. 35; Human Rights Committee, *Deisl v. Austria*, Communication No. 1060/2002, UN Doc CCPR/C/81/D/1060/2002 (2004), paras. 11.2–11.6.
- 119 European Court of Human Rights, *Triggiani v. Italy*, Application No. 13509/87 (1991), para. 17 (in ‘As to the Law’).
- 120 European Court of Human Rights, *Angelucci v. Italy*, Application No. 12666/87 (1991), para. 15 (in ‘As to the Law’).
- 121 General Comment 32, para. 35; Human Rights Committee, *Cagas v. Philippines*, Communication No. 788/1999, UN Doc CCPR/C/73/D/788/1997 (2001), para. 7.4; Human Rights Committee, *Kelly v Jamaica*, Communication No. 253/1987, UN Doc CCPR/C/41/D/253/1987 (1991), para. 5.11; Human Rights Committee, *Johnson v. Jamaica*, Communication No. 588/1994, UN Doc CCPR/C/56/D/588/1994 (1996), para. 8.9; Human Rights Committee, *Yassen and Thomas v. Guyana*, Communication No. 676/1996, UN Doc CCPR/C/62/D/676/1996 (1998), para. 7.11; Human Rights Committee, *Sextus v. Trinidad and Tobago*, Communication No. 818/1998, UN Doc CCPR/C/72/D/818/1998 (2001), para. 7.3; Human Rights Committee, *Hendricks v. Guyana*, Communication No. 838/1998, UN Doc CCPR/C/76/D/838/1998 (2002), para. 6.3; Human Rights Committee, *Siewpersaud, Sukhram, and Persaud v. Trinidad and Tobago*, Communication No. 938/2000, UN Doc CCPR/C/81/D/938/2000 (2004), para. 6.2; European Court of Human Rights, *Unión Alimentaria Sanders S. A. v. Spain*, Application No. 11681/85 (1989), para. 35; and European Court of Human Rights, *Eckle v. Germany*, Application No. 8130/78 (1982), para. 82.

- 122 Human Rights Committee, *Deisl v. Austria*, Communication No. 1060/2002, UN Doc CCPR/C/81/D/1060/2002 (2004), paras. 11.2–11.6.
- 123 European Court of Human Rights, *Manzoni v. Italy*, Application No. 11804/85 (1991), para. 18 (in ‘As to the Law’).
- 124 Human Rights Committee, *Deisl v. Austria*, Communication No. 1060/2002, UN Doc CCPR/C/81/D/1060/2002 (2004), paras. 11.2–11.6.
- 125 Human Rights Committee, *Deisl v. Austria*, Communication No. 1060/2002, UN Doc CCPR/C/81/D/1060/2002 (2004), paras. 11.2–11.6.
- 126 European Court of Human Rights, *Boddaert v. Belgium*, Application No. 12919/87 (1992), para. 39.
- 127 European Court of Human Rights, *Katte Klitsche de la Grange v. Italy*, Application No. 12539/86 (1994), para. 62.
- 128 General Comment 32, para. 35; Human Rights Committee, *Taright, Touadi, Remli and Yousofi v. Algeria*, Communication No. 1085/2002, UN Doc CCPR/C/86/D/1085/2002 (2006), para. 8.5; Human Rights Committee, *Rouse v. the Philippines*, Communication No. 1089/2002, UN Doc CCPR/C/84/D/1089/2002 (2005), para. 7.4; Human Rights Committee, *Sobhraj v. Nepal*, Communication No. 1870/2009, UN Doc CCPR/C/99/D/1870/2009 (2010), para. 7.4; and European Court of Human Rights, *Deweer v. Belgium*, Application No. 6903/78 (1980), para. 42.
- 129 See further *Legal Digest of International Fair Trial Rights*, pp. 133–135.
- 130 See European Court of Human Rights, *Colozza v. Italy*, Application No. 9024/80 (1985), para. 29.
- 131 Human Rights Committee, *Mbenge v. Zaire*, Communication No. 16/1977, UN Doc CCPR/C/18/D/16/1977 (1983), para. 14.1.
- 132 General Comment 32, para. 36.
- 133 General Comment 32, paras. 31 and 36.
- 134 European Court of Human Rights, *Sejdovic v. Italy*, Application No. 56581/00 (2006), paras. 58 and 105.
- 135 Article 22(1) sub a, b, and c of the Statute for the Special Tribunal for Lebanon.
- 136 See further *Legal Digest of International Fair Trial Rights*, pp. 135–136.
- 137 See European Court of Human Rights, *Colozza v. Italy*, Application No. 9024/80 (1985), para. 29; as confirmed, in the counter-terrorism context, by the former Special Rapporteur on counter-terrorism: Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Martin Scheinin (A/63/223), para. 15.
- 138 Human Rights Committee, *Maleki v. Italy*, Communication No. 669/96, UN Doc CCPR/C/66/D/669/1996 (1999), paras. 9.3–9.5.
- 139 Council of Europe Committee of Ministers resolution (75)11 on the Criteria Governing Proceedings Held in the Absence of the Accused, para. I.

- 140 See *Legal Digest of International Fair Trial Rights*, pp. 137–140; Inter-American Court of Human Rights, *Baena Ricardo v. Panama*, Ser. C No. 72 (2001), para. 125, could be read as to state that the right of representation is applicable to non-criminal proceedings (Article 8(2) (d) of the American Convention on Human Rights). In the context of the funding of legal aid in the context of delisting of proscribed organisations: see Report of the Special Rapporteur on the promotion of human rights and fundamental freedoms while countering terrorism, Ben Emmerson (A/67/396), para. 52; and, more generally, the Basic Human Rights Reference Guide on *Proscription of Organisations in the Context of Countering Terrorism*.
- 141 Human Rights Committee, *Domukovsky and Others v. Georgia*, Communication Nos. 623/1995, 624/1995, 626/1995, 627/1995, UN Docs CCPR/C/62/D/623/1995 (1998), CCPR/C/62/D/624/1995 (1998), CCPR/C/62/D/626/1995 (1998), and CCPR/C/62/D/627/1995 (1998), para. 18.9.
- 142 Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Martin Scheinin (A/63/223), para. 37; General Comment 32, para. 37. See, for example, Human Rights Committee, *Correia de Matos v. Portugal*, Communication No. 1123/2002, UN Doc CCPR/C/86/D/1123/2002 (2006), paras. 7.4–7.5.
- 143 See also UN 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, 1990 (hereafter UN Basic Principles on the Role of Lawyers), para. 6.
- 144 European Court of Human Rights, *Yoldaş v. Turkey*, Application No. 27503/04 (2010), para. 52.
- 145 UN Basic Principles on the Role of Lawyers, para. 1. See, for example: Human Rights Committee, *Lopez v. Uruguay*, Communication No. 52/1979, UN Doc CCPR/C/OP/1 at 88 (1984), para. 13; and Human Rights Committee, *Kulov v. Kyrgyzstan*, Communication No. 1369/2005, UN Doc CCPR/C/99/D/1369/2005 (2010), para. 8.7.
- 146 European Court of Human Rights, *Lagerblom v. Sweden*, Application No. 26891/95 (2003), para. 54. See also Human Rights Committee, *Ricketts v. Jamaica*, Communication No. 667/1995, UN Doc CCPR/C/74/D/667/1995 (2002), para. 7.3.
- 147 See further *Legal Digest of International Fair Trial Rights*, pp. 146–149.
- 148 Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Martin Scheinin (A/63/223), para. 38.
- 149 Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Martin Scheinin (A/63/223), para. 40.
- 150 See the Basic Human Rights Reference Guide on *Detention in the Context of Countering Terrorism*, Guideline 3.
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- 157 UN Body of Principles, Principle 18(4); UN Basic Principles on the Role of Lawyers, A/CONF.144/28/Rev.1 at 118 (1990), Principles 8 and 22; Human Rights Committee, *Concluding Observations: Fifth periodic report of Spain*, UN Doc CCPR/C/ESP/CO/5 (2008) para. 14; Human Rights Committee, *Concluding Observations: Fourth periodic report of Austria*, UN Doc CCPR/C/AUT/CO/4 (2007), para. 16. See further the Basic Human Rights Reference Guide on *Detention in the Context of Countering Terrorism*, Guideline 3.
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- 160 See, for example: European Court of Human Rights, *S v. Switzerland*, Application Nos. 12629/87, 13965/88 (1991), para. 48; and European Court of Human Rights, *Brennan v. United Kingdom*, Application No. 39846/98 (2001), para. 60.
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- 162 European Court of Human Rights, *Brennan v. United Kingdom*, Application No. 39846/98 (2001), paras. 59–63.
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- 164 Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Martin Scheinin (A/63/223), para. 39.
- 165 General Comment 32, para. 32. See, for example: Human Rights Committee, *Taylor v. Jamaica*, Communication No. 707/1996, UN Doc CCPR/C/60/D/707/1996 (1997), para. 6.2; Human Rights Committee, *Chan v. Guyana*, Communication No. 913/2000, UN Doc CCPR/C/85/D/913/2000 (2006), para. 6.2; and Human Rights Committee, *Hussein v. Mauritius*, Communication No. 980/2001, UN Doc CCPR/C/77/D/980/2001 (2002), para. 6.3. See also: European Court of Human Rights, *Artico v. Italy*, Application No. 6694/74 (1980), para. 36; European Court of Human Rights, *Kamasinski v. Austria*, Application No. 9783/82 (1989), paras. 33, 65; European Court of Human Rights, *Daud v. Portugal*, Application No. 22600/93 (1998), para. 38; and European Court of Human Rights, *Czekalla v. Portugal*, Application No. 38830/97 (2002), paras. 60 and 62.

- 166 See, for example, Human Rights Committee, *Kelly v. Jamaica*, Communication No. 253/1987, UN Doc CCPR/C/41/D/253/1987 (1991), para. 9.5.
- 167 See, for example: Human Rights Committee, *Hendricks v. Guyana*, Communication No. 838/1998, UN Doc CCPR/C/76/D/838/1998 (2002), para. 6.4; and Human Rights Committee, *Brown v. Jamaica*, Communication No. 775/1997, UN Doc CCPR/C/65/D/775/1997 (1999), para. 6.6.
- 168 General Comment 32, para. 34. See also UN Basic Principles on the Role of Lawyers, paras. 16, 18 and 20.
- 169 See further JUSTICE, *Secret Evidence* (London: 2009).
- 170 In the case of the use of special advocates in the United Kingdom, it is specified that the special advocate owes no duty of care to the person. See: Special Immigration Appeals Commission Act (UK); and Special Advocates Support Office Open Manual.
- 171 Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Martin Scheinin (A/63/223), para. 41; *R (Roberts) v. Parole Board* [2005] 2 AC 738, para. 60 (Lord Woolfe).
- 172 Report of the United Nations High Commissioner for Human Rights on the protection of human rights and fundamental freedoms while countering terrorism (A/HRC/22/26), para. 36.
- 173 *R (Roberts) v. Parole Board* [2005] 2 AC 738, para. 144.
- 174 Human Rights Committee, *Hibbert v. Jamaica*, Communication No. 293/1988, UN Doc CCPR/C/45/D/293/1988 (1992), para. 7.4; and Human Rights Committee, *Williams v. Jamaica*, Communication No. 561/1993, UN Doc CCPR/C/59/D/561/1993 (1997), para. 9.3.
- 175 General Comment 32, para. 9.
- 176 General Comment 32, para. 33.
- 177 General Comment 32, para. 33.
- 178 In *Lobo Machado v. Portugal*, Application No. 15764/89 (1996), the Court held at para. 31 that the right to adversarial proceedings “means in principle the opportunity for the parties to a criminal or civil trial to have knowledge of and comment on all evidence adduced or observations filed[, even by an independent member of the national legal service,] with a view to influencing the court’s decision.” See also European Court of Human Rights, *Krcmar and Others v. Czech Republic*, Application No. 35376/97 (2000), para. 40; and European Court of Human Rights, *Nideröst-Huber v. Switzerland* Application No. 18990/91 (1997), para. 24. See also Inter-American Court of Human Rights, *Baena Ricardo v. Panama*, Series C No. 72 (2001), para. 125, which could also be read as so stating since disclosure of information is necessary to uphold the right of a dismissed person to have access to adequate means for the preparation of his or her defense; see further *Legal Digest of International Fair Trial Rights*, p. 123.
- 179 See, for example: European Court of Human Rights, *Mirilashvili v. Russia*, Application No. 6293/04 (2008), para. 202; and European Court of Human Rights, *Dowsett v. United Kingdom*, Application No. 39482/98 (2003), para. 42. See also Report of the United Nations

- High Commissioner for Human Rights on the protection of human rights and fundamental freedoms while countering terrorism (A/HRC/22/26), para. 38.
- 180** See, for example: European Court of Human Rights, *Doorson v. Netherlands*, Application No. 20524/92 (1996), para. 70; and European Court of Human Rights, *Kovač v Croatia*, Application No. 503/05 (2007), para. 27.
- 181** See, for example: European Court of Human Rights, *Rowe and Davis v. United Kingdom*, Application No. 28901/95 (2000), para. 61; European Court of Human Rights, *Lüdi v. Switzerland*, Application No. 12433/86 (1992), para. 49; and European Court of Human Rights, *Van Mechelen and Others v. Netherlands*, Application Nos. 21363/93, 21364/93, 21427/93 and 22056/93 (1997), para. 57.
- 182** Report of the United Nations High Commissioner for Human Rights on the protection of human rights and fundamental freedoms while countering terrorism (A/HRC/22/26), para. 38.
- 183** Report of the United Nations High Commissioner for Human Rights on the protection of human rights and fundamental freedoms while countering terrorism (A/HRC/16/50), para. 40.
- 184** Report of the United Nations High Commissioner for Human Rights on the protection of human rights and fundamental freedoms while countering terrorism (A/HRC/22/26), paras. 36–38; Report of the United Nations High Commissioner for Human Rights on the protection of human rights and fundamental freedoms while countering terrorism (A/HRC/16/50), paras. 34–35; and Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Martin Scheinin (A/HRC/4/26/Add.3), para. 39. See also the Global Principles on National Security and the Right to Information (Tshwane Principles) (2013), Background and Rationale, p. 6.
- 185** See, for example: European Court of Human Rights, *Rowe and Davis v. United Kingdom*, Application No. 28901/95 (2000), para. 63; and European Court of Human Rights, *Dousett v. United Kingdom*, Application No. 39482/98 (2003), para. 44.
- 186** See, for example: European Court of Human Rights, *Doorson v. Netherlands*, Application No. 20524/92 (1996), para. 70; and European Court of Human Rights, *Rowe and Davis v. United Kingdom*, Application No. 28901/95 (2000), para. 61.
- 187** See, for example: European Court of Human Rights, *Van Mechelen and Others v. Netherlands*, Application Nos. 21363/93, 21364/93, 21427/93 and 22056/93 (1997), para. 58; and European Court of Human Rights, *Rowe and Davis v. United Kingdom*, Application No. 28901/95 (2000), para. 61.
- 188** See, for example: European Court of Human Rights, *Van Mechelen and Others v. Netherlands*, Application Nos. 21363/93, 21364/93, 21427/93 and 22056/93 (1997), para. 54; European Court of Human Rights, *Edwards v. United Kingdom*, Application No. 13071/87 (1992), para. 36; and European Court of Human Rights, *Rowe and Davis v. United Kingdom*, Application No. 28901/95 (2000), paras. 61 and 64–65.
- 189** Report of the United Nations High Commissioner for Human Rights on the protection of human rights and fundamental freedoms while countering terrorism (A/HRC/22/26), para. 38.



- 190 Human Rights Committee, *Ahani v. Canada*, Communication No. 1051/2002, UN Doc CCPR/C/80/D/1051/2002 (2004), para. 10.4.
- 191 European Court of Human Rights, *A and others v. United Kingdom*, Application No. 3455/05 (2009), para. 220.
- 192 See, for example, European Court of Human Rights, *Dombo Beheer B.V. v. Netherlands*, Application No. 14448/88 (1993), para. 35; Inter-American Court of Human Rights, *Baena Ricardo v. Panama*, Ser. C No. 72 (2001), para. 125.
- 193 Human Rights Committee, *Gordon v. Jamaica*, Communication No. 237/1987, UN Doc CCPR/C/46/D/237/1987 (1992), para. 6.3.
- 194 See, for example: Human Rights Committee, *Grant v. Jamaica*, Communication No. 363/88, UN Doc CCPR/C/50/D/353/1998 (1994), para. 8.5; and Human Rights Committee, *Dugin v. the Russian Federation*, Communication No. 815/1998, UN Doc CCPR/C/81/D/815/1998 (2004), para. 6.3.
- 195 Human Rights Committee, *Fuenzalida v. Ecuador*, Communication No. 480/1991, CCPR/C/57/D/480/1991 (1996), para. 9.5.
- 196 Report of the United Nations High Commissioner for Human Rights on the protection of human rights and fundamental freedoms while countering terrorism (A/HRC/22/26), para. 39. For additional alternative measures, see UNODC, *Good practices for the protection of witnesses in criminal proceedings involving organized crime* (2008).
- 197 Report of the Office of the High Commissioner for Human Rights (A/HRC/12/19), para. 68.
- 198 The United Nations Basic Principles and Guidelines on a Right to Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law (2005) identify five categories of reparation that should be included as appropriate in order to ensure full and adequate reparation: restitution; compensation; rehabilitation; satisfaction and guarantees of non-repetition (Principles 18–23). See also the Report of the Special Rapporteur on the protection and promotion of human rights and fundamental freedoms while countering terrorism, Ben Emmerson (A/HRC/20/14), paras. 49–62; and Report of the Special Rapporteur on the protection and promotion of human rights and fundamental freedoms while countering terrorism, Ben Emmerson (A/HRC/22/52), para. 23.
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- 200 Report of the United Nations High Commissioner for Human Rights on the protection of human rights and fundamental freedoms while countering terrorism (A/HRC/22/26), para. 38.
- 201 See, for example: European Court of Human Rights, *Kostovski v. Netherlands*, Application No. 11454/85 (1989), para. 44; European Court of Human Rights, *Doorson v. Netherlands*, Application No. 20524/92 (1996), para. 69; and European Court of Human Rights, *Balysyte-Lideikiene v. Lithuania*, Application No. 72596/01 (2008), para. 62.

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- 203** Human Rights Committee, *Concluding Observations: Third periodic report of the Netherlands*, UN Doc CCPR/CO/72/NET (2001), para. 12.
- 204** See, for example: European Court of Human Rights, *Saïdi v. France*, Application No. 14647/89 (1993), paras. 43–44; European Court of Human Rights, *A.M. v. Italy*, Application No. 37019/97 (1999), para. 25; European Court of Human Rights, *Gossa v. Poland*, Application No. 47986/99 (2007), para. 63; and European Court of Human Rights, *Mirilashvili v. Russia*, Application No. 6293/04 (2008), para. 164.
- 205** See, for example: European Court of Human Rights, *Doorson v. Netherlands*, Application No. 20524/92 (1996), para. 76; and European Court of Human Rights, *Al-Khawaja and Tahery v United Kingdom*, Application Nos. 26766/05 and 22228/06 (2009), paras. 47–48.
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- 211** See, for example: European Court of Human Rights, *Lüdi v. Switzerland*, Application No. 12433/86 (1992), para. 49; and European Court of Human Rights, *Van Mechelen and Others v. Netherlands*, Applications nos. 21363/93, 21364/93, 21427/93 and 22056/93 (1997), para. 57.
- 212** Report of the Working Group on Arbitrary Detention (A/HRC/10/21), para. 54(b).
- 213** As confirmed, in the counter-terrorism context, by the former Special Rapporteur on counter-terrorism: Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Martin Scheinin (A/63/223), para. 15. See, for example: Human Rights Committee, *Fernández v. Spain*, Communication No. 1007/2001, UN Doc CCPR/C/78/D/1007/2001 (2003), para. 7; and Inter-American Court of Human Rights, *Herrera Ulloa*, Series C No. 107 (2004), paras. 157–168.

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- 215 Inter-American Court of Human Rights, *Castillo Petruzzi et al.*, Series C No. 52 (1999), para. 161.
- 216 Human Rights Committee, *Puertas v. Spain*, Communication No. 1183/2003, UN Doc CCPR/C/86/D/1183/2003 (2006), para. 6.4; and Human Rights Committee, *Linares v. Spain*, Communication No. 1213/2003, UN Doc CCPR/C/89/D/1213/2003 (2007), para. 6.5.
- 217 General Comment 32, paras. 45–51. See further *Legal Digest of International Fair Trial Rights*, pp. 221–226.
- 218 General Comment 32, para. 59.
- 219 General Comment 32, para. 51. See, for example, Human Rights Committee, *LaVende v. Trinidad and Tobago*, Communication No. 554/1993, UN Doc CCPR/C/61/D/554/1993 (1997), para. 5.8.
- 220 General Comment 32, para. 58. See, for example, Human Rights Committee, *Terrón v. Spain*, Communication No. 1073/2002, UN Doc CCPR/C/82/D/1073/2002 (2994), para. 6.6. See also article 8 of the Universal Declaration of Human Rights.
- 221 Guideline 8.
- 222 Human Rights Committee, *Vargas-Machuca v. Peru*, Communication No. 906/2000, UN Doc CCPR/C/75/D/906/2000 (2002), para. 7.3. Compare with Human Rights Committee, *Arutyuniantz v Uzbekistan*, Communication No. 971/2001, UN Doc CCPR/C/83/D/971/2001 (2005), para. 6.4.
- 223 General Comment 32, para. 52.
- 224 See, for example: Human Rights Committee, *Dumont v. Canada*, Communication No. 1467/2006, UN Doc CCPR/C/98/D/1467/2006 (2010), para. 23.2; and Council of Europe Explanatory Note to Protocol 7 of the European Convention on Human Rights, para. 23.
- 225 General Comment 32, para. 53. See, for example, Human Rights Committee, *Muhonen v. Finland*, Communication No. 89/1981, UN Doc Supp 40 (A/40/40) (1985) at 164, para. 11.2.

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