

# Handout 5.1

## Key provisions of international and regional instruments

### *A. Lawful arrest and detention*

#### **Article 9 (1) of the International Covenant on Civil and Political Rights**

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

#### **Article 16 (1) and (4) of the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families**

1. Migrant workers and members of their families shall have the right to liberty and security of person.
4. Migrant workers and members of their families shall not be subjected individually or collectively to arbitrary arrest or detention; they shall not be deprived of their liberty except on such grounds and in accordance with such procedures as are established by law.

#### **Article 6 of the African Charter on Human and Peoples' Rights**

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

#### **Principle M (1) (a) and (b) of the Principles and guidelines on the right to a fair trial and legal assistance in Africa**

- (a) States shall ensure that the right of everyone on its territory and under its jurisdiction to liberty and security of person is respected.
- (b) States must ensure that no one shall be subject to arbitrary arrest or detention, and that arrest, detention or imprisonment shall only be carried out strictly in accordance with the provisions of the law and by competent officials or persons authorized for that purpose, pursuant to a warrant, on reasonable suspicion or for probable cause.

#### **Article 7 (1)-(3) of the American Convention on Human Rights**

1. Every person has the right to personal liberty and security.
2. No one shall be deprived of his physical liberty except for the reasons and under the conditions established beforehand by the constitution of the State Party concerned or by a law established pursuant thereto.
3. No one shall be subject to arbitrary arrest or imprisonment.

### **Article 5 (1) of the European Convention on Human Rights**

Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law;

- (a) The lawful detention of a person after conviction by a competent court;
- (b) The lawful arrest or detention of a person for non-compliance with the lawful order of a court or in order to secure the fulfilment of any obligation prescribed by law;
- (c) The lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so;
- (d) The detention of a minor by lawful order for the purpose of educational supervision or his lawful detention for the purpose of bringing him before the competent legal authority;
- (e) The lawful detention of persons for the prevention of the spreading of infectious diseases, of persons of unsound mind, alcoholics or drug addicts, or vagrants;
- (f) The lawful arrest or detention of a person to prevent his effecting an unauthorized entry into the country or of a person against whom action is being taken with a view to deportation or extradition.

### *B. The right to be informed of reasons for arrest/detention and the existence of charges*

### **Article 9 (2) of the International Covenant on Civil and Political Rights**

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

### **Article 16 (5) and (7) of the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families**

5. Migrant workers and members of their families who are arrested shall be informed at the time of arrest as far as possible in a language they understand of the reasons for their arrest and they shall be promptly informed in a language they understand of any charges against them.
7. When a migrant worker or a member of his or her family is arrested or committed to prison or custody pending trial or is detained in any other manner:
  - (a) The consular or diplomatic authorities of his or her State of origin or of a State representing the interests of that State shall, if he or she so requests, be informed without delay of his or her arrest or detention and of the reasons therefor;
  - (b) The person concerned shall have the right to communicate with the said authorities. Any communication by the person concerned to the said authorities shall be forwarded without delay, and he or she shall also have the right to receive communications sent by the said authorities without delay;
  - (c) The person concerned shall be informed without delay of this right and of rights deriving from relevant treaties, if any, applicable between the States concerned, to correspond and to meet with representatives of the said authorities and to make arrangements with them for his or her legal representation.

### **Principle M (2) (a) – (d) of the Principles and guidelines on the right to a fair trial and legal assistance in Africa**

- (a) Anyone who is arrested shall be informed, at the time of arrest, of the reasons for his or her arrest and shall be promptly informed, in a language he or she understands, of any charges against him or her.
- (b) Anyone who is arrested or detained shall be informed upon arrest, in a language he or she understands, of the right to legal representation and to be examined by a doctor of his or her choice and the facilities available to exercise this right.
- (c) Anyone who is arrested or detained has the right to inform, or have the authorities notify, their family or friends. The information must include the fact of their arrest or detention and the place the person is kept in custody.
- (d) If the arrested or detained person is a foreign national, he or she must be promptly informed of the right to communicate with his or her embassy or consular post. In addition, if the person is a refugee or stateless person or under the protection of an inter-governmental organization, he or she must be notified without delay of the right to communicate with the appropriate international organization.

### **Article 7 (4) of the American Convention on Human Rights**

Anyone who is detained shall be informed of the reasons for his detention and shall be promptly notified of the charge or charges against him.

### **Article 5 (2) of the European Convention on Human Rights**

Everyone who is arrested shall be informed promptly, in a language which he understands, of the reasons for his arrest and of any charge against him.

### **C. *The right to be brought promptly before a judge or other judicial officer***

### **Article 9 (3) of the International Covenant on Civil and Political Rights**

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.

### **Article 16 (6) of the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families**

Migrant workers and members of their families who are 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 while awaiting trial they 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 the occasion arise, for the execution of the judgement.

### **Principle M (3) (a) and (b) of the Principles and guidelines on the right to a fair trial and legal assistance in Africa**

- (a) Anyone who is arrested or detained on a criminal charge shall be brought before a judicial officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release.
- (b) The purpose of the review before a judicial or other authority includes to:
  - 1. Assess whether sufficient legal reason exists for the arrest;
  - 2. Assess whether detention before trial is necessary;
  - 3. Determine whether the detainee should be released from custody, and the conditions, if any, for such release;
  - 4. Safeguard the well-being of the detainee;
  - 5. Prevent violations of the detainee's fundamental rights;
  - 6. Give the detainee the opportunity to challenge the lawfulness of his or her detention and to secure release if the arrest or detention violates his or her rights.

### **Article 7 (5) of the American Convention on Human Rights**

Any person detained 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 be released without prejudice to the continuation of the proceedings. His release may be subject to guarantees to assure his appearance for trial.

### **Article 5 (3) of the European Convention on Human Rights**

Everyone arrested or detained in accordance with the provisions of paragraph 1 (c) of this article 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 pending trial. Release may be conditioned by guarantees to appear for trial.

### *D. Right to have the lawfulness of a detention determined by a court*

### **Article 9 (4) of the International Covenant on Civil and Political Rights**

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

### **Article 16 (8) of the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families**

Migrant workers and members of their families who are deprived of their liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of their detention and order their release if the detention is not lawful. When they attend such proceedings, they shall have the assistance, if necessary without cost to them, of an interpreter, if they cannot understand or speak the language used.

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### **Principle M (4) and (5) of the Principles and guidelines on the right to a fair trial and legal assistance in Africa**

4. Anyone who is deprived of his or her liberty by arrest or detention shall be entitled to take proceedings before a judicial body, in order that that judicial body may decide without delay on the lawfulness of his or her detention and order release if the detention is not lawful.
5. Right to habeas corpus:
  - (a) States shall enact legislation, where it does not exist, to ensure the right to habeas corpus, amparo or similar procedures.
  - (b) Anyone concerned or interested in the well-being, safety or security of a person deprived of his or her liberty has the right to a prompt and effective judicial remedy as a means of determining the whereabouts or state of health of such a person and/or identifying the authority ordering or carrying out the deprivation of liberty.
  - (c) In such proceedings, competent national authorities shall have access to all places where persons deprived of their liberty are being held and to each part of those places, as well as to any place in which there are grounds to believe that such persons may be found.
  - (d) Any other competent authority entitled under law of the State or by any international legal instrument to which the State is a party may also have access to such places.
  - (e) Judicial bodies shall at all times hear and act upon petitions for habeas corpus, amparo or similar procedures. No circumstances whatever must be invoked as a justification for denying the right to habeas corpus, amparo or similar procedures.

### **Article 7 (6) of the American Convention on Human Rights**

Anyone who is deprived of his liberty shall be entitled to recourse to a competent court, in order that the court may decide without delay on the lawfulness of his arrest or detention and order his release if the arrest or detention is unlawful. In States Parties whose laws provide that anyone who believes himself to be threatened with deprivation of his liberty is entitled to recourse to a competent court in order that it may decide on the lawfulness of such threat, this remedy may not be restricted or abolished. The interested party or another person in his behalf is entitled to seek these remedies.

### **Article 5 (4) of the European Convention**

Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.

Other legal instruments that will be referred to in this chapter are:

- The Body of Principles for the Protection of All Persons under any Form of Detention or Imprisonment, adopted by the General Assembly in 1988;
- The Declaration on the Protection of All Persons from Enforced Disappearance, adopted by the General Assembly in 1992;
- The Principles on the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions, recommended by Economic and Social Council resolution 1989/65; and
- The United Nations Standard Minimum Rules for Non-custodial Measures (Tokyo Rules), adopted by the General Assembly in 1990