

Chapter 4: Rights of the Suspect and the Accused

Part 1: General Fair Trial Rights

Article 54: Right to Equality before the Law and the Courts

1. All persons are equal before the law.
2. All persons are equal before the courts.

Commentary

Paragraph 1: The guarantee contained in Paragraph 1 derives from a number of international and regional human rights treaties. It is expressed in Article 26 of the International Covenant on Civil and Political Rights, Article 24 of the American Convention on Human Rights, Article 3 of the African Charter on Human and Peoples' Rights, and Article 11 of the Arab Charter on Human Rights. Equality before the law relates to the equal treatment of persons in the application and enforcement of the law. It applies to all public officials, including judges, prosecutors, and policing officials, and requires that they treat all persons equally. Equality of treatment, however, does not mean identical treatment for all persons. Instead, it means that persons in a like position should be treated in the same way. The right to equality before the law is also related to the right to freedom from discrimination under Article 55.

A related but different concept to equality before the law is the right to equal protection of the law, a right which is also contained in Article 26 of the International Covenant on Civil and Political Rights, Article 3 of the African Charter on Human and Peoples' Rights, and Article 24 of the American Convention on Human Rights. Equal protection of the law relates to lawmaking and requires that all persons be treated equally in domestic laws.

Paragraph 2: The right to equality before the courts is a subset of the general right to equality and comes from Article 14(1) of the International Covenant on Civil and Political Rights, Article 5(a) of the International Convention on the Elimination of All

Forms of Racial Discrimination, and Article 15(2) of the Convention on the Elimination of Discrimination against Women.

Article 55: Right to Freedom from Discrimination

No person may be discriminated against on grounds such as sex, race, color, language, religion or belief, political or other opinion, sexual orientation, national, ethnic or social origin, wealth, birth, or other status.

Commentary

The right to freedom from discrimination applies more broadly than just in the context of the criminal justice system; however, in this context, it refers to freedom from discrimination both in the criminal law and in the operation of criminal justice. The right to nondiscrimination is found in the Universal Declaration of Human Rights (Article 10), the International Covenant on Civil and Political Rights (Article 26), the American Convention on Human Rights (Articles 1[1] and 24), the Arab Charter on Human Rights (Article 3), and the Universal Islamic Declaration of Human Rights (Article III). There are also two treaties dedicated to the treatment of non-discrimination: the International Convention on the Elimination of All Forms of Racial Discrimination and the Convention on the Elimination of Discrimination against Women. The United Nations Human Rights Committee in General Comment no. 18 on Non-Discrimination has termed the right to nondiscrimination “a basic and general principle relating to the protection of human rights” (paragraph 1). Article 55 of the MCCP requires that discriminatory distinctions not be made between different people based on the grounds listed. To gain some idea of what “discrimination” means, it is useful to look to the definition of “racial discrimination” contained in Article 1(1) of the International Convention on the Elimination of All Forms of Racial Discrimination, which states that racial discrimination means “any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life.”

This is not to say that distinctions between persons cannot be made. Distinctions between different persons are in fact permissible, even on the basis of the groups listed. The United Nations Human Rights Committee has stated that the determinant of whether a distinction is discriminatory is whether it is “reasonable and objective” and whether its aim is to achieve a purpose that is legitimate under the covenant (see General Comment no. 18, paragraph 13). The European Court of Human Rights has added

to this that there must be a “reasonable relationship of proportionality” between the different treatment and the aim pursued (see Case Relating to Certain Aspects of the Laws on the Use of Languages in Education in *Belgium v. Belgium*, application no. 1474/62;1677/62;1691/62 [1967], ECHR 1 [February 9, 1967], paragraph 10).

Many of the grounds of discrimination listed in Article 55 are self-explanatory. The “other status” ground has been interpreted by the United Nations Human Rights Committee to include discrimination based on nationality, marital status, place of residence within a state, a distinction between foster children and natural children, and differences between students at public and private schools (see Sarah Joseph, Jenny Schultz, Melissa Castan, and Ivan Shearer, *The International Covenant on Civil and Political Rights: Cases, Commentary and Materials*, p. 690).

Article 56: Presumption of Innocence

All persons are presumed innocent until proven guilty in accordance with the applicable law.

Commentary

The presumption of innocence is contained in international and regional instruments such as the Universal Declaration of Human Rights (Article 11), the International Covenant on Civil and Political Rights (Article 14[2]), the American Declaration of the Rights and Duties of Man (Article XXVI), the American Convention on Human Rights (Article 8[2]), the African Charter on Human and Peoples’ Rights (Article 7[b]), and the Arab Charter on Human Rights (Article 16). It is also found in the United Nations Standard Minimum Rules for the Treatment of Prisoners (Rule 84[2]). Guilt cannot be presumed before the prosecution proves a charge beyond reasonable doubt, and this principle applies until the judgment is made final as defined in Article 266 of the MCCP. There are a number of ways in which the presumption of innocence can be protected. First, according to the United Nations Human Rights Committee, the presumption is breached where public officials prejudge the outcome of a trial (General Comment no. 13, paragraph 7). Public officials include judges, prosecutors, the police, and government officials, all of whom must avoid making public statements of the guilt of an individual prior to a conviction or after an acquittal. It is permissible, however, for the authorities to inform the public of the name of a suspect and that the person has been arrested or has made a confession, as long as the person is not publicly declared guilty (see the European Court of Human Rights case of *Worm v. Austria*, application no. 83/1996/702/894 [August 29, 1997], paragraph 52). A second element in protecting the presumption of innocence relates to the burden of proof. The burden of proof refers to which party will have the burden of proving a particular fact or set of facts. In order to protect the presumption of innocence, the burden of

proof should be on the prosecution to prove the guilt of the accused rather than on the accused to prove his or her innocence. This principle is enshrined in Article 216 of the MCCP.

A third way in which the presumption of innocence can be maintained relates to how the suspect or accused person is presented. A suspect or accused person should not be made to look like a guilty person by being caged or shackled in the courtroom or forced to appear in court wearing a prison uniform or with his or her head shaved. If possible, the accused should be allowed to dress in civilian clothes for the duration of the trial. The presumption of innocence will not be violated where the accused person needs to be handcuffed or restrained to prevent his or her escape or to maintain the general security of the courtroom.

In addition to these guarantees, it is important that prior convictions of the accused not be disclosed to the court in the course of the trial, a disclosure that might unduly influence the decision of the judge and consequently violate the presumption of innocence. (Prior convictions may be considered, however, at a hearing on penalties conducted once an accused person has been found guilty of a criminal offense.) A person's right to the presumption of innocence may be violated not only leading up to and during a trial but also, if the person has been acquitted, afterward. Where a person has been acquitted, it is important for public officials not to make any statements suggesting that the person should have been found guilty.

The presumption of innocence is linked to many other fair trial rights; for example, the presumption of liberty found in Article 169 of the MCCP stems from the presumption of innocence, as does the right to trial without undue delay and the right of a detained person to trial within a reasonable time or release found in Article 63, and the freedom from self-incrimination laid out in Article 57. The right to a trial by an impartial judge as set out in Article 17 overlaps with the presumption of innocence.

Article 57: Privilege against Self-Incrimination and the Right to Silence

1. No person may be compelled to testify against himself or herself or to confess guilt.
2. No negative inferences may be derived from a person's failure to testify against himself or herself or to confess guilt.

Commentary

Paragraph 1: The right not to be compelled to testify against oneself and the right not to confess guilt are expressed in Article 14(3)(g) of the International Covenant on Civil and Political Rights, Articles 8(2)(g) and 8(3) of the American Convention on Human Rights, and Principle 21 of the Body of Principles for the Protection of All

Persons under Any Form of Detention or Imprisonment. While these rights are not expressly provided for in the European Convention on Human Rights and Fundamental Freedoms, the European Court for the Protection of Human Rights and Fundamental Freedoms has declared that the right not to be compelled to testify against oneself and the right not to confess guilt are implicit in the right to a fair trial set out in Article 6(1) of the convention.

The right not to be compelled to testify against oneself and the right not to confess guilt include two elements: the right to freedom from self-incrimination and the right to silence. These components are related and at times overlapping, but they are distinct. The right to silence encompasses only oral representations made by a person and refers to a person's right not to make oral statements to the police or any other criminal justice actor during the investigation of a criminal offense. The freedom from self-incrimination is broader in scope and refers to both oral representations and to the provision of any materials that may tend to incriminate a person. Under international human rights law, what is excluded from the freedom from self-incrimination are materials that are legally obtained from the accused under compulsory powers of criminal investigation such as breath, blood, and urine samples and bodily tissue for the purpose of DNA testing.

The right to silence is recognized as absolute in many states. In addition, under the international human rights conventions, there is no limitation placed on these rights. In some domestic jurisdictions, statutory provisions have been included to the effect that a person has the right to silence and the freedom from self-incrimination, but if the person does not provide information to the authorities or at trial, then adverse inferences may be drawn from the failure to provide information. The case law on such limitations on the right to silence and freedom from self-incrimination, mainly deriving from the European Court of Human Rights, is somewhat unclear. Under cases such as *Funke v. France* (application no. 10828/84, Judgment [February 25, 1993], paragraph 44), the European Court has stated that the freedom from self-incrimination is absolute. In the case of *Saunders v. United Kingdom* (application no. 19187, Judgment [December 17, 1996], paragraph 71), the court stated that self-incrimination was an absolute right and even applied where the compulsion to testify resulted in the giving of exculpatory evidence. On the other hand, in the case of *Murray v. United Kingdom*, the European Court—dealing with both the right to freedom from self-incrimination and the right to silence—deemed that a law that drew adverse inferences from an accused person's silence did not violate the European Convention because the inferences were not decisive to the finding of criminal responsibility. The drafters of the MCCP were firmly of the view that the right to silence and the freedom from self-incrimination should be recognized as absolute and unqualified rights under the MCCP. Part of the rationale for this view is the fact that where a person's right to silence is compromised, allowing adverse inferences means that the silence of a person is taken as an admission of guilt and thus the person's right to the presumption of innocence is violated.

As well as being related to the presumption of innocence, the right to silence and the freedom from self-incrimination are also related to the right to freedom from coercion, torture, or cruel, inhuman, or degrading treatment contained in Article 58, because the right to freedom from self-incrimination and the right to silence prohibit the use of these techniques to compel testimony.

As part of the right to silence and the freedom from self-incrimination, a suspect or an accused must be informed of these rights, as stipulated in Article 172(3)(a).

Article 58: Right to Freedom from Coercion, Duress, Threat, Torture, or Cruel, Inhuman, or Degrading Treatment

1. All persons have the right to be free from any form of coercion, duress, or threat of duress.
2. All persons have the right to be free from torture, threat of torture, or any other form of cruel, inhuman, or degrading treatment or punishment.

Commentary

The right to freedom from coercion, duress, or threat is related to the right to freedom from self-incrimination and the right to silence set out in Articles 57 of the M CCP, Article 14(3)(g) of the International Covenant on Civil and Political Rights, Articles 8(2)(g) and 8(3) of the American Convention on Human Rights, and Principle 21 of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment. According to the United Nations Human Rights Committee in General Comment no. 13, as part of the right to freedom from self-incrimination and the right to silence, any methods of compulsion are wholly unacceptable (paragraph 14). In addressing a number of cases brought before it, the United Nations Human Rights Committee has stated that the freedom from compulsion to testify or to confess guilt “must be understood in terms of the absence of any direct or indirect physical or psychological pressure from the investigating authorities on the accused with a view to obtaining a confession of guilt” (*Kelly v. Jamaica*, communication no. 253/1987, Judgment [April 8, 1991], UN document CCPR/C/4/D/253/1987, paragraph 5.5).

The right to freedom from torture or cruel, inhuman, or degrading treatment stems from a number of international instruments, including the Universal Declaration of Human Rights (Article 5), the International Covenant on Civil and Political Rights (Article 7), the American Convention on Human Rights (Article 5), the African Charter on Human and Peoples’ Rights (Article 5), and the Convention on the Rights of the Child (Article 37). Unlike other rights, such as the right to privacy or the right to freedom of expression, the right to freedom from torture or cruel, inhuman, or degrading treatment is an absolute right. This means that under no circumstances can a person’s right to freedom from torture be violated. According to the United Nations Human Rights Committee, the prohibition of torture “allows of no limitation” (General Comment no. 20, paragraph 3). In 1984 a convention was drafted and signed specifically on this subject: the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. The meaning of torture is spelled out in Article 1 of the convention: (1) the infliction of “severe pain or suffering” (discussed below), (2) for a number of purposes listed in the convention (discussed

below), (3) at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. The issue of what constitutes torture or “cruel, inhuman, or degrading treatment” has been the subject of debate. Some commentators view torture as an aggravated form of cruel, inhuman, or degrading treatment, while other bodies, such as the United Nations Human Rights Committee, view them as synonymous.

Torture or cruel, inhuman, or degrading treatment may be either physical or mental. Many people wrongly believe that such treatment involves only physical acts. The United Nations Human Rights Committee has stated that torture and cruel treatment “relates not only to acts that cause physical pain but also to acts that cause mental suffering to the victim” (General Comment no. 20, paragraph 5). Article 2 of the Inter-American Convention to Prevent and Punish Torture elaborates on this, stating that “torture shall also be understood to be the use of methods upon a person intended to obliterate the personality of the victim or to diminish his physical or mental capacities, even if they do not cause physical pain or mental anguish.” There is no definitive list of what constitutes torture or cruel, inhuman, or degrading treatment; this will need to be decided on a case by case basis. Some guidance has been given by international and regional human rights bodies; for example, prolonged solitary confinement has been held to amount to torture and ill-treatment (see United Nations Human Rights Committee, General Comment no. 20, paragraph 6), as does the use of physical pressure during interrogation, hooding a person (placing a black hood over a detainee’s head), subjection to loud noise, sleep deprivation and deprivation of food, wall-standing (forcing detainees to stand with their legs spread against a wall for long periods of time), death threats, violent shaking, and using cold air to chill a person. Further guidance may be obtained by making reference to the jurisprudence of the United Nations Human Rights Committee, the European Court of Human Rights, the Inter-American Commission on Human Rights, the Inter-American Court of Human Rights, the African Commission and Court on Human Rights, and the European Committee against Torture and to the work of the United Nations Special Rapporteur on Torture. With regard to the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT), reference may be made to *The CPT Standards: “Substantive” Sections of the CPT’s General Reports*, which outlines numerous acts that the committee considers to amount to torture or cruel, inhuman, or degrading treatment in the context of criminal proceedings. Also useful are *Combating Torture: A Manual for Judges and Prosecutors*, produced by the Human Rights Centre of the University of Essex and the *Manual on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (the “Istanbul Protocol”). Articles 229 and 232 of the MCCP require that all evidence obtained through torture or cruel, inhuman, or degrading treatment should be excluded from evidence by the court.

Article 59: Right to an Interpreter

A suspect or an accused has the right to the free assistance of an interpreter if he or she cannot understand or speak the language used in court.

Commentary

Interpretation is the oral conversion of information from one language to another. It is related but different from translation, which involves converting a written document from one language into another. The right to an interpreter is guaranteed by Article 14(3)(f) of the International Covenant on Civil and Political Rights, Article 6(3)(e) of the European Convention for the Protection of Human Rights and Fundamental Freedoms, and Article 8(2)(a) of the American Convention on Human Rights. While the right to interpretation is mentioned in international human rights instruments, the right to translation is provided for only in the American Convention on Human Rights. In practice, however, the right to translation has been found to be inherent in the right to an interpreter.

The right to an interpreter should be available at all stages of criminal proceedings. Article 172(3)(i) requires that when a person is arrested, he or she is entitled to an interpreter and to such translations as are necessary to meet the requirement of fairness. According to General Comment no. 13 of the United Nations Human Rights Committee, the right to an interpreter should be available to all people who do not speak or understand the language of the court, including nationals and nonnationals (paragraph 13). International human rights law does not require that a person who understands or speaks the language of the court be provided with an interpreter where he or she would prefer to speak another language, for example, his or her native language (see comments of United Nations Human Rights Committee in *Bihan v. France* [communication 221/1987, UN document CCPR/C/41/D/221/1987 at 43 (1991)] and *Barzhig v. France* [communication 327/1988, UN document CCPR/C/41/D/327/1988 at 92 (1991)]), nor does it provide for the right to speak one's own language in court. Therefore, where a person meets the requirement of being able to speak or understand the language being spoken in the course of the criminal proceedings, he or she will not be provided with an interpreter.

The right to interpretation is related to the right to defend oneself personally or through counsel under Article 65 and the right to prepare a defense under Article 61. According to the United Nations Human Rights Committee in General Comment no. 13, the right to an interpreter is “of basic importance in cases in which ignorance of the language used by a court or difficulty in understanding may constitute a major obstacle to the right of defense (paragraph 13).”

Article 60: Right to Be Informed of the Charges

An accused has the right to be informed promptly and in detail in a language in which he or she understands of the nature and cause of the charge against him or her.

Commentary

The right to be informed in detail of the charges against a person is derived from Article 14(3)(a) of the International Covenant on Civil and Political Rights, Article 6(3)(a) of the European Convention for the Protection of Human Rights and Fundamental Freedoms, and Article 8(2)(b) of the American Convention on Human Rights. This right applies to accused persons as defined in Article 1(1) rather than to suspects as defined in Article 1(43). A suspect has the right in accordance with Article 172(2)(a) to be informed at the time of arrest of the reasons for his or her arrest and the right to be informed of any charges against him or her. Once a suspect becomes an accused person by reason of the confirmation of an indictment by the court or when a suspect is charged and is proceeded against by way of expedited trial, the extent of the information required by the accused person is greater. The accused person and his or her defense counsel will wish to prepare an adequate defense and, in accordance with Article 61, will require the facilities to do so. Part of the right to facilities to prepare a defense contained in Article 61 is access to information that the defense can use to defend the accused person. Thus, the right to be informed of the charges and the right to the preparation of a defense are interlinked.

According to General Comment no. 13 of the United Nations Human Rights Committee in interpreting Article 14(3)(a) of the International Covenant on Civil and Political Rights (the wording of which is duplicated in Article 60), the information given to the accused person must provide the law (i.e., the “nature”) and the alleged facts (i.e., the “cause”) upon which the charge is based (paragraph 8). The United Nations Human Rights Committee in its General Comment goes on to explain that *promptly*, in the context of Article 14(3)(a) of the International Covenant on Civil and Political Rights means “as soon as the charge is first made by a competent authority” (paragraph 8).

In order for an accused person to enjoy the right contained in Article 63, disclosure of information is required on the part of the prosecutor. Reference should be made to Articles 195 and 196, which require that the indictment filed against the suspect be transmitted to the suspect (the indictment contains information on both the legal and factual claims made by the prosecutor against the suspect). Reference should also be made to Chapter 10, Part 3, which outlines the disclosure regime and the various obligations on the prosecution to disclose relevant evidence to the accused person prior to the trial.

Article 61: Right to Preparation of a Defense

An accused has the right to adequate time and facilities for the preparation of his or her defense.

Commentary

The right to adequate time and facilities for the preparation of the accused's defense is contained in Article 14(3)(b) of the International Covenant on Civil and Political Rights, Article 8(2)(c) of the American Convention on Human Rights, and Article 6(3)(b) of the European Convention for the Protection of Human Rights and Fundamental Freedoms. It is a fundamental aspect of the principle of "equality of arms," discussed in the commentary to Article 62 of the MCCP. According to General Comment no. 13 of the United Nations Human Rights Committee, "what is 'adequate time' depends on the circumstances of each case" (paragraph 9). It will also largely depend on the complexity of the case. As to the concept of facilities, the United Nations Human Rights Committee in General Comment no. 13 stated that "facilities must include access to documents and other evidence which the accused requires to prepare his case, as well as the opportunity to engage and communicate with counsel" (paragraph 9). Thus, the right to prepare a defense is related to the right to communicate with counsel set out in Article 70. The right to the preparation of a defense is also related to the disclosure regime established under the MCCP because this is the mechanism by which the prosecution must give the accused and his or her counsel relevant information to prepare the accused's defense. Reference should be made to Chapter 10, Part 3, which provides the obligations on the prosecution to disclose the indictment and other evidence to the defense pending a confirmation hearing, and Chapter 10, Part 4, which sets out the pretrial disclosure regime applicable under the MCCP.

Where the defense believes that it has been granted insufficient time to prepare a defense, it may make a motion to the court under Article 203(4) for an adjournment.

Article 62: Right to a Fair and Public Hearing and the Right to Be Present during a Trial

1. All persons are entitled to a fair and public hearing.
2. The press and the public may be excluded from all or part of a trial for any of the following reasons:
 - (a) to protect morals, public order, or national security;
 - (b) where the interests of a child so requires;
 - (c) where the protection of the private lives of the parties to the proceedings or witnesses so requires, such as in cases of sexual offenses; or
 - (d) in special circumstances, and only to the extent necessary, where publicity would prejudice the interests of justice.
3. Court judgments must be made public, except where the interests of a juvenile requires otherwise.
4. An accused person has the right to be tried in his or her presence, except as otherwise provided for in the MCCP.

Commentary

Paragraph 1: The right to a fair and public hearing is set out in a number of international and regional human rights instruments, including the Universal Declaration of Human Rights (Article 10), the International Covenant on Civil and Political Rights (Article 14[1]), and the European Convention for the Protection of Human Rights and Fundamental Freedoms (Article 6[1]). The concepts of a “fair hearing” and a “public hearing” will be addressed separately.

The concept of a fair hearing is a general principle that applies to the whole criminal process. It is possible for a trial to provide all the other enumerated fair trial rights set out in international human rights law and yet not constitute a fair trial if it, as a whole, does not comply with the precept of fairness. These enumerated rights are only minimum guarantees. The right to a fair trial has therefore been construed as having a residual meaning that includes other indefinable characteristics that are necessary for the fair administration of justice. According to the United Nations Human Rights Committee’s interpretation, the right to a fair trial is broader than the sum of the individual fair trial guarantees and depends on the entire conduct of the trial (General Comment no. 13, paragraph 5). Similar sentiments have been expressed by the Inter-American Court of Human Rights (*Exceptions to the Exhaustion of Domestic Remedies*,

Annual Report of the Inter-American Court [August 10, 1990], OAS/ser. L/V/III.23, doc. 12, rev. 1991, page 44, paragraph 24). Implicit in the right to a fair trial is the concept of the “equality of arms.” According to the European Court of Human Rights, “[e]quality of arms, which must be observed throughout the trial process, means that both parties are treated in a manner ensuring that they have a procedurally equal position during the course of the trial, and are in an equal position to make their case” (*Ofrer and Hopfinger*, applications nos. 524/59 and 617/59, *Yearbook* 6, December 12, 1960, pages 680 and 696). Violations of the equality of arms principle have been found by the European Court of Human Rights where, for example, one side was denied access to relevant documents contained in the case file, where a court considered submissions from only one party, and where one party was never informed about relevant dates in proceedings.

With regard to the required public nature of hearings, the United Nations Human Rights Committee has held that “apart from such exceptional circumstances [set out in Article 14(1) of the International Covenant on Civil and Political Rights], the Committee considers that a hearing must be open to the public in general, including members of the press, and must not, for instance, be limited only to a particular category of persons” (General Comment no. 13, paragraph 6). A number of limited exceptions are set out in Paragraph 2 of Article 62. The rationale behind public hearings is, firstly, to ensure that the general public has an opportunity to see justice being done, and secondly, to ensure that trials are open to public scrutiny and attention, thus protecting the rights of the accused. In order to facilitate the operation of this right, it is important that a court make information about the time and venue of the oral hearings available to the public and provide adequate facilities, within reasonable limits, for the attendance of interested members of the public (*Van Meurs v. The Netherlands* [Communication no. 215/1986], UN document no. CCPR/C/39/D/215/1986 1990, paragraph 6.2). It is also important that the hearing of the trial be conducted orally at the trial court level (*Fredin v. Sweden* [No. 2], 18928/91 [1994], ECHR 5, [February 23, 1999]). This does not always apply to the appeals court level (*Fredin v. Sweden* 6–7), but leading commentators have suggested that hearings at the appeals court level should be public when they relate to the determination of a criminal charge.

Paragraph 2: Paragraph 2 provides a finite number of exceptions to the right to a public hearing. These exceptions have been drawn from Article 14(1) of the International Covenant on Civil and Political Rights and Article 6(1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms. In the first place, it must be noted that Paragraph 2 refers to “the press” and “the public” as separate groups. In some instances, both groups may be excluded at the same time: however, in other instances, the court may determine that the press should be allowed to remain when the public is excluded.

The concept of “morals” in Subparagraph (a) is taken to include cases involving sexual offenses, while “public order” has been interpreted by some commentators as relating to order in the courtroom, and “national security” as relating to the protection of important military facts or to the protection of judges against attack. Amnesty International’s *Fair Trials Manual* points out in relation to the concept of national security that “international law does not grant to states an unfettered discretion to define for

themselves what constitutes an issue of national security. According to experts in international law, national security, and human rights, ‘A restriction sought to be justified on the ground of national security is not legitimate unless its genuine purpose and demonstrable effect is to protect a country’s existence or its territorial integrity against the use or threat of force, or its capacity to respond to the threat or use of force, whether from an external source, such as a military threat, or an internal source, such as incitement to overthrow the government’” (*Fair Trials Manual*, Section 14.3).

Subparagraph (b) refers to the “interests of a child.” This exception would be particularly relevant in cases of sexual offenses. The European Commission found that the exclusion of the public from a case involving sexual offenses against children was permissible under Article 6(1) of the European Convention (*X v. Austria* [1913/63], 2 Digest of Strasbourg Case Law 438 [April 30, 1965]), unpublished). Reference should be made to Article 335(2).

The final exception to the right to a public trial, enumerated in Subparagraph (d), is an exceptional measure. The determinant of whether the press or public can be excluded is that of “the interests of justice.”

Paragraph 3: The requirement that judgments be publicly delivered is set out in Article 14(1) of the International Covenant on Civil and Political Rights and in Article 6(1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms. The European Court of Human Rights has stated that the purpose of delivering the judgment in public is to “ensure the scrutiny of the judiciary by the public with a view to safeguarding the right to a fair trial” (*Pretto v. Italy*, application no. 7984/77 [1983] ECHR 15 ser. A, no. 71 [December 8, 1983], paragraph 27). The grounds for exclusion of the press and public under Paragraph 2 do not apply to the delivery of a judgment. The only permissible exception is where “the interests of a child require otherwise.” See Article 355(5).

There is a distinction between a judgment being pronounced publicly and being made public. The requirement set out in Paragraph 3 does not mean that a judge has to read the judgment verbatim in the courtroom. Instead, this right has been interpreted as meaning that the judgment must be publicly accessible to everyone.

Paragraph 4: The right to be present during a trial is expressed in the International Covenant on Civil and Political Rights (Article 14(3)[d]). The right to the presence of the accused is not expressly provided for by the European Convention on the Protection of Human Rights and Fundamental Freedoms, although this right has been interpreted as being implicit in Article 6 of the convention. The right is also not expressed in the American Convention on Human Rights; however, it has been also held to be implicit in Article 8 of the convention. Conducting a trial “in absentia,” or without the presence of the accused, is, according to the United Nations Human Rights Committee, permissible only “exceptionally for justified reasons” (General Comment no. 13, paragraph 11). Where a trial is conducted in absentia, according to the Human Rights Committee, “strict observance of the rights of the defense is all the more necessary.” However, in the case of *Mbenge v. Zaire* (UN document CCPR/C/OP/2[1990], paragraph 14.1), the Human Rights Committee further stated that the requirements of a fair trial laid down in the International Covenant on Civil and Political Rights “cannot

be construed as invariably rendering proceedings *in absentia* inadmissible irrespective of the reasons for the accused person's absence." Reasons justifying the accused person's absence may be that the accused, after being adequately informed of the date and time of the trial, has fled or that the accused has been disruptive and has been temporarily removed from the courtroom. These restrictions are contained in Article 214. Another exception and a temporary restriction on the presence of the accused during the trial is where a witness is testifying under a protective measure under Article 147(F) that requires the absence of the accused during his or her testimony. This may occur, for example, where the witness would be too intimidated to testify in the presence of the accused.

Article 63: Right to Trial without Undue Delay and the Right of Detained Persons to Trial within a Reasonable Time or Release

1. All persons have the right to trial without undue delay.
2. All detained persons have the right to trial within a reasonable time or release.

Commentary

Article 63 covers two aspects of international human rights law relating to the time when an accused person is tried. The right contained in Paragraph 1 applies to all persons, but the right contained in Paragraph 2 applies to detained persons only, as defined in Article 1(12).

Paragraph 1: The right to trial without undue delay is found in numerous international and regional human rights instruments: for example, the International Covenant on Civil and Political Rights (Article 14[3][c]), the American Convention on Human Rights (Article 8[1]), the African Charter on Human and Peoples' Rights (Article 7[1][d]), and the European Convention for the Protection of Human Rights and Fundamental Freedoms (Article 6[1]). The terminology used in Article 63 mirrors that of the International Covenant on Civil and Political Rights.

The right to a trial without undue delay refers not only to the right to a trial but also to a final judgment without undue delay. According to the United Nations Human Rights Committee, the right to trial without undue delay "relates not only to the time by which a trial should commence, but also the time by which it should end and judgment is rendered; all stages must take place 'without undue delay'" (General Comment

no. 13, paragraph 10). The clock starts to run once a person is charged with a criminal offense, which has been interpreted by the European Court of Human Rights to mean “from an official notification given to an individual by the competent authority of an allegation that he has committed a criminal offense or from some other act which carries the implication of such an allegation and which likewise substantially affects the situation of the suspect” (*Kangaslauma v. Finland*, application no. 48339/99 [2004], ECHR 29 [January 20, 2004], paragraph 26). This may include the official initiation of an investigation (such as under Article 94 of the MCCC), an arrest (under Articles 170 or 171 of the MCCC), the questioning of a person by police (see *Kangaslauma v. Finland*, paragraph 26), or a search (see *Diamantides v. Greece*, application no. 60821/00 [2003], ECHR 533 [October 2003], paragraph 21). The clock stops and the right to a trial without undue delay is realized where there has been a final conviction or acquittal. Not only must the judgment be final but also the accused must be made aware of it.

There is no objective standard or benchmark when it comes to determining when a case has been conducted in violation of the accused’s right to trial without undue delay. This determination will depend on the individual facts and circumstances of the particular case. In one case, five years could be found to be a reasonable time, whereas in another case, one year could be found to be unreasonable. A number of factors are generally considered in the determination of what represents undue delay, for example, the conduct of the accused, the complexity of the case, and the conduct of the authorities. The ordinary delay in similar matters is also considered (see *König v. Federal Republic of Germany*, application no. 6732/73 [1978] ECHR [June 28, 1978] paragraph 99).

With regard to the conduct of the accused, it is not necessary that the accused cooperates in a manner to expedite the trial process or renounce some of his or her rights, such as the right to silence. He or she is entitled to assert all his or her procedural rights. In some instances, however, such as where the accused repeatedly asks for postponement of hearings, this behavior may be taken into account. With regard to the complexity of the case, the general rule is that the more complex a case is, the more time will be permitted to conduct the trial. A case may be deemed complex because of the nature and seriousness of the alleged offense. For example, an economic crime case that has been perpetrated transnationally will be much more complex than a simple robbery case and will require more time to investigate and try. A number of other things may be taken into account in looking at the complexity of the case, including the number of witnesses, the number of charges, and the number of coaccused or other people involved in the trial. The conduct of the authorities is often the primary factor in determining whether there has been undue delay in trying a case. A finding of undue delay may occur where a prosecutor has not been actively investigating a case or has not proceeded diligently in the investigation, or where there have been unnecessary delays in investigating the case. The delay can be found at the trial stage or even the appeals stage, in addition to the investigation stage. At the trial phase, a delay due to ineffective organization of the trial may also constitute a violation of the right to trial without undue delay (see *Yağci and Sargin v. Turkey*, application no. 16419/90; 16426/90 [1995], ECHR 20 [June 8, 1995], paragraphs 68–69). In a case before the United Nations Human Rights Committee, a violation was found where there was a twenty-nine-month delay in producing transcripts, which meant that an appeal took three years.

It should also be noted that the right to trial without undue delay may conflict with the right to adequate time and facilities to prepare a defense. Cross-reference should be made to Article 61 and its accompanying commentary.

In some post-conflict contexts, significant delays frequently occur in bringing accused persons to trial. Often, for example, accused persons are kept in detention for longer than the applicable law allows or in some cases beyond maximum penalty provided for the offense with which they are charged. Such protracted detentions can occur because of a proliferation of crime problems in the post-conflict period, or because the criminal justice system is overstretched and understaffed. In addition, programs to vet criminal justice personnel and remove those who may have been complicit in human rights violations may create a temporary shortage of personnel. The vetting process can also impair the authorities' ability to investigate and try criminal cases expeditiously. Undue delays of trial is not only a problem in itself but also creates other problems. For example, keeping accused persons in detention for excessive periods can lead to prison overcrowding.

Paragraph 2: The right to be tried within a reasonable time or otherwise to be released is contained in Article 9(3) of the International Covenant on Civil and Political Rights, Article XXV of the American Declaration on the Rights and Duties of Man, Article 7(5) of the American Convention on Human Rights, Article 5(3) of the European Convention on Human Rights, and Principle 38 of the Body of Principles for the Treatment of Persons under Any Form of Detention or Imprisonment. Under Paragraph 2, where a person is not tried within a reasonable time, he or she must be released from detention pending trial. The reasonableness of the time spent in detention pending trial is determined in the same way as the determination of undue delay discussed in the commentary to Paragraph 1. Articles 189 and 190 of the MCCP set out upper limits on the length of pretrial detention in an attempt to ensure that the trial takes place within a reasonable time and that the reasonableness of the time a person spends in detention is independently assessed by a judge.

Article 64: Right to Examination of Witnesses

The accused has the right to examine, or have examined, the witnesses against him or her and to obtain the attendance and examination of witnesses on his or her behalf under the same condition as witnesses against him or her.

Commentary

The right of the accused to examine or have examined witnesses on his or her behalf is expressed in Article 14(3)(e) of the International Covenant on Civil and Political Rights, Article 6(3)(d) of the European Convention for the Protection of Human Rights and Fundamental Freedoms, and Article 8(2)(f) of the American Convention on Human Rights. The right to examine witnesses—an inherent element of the “equality of arms” principle discussed in the commentary to Article 62—is, according to the United Nations Human Rights Committee, “designed to guarantee to the accused the same legal powers of compelling the attendance of witnesses and of examining or cross-examining any witness as are available to the prosecution” (General Comment no. 13, paragraph 12). The right to examine witnesses is also related to the right to prepare a defense under Article 61.

The right to examine witnesses has two components: first, the right to call witnesses to testify during the trial, and second, the right to examine prosecution witnesses. The right to call witnesses is not unlimited in nature. For example, if a witness becomes unavailable or fails to appear, this is not a violation of the right to examine witnesses. In addition, a court is not required to call all witnesses requested by the defense. However, the court must not violate the principles of fairness and equality of arms. With regard to the right to examine prosecution witnesses, the defense must be given adequate opportunity to cross-examine the witness in court. Reference should be made to Article 224, which sets out the requirement that the defense may examine any witness called in court. An aspect of the right to examine a witness is that the defense has sufficient information about the witness to challenge his or her reliability (and to perhaps impeach the witness under Article 261). A number of cases raised before the European Court of Human Rights have dealt with the issue of anonymous witnesses and whether their use violated the right to examine a witness. These cases are discussed in the commentary to Chapter 8, Part 4, Section 2. Ultimately, the European Court held that the rights of the accused were not violated, after balancing the right to examine a witness against the need to protect the safety of persons testifying before the court and the safety of their families.

Part 2: Rights Relating to Legal Assistance to the Suspect and the Accused

General Commentary

There are several elements of the right to legal assistance, a number of which (e.g., the right to defend oneself in person, the right to choose one's own counsel, and the right to receive free legal assistance) are contained in Part 2. Reference should also be made to Article 52, which places an obligation on the state to establish a mechanism for delivering free legal assistance to indigent arrested persons and accused. The remaining right relating to the right to defense is contained in Article 172(3)(b)—the right to be informed of the right to counsel.

Article 65: Right to Defend Oneself Personally or through Counsel

1. A suspect or an accused has the right to defend himself or herself in person or through counsel.
2. A suspect or an accused has the right to have counsel present at all stages of the criminal proceedings, including during interrogation and during pretrial proceedings.

Commentary

Paragraph 1: The right to defend oneself in person or through legal assistance derives from Article 11(1) of the Universal Declaration of Human Rights, Article 14(3)(d) of the International Covenant on Civil and Political Rights, Article 8(2)(d) of the American Convention on Human Rights, Article 6(3)(c) of the European Convention for the Protection of Human Rights and Fundamental Freedoms, Article 7(1)(c) of the African Charter on Human and Peoples' Rights, and Principle 1 of the United Nations Basic Principles on the Role of Lawyers.

Paragraph 2: Where a person is being defended through counsel (either at his or her own expense or by way of free legal assistance), the M CCP provides that the person may be defended by counsel throughout the entirety of the criminal proceedings and not just during trial. This right is recognized in the Basic Principles on the Role of Lawyers (Principle 1) and in the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment (Principle 17). According to Amnesty International's *Fair Trials Manual* (chapter 3.1.1.), "A person's right to the help of a lawyer in pre-trial proceedings is not expressly set out in the ICCPR, the American Convention, the African Charter or the European Convention. However, the Human Rights Committee, the Inter-American Commission and the European Court have all recognized that the right to a fair trial requires access to a lawyer during detention, interrogation and preliminary investigations." The European Court of Human Rights, for example, found in the case of *Murray v. United Kingdom* ([1996] 22 EHRR 29) that a failure to grant an arrested person access to counsel within the first forty-eight hours after arrest was a violation of Article 6 of the European Convention on Human Rights and Fundamental Freedoms.

In the course of drafting the Model Codes, the drafters and other experts engaged in considerable discussion on the issue of access to counsel. The issue has also been debated among practitioners in post-conflict states. In a number of post-conflict states, some experts have supported the idea of restricting an arrested person's access to defense counsel, granting police or prosecutors access to an arrested person without the presence of a lawyer for some period immediately after arrest. Those who support such restrictions argue that they are justified because some defense lawyers, especially those retained by members of organized crime gangs, are in league with the gangs and would pass on information from an arrested person to other members of the gang, thereby, for example, helping to thwart the arrest of suspects not yet located. Opponents of the restrictions contend that denying the arrested person immediate access to counsel endangers his or her rights, increasing the risk, for example, that the suspect may be tortured or mistreated in some other way.

This latter school of thought won out in the debate among the drafters of the M CCP, which stipulates that the right to counsel without restriction is the general principle and should be followed in all but very exceptional cases. Rather than restricting access to counsel, police and prosecution should use supplemental safeguards to deter defense malfeasance. If it is proven that defense counsel is acting contrary to his or her professional standards of ethical conduct, or indeed contrary to the law (if he or she is involved in the obstruction of justice, for example, through leaking information to criminal associates who then take steps to thwart an investigation), he or she should be subject to disciplinary action or to prosecution for obstruction of justice (for such an offense, see Article 193 of the MCC). There are more appropriate ways of dealing with defense council misconduct than impinging upon a suspect's or accused's right to counsel.

Article 66: Right to Choice of Counsel

A suspect or an accused has the right to counsel of his or her own choosing.

Commentary

The suspect's or accused's right to counsel of his or her choosing derives from international instruments such as the International Covenant on Civil and Political Rights (Article 14[3][d]), the European Convention for the Protection of Human Rights and Fundamental Freedoms (Article 6[3][c]), the American Convention on Human Rights (Article 8[2][d]), and the African Charter on Human and Peoples' Rights (Article 7[1][c]). This right technically falls under the category of rights of the accused rather than rights of the suspect; however, it has consistently been held in case law to apply in the pretrial stages to a suspect. This right is also found in Principle 1 of the United Nations Basic Principles on the Role of Lawyers, which states that the purpose of having a lawyer of choice "is to protect and establish the rights of the suspect or accused to defend them in all stages of criminal proceedings." This means that the suspect or the accused can hire a qualified lawyer of their choice to represent him or her throughout the proceedings. Amnesty International's *Fair Trials Manual*, citing two cases from the United Nations Human Rights Committee, states that there have only been two exceptions made to this right. The first exception was made where the accused's lawyer was suspected of complicity in some of the criminal offenses charged; the second was made when the accused's lawyer refused to wear robes in court where required under the law (see section 20.3.2). The right to choice of counsel does not apply without restriction where a person has obtained free legal assistance under Article 67 or mandatory legal assistance under Article 68. In general, the state must endeavor to ensure that the suspect or the accused is amenable to the lawyer chosen to represent him or her. Principle H(d) of the African Union Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa provides a person with the right to contest the choice of his or her court-appointed lawyer. While the suspect or accused may contest the choice of counsel, there is no obligation on the state to provide another lawyer of choice as a substitute. The state must also ensure that the lawyer chosen is competent. The requirement that the lawyer chosen to provide free legal assistance to an indigent person be competent is discussed in the commentary to Article 52.

It is permissible for a person to engage the services of more than one lawyer in his or her defense. Where a person has chosen a lawyer who is also defending another accused in the same case, an issue may arise relating to conflict of interest. In many states, the court may limit the right to choice of counsel where such a conflict arises. Where this choice is not limited, best practice generally requires that the judge queries the suspect or the accused to determine if this is a fully informed and voluntary choice. Conflict of interest is usually dealt with in a code of practice or code of conduct for lawyers, which may require that a lawyer defend only one accused person in any criminal case.

Article 67: Right to Free Legal Assistance

Legal assistance without cost must be provided to an arrested person or an accused where:

- (a) the interests of justice so require; and
- (b) the arrested person or the accused does not have sufficient means to pay for legal assistance.

Commentary

The right to free legal assistance derives from Article 14(3)(d) of the International Covenant on Civil and Political Rights, Article 6(3)(c) of the European Convention for the Protection of Human Rights and Fundamental Freedoms, and Article 8(2)(e) of the American Convention on Human Rights. It is also contained in Principle H(a) of the African Union Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, Principle 17(2) of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, and Rule 93 of the United Nations Standard Minimum Rules for the Treatment of Prisoners. The right to free legal assistance becomes effective under the MCCC the moment a person is arrested (see Article 158[3][b]). Strictly speaking, this is a right that applies to the trial; however, it has consistently been held by international and regional human rights bodies and courts to apply to pretrial proceedings as well.

Under the American Convention, there is an “inalienable” right to free legal assistance where the person does not have the means to pay for it. This is qualified slightly in the International Covenant on Civil and Political Rights and the European Convention for the Protection of Human Rights and Fundamental Freedoms, which add the additional criteria of “the interests of justice.” In determining the meaning of the interests of justice, the United Nations Draft Declaration on the Right to a Fair Trial and a Remedy, at paragraph 50(a), states that “[t]he interests of justice in a particular case should be determined by consideration of the seriousness of the offense of which the defendant is accused and the severity of the sentence which he or she risks.” Identical wording is also used in the Guidelines on the Right to a Fair Trial and Legal Assistance in Africa (Principle H[b][i]). The European Court of Human Rights in interpreting the same phrase has gone further in its consideration of relevant factors for the appointment of legal representation. In addition to examining the seriousness of the offense and the severity of the sentence (see *Quaranta v. Switzerland*, application no. 12744/87 [1991] ECHR 33 [May 24, 1991]), the European Court has also required the court to take into account the complexity of the case before it (see *Quaranta v. Switzerland*,; and *Granger v. United Kingdom*, application no. 11932/86 [1990] ECHR 6 [March 28, 1990] ser. A, vol. 174 [1990]) and also the capacity of the arrested or accused to represent himself or herself (see *Pakelli v. Germany*, application no. 8398178 [1983] ECHR 6

[April 25, 1983], ser. A, vol. 64 [1983]). Ultimately, the test articulated by the European Court (*Artico v. Italy*, application no. 6694/74 [1980] ECHR 4 [May 13, 1980]) is whether “it appears plausible in the particular circumstances” that counsel would be of assistance (paragraph 35).

As discussed in the commentary to Article 66 above, the suspect or the accused who has been granted free legal assistance has a limited right to object to the choice of counsel. The state must ensure that counsel provided is competent. Principle 6 of the United Nations Basic Principles on the Role of Lawyers speaks of the need for the state to provide “a lawyer of experience and competence commensurate with the nature of the offense assigned to them.” The African Union Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa contains more extensive guidelines and provides that the appointed lawyer should be “qualified to represent and defend the accused,” “have the necessary training and experience corresponding to the nature and seriousness of the matter,” “be free to exercise his or her professional judgment in a professional manner free of influence of the State or the judicial body,” “advocate in favour of the accused,” and “be sufficiently compensated to provide an incentive to accord the accused . . . adequate and effective representation.” Reference should be made to Article 52 on “Defense Service” for a more complete discussion on the provision of free legal assistance and its practical implementation around the world, including a discussion on free legal assistance in post-conflict environments, which usually have a dearth of lawyers available to take on cases.

Article 68: Mandatory Free Legal Assistance

1. An arrested person or an accused must have counsel when he or she is:
 - (a) a juvenile;
 - (b) mute or deaf, or where he or she displays signs of mental illness or other mental disabilities;
 - (c) charged with a criminal offense that carries a potential penalty of fifteen or more years’ imprisonment; or
 - (d) the subject of a request for extradition under Article 313.
2. If an arrested person or an accused who falls into categories set out in paragraph 1(a)–(d) does not engage his or her counsel, counsel must automatically be provided free of charge.

Commentary

Under Article 67, the right to free legal assistance is premised on two criteria: first, that the arrested person is indigent, meaning he or she does not have the means to pay for legal assistance; and second, that the “interests of justice” require the provision of free legal assistance. In some cases, free legal assistance should be provided as an automatic right. This is standard practice in many states around the world, particularly with regard to vulnerable groups such as children or those with mental disabilities. It is also standard practice in many states to afford mandatory defense to those who have committed serious offenses. The MCCP under Article 68 provides that persons who have committed serious offenses, meaning offenses that carry a potential penalty of fifteen years’ or more imprisonment, must have an automatic right to free legal assistance, as does a person subject to a request for extradition, given the complicated nature of extradition proceedings.

Article 69: Waiver of Right to Counsel

1. The right to counsel may be waived by an arrested person or an accused, except where he or she:
 - (a) is a juvenile; or
 - (b) displays signs of mental illness or other mental disabilities.
2. Before a person waives his or her right to counsel, the implications of waiving the right to counsel must be explained to the arrested person or accused.
3. A waiver of the right to free legal assistance under Article 69 may only be made in the presence of a lawyer.
4. A waiver of the right to counsel by an arrested person or an accused must be:
 - (a) voluntarily made;
 - (b) in writing;
 - (c) contain a declaration that the implications of waiving the right to free legal assistance or to counsel have been explained to the arrested person or the accused and that the person understands the consequences of waiving his or her right;
 - (d) signed by the arrested person or the accused; and
 - (e) signed by the police officer or prosecutor to whom the waiver is made.

5. Where the facilities exist, the waiver must be audio or video recorded.
6. Waiver of the right to counsel by an arrested person or an accused does not preclude the subsequent reassertion of that right by the arrested person or the accused.

Commentary

The right to counsel “belongs” to the arrested or accused person; consequently, in general, he or she also has the right not to exercise that right. A waiver of the right to counsel is given a revocable status under Paragraph 4, meaning that the person may reassert their right at any time and the prior waiver will be deemed prospectively void. Due to the potential danger that an arrested person or an accused person may be coerced or forced into waiving their right to counsel, Paragraph 2 provides that the waiver must be given in writing and must contain a declaration that the person understands fully the implications of waiving this right.

Article 70: Right to Communication with Counsel

1. A suspect or an accused has the right to communicate freely and confidentially, orally and in writing, with his or her counsel.
2. This right must be respected at all stages of the proceedings.
3. Communications between a detained suspect or accused person and his or her counsel may be within sight but not within hearing of a police officer or detention authority officer.

Commentary

Article 70 is inspired by Article 6(3)(c) of the European Convention for the Protection of Human Rights and Fundamental Freedoms, Article 7(1)(c) of the African Charter on Human and Peoples’ Rights, Principles 8 and 22 of the United Nations Basic Principles on the Role of Lawyers, Principle 18 of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, and Rule 93 of the United Nations Standard Minimum Rules for the Treatment of Prisoners. The United Nations Human Rights Committee has noted that access to counsel is important for the protection of a detainee (General Comment no. 20, paragraph 11). It has also noted that communication with counsel should take place in conditions that give full respect

to the confidentiality of the communications and that “lawyers should be able to counsel and represent their clients in accordance with their established professional standards and judgment without any restrictions, pressures or undue influences from any quarter” (General Comment no. 13, paragraph 9).

The general right to communicate freely and confidentially with counsel is given effect in Paragraph 3, which requires that when a person is consulting with counsel a police officer or detention authority officer must not be able to hear what is being said. The police officer or detention authority officer may have a view of the consultation for security reasons, however. In addition, there must be no surveillance or recording devices activated in the area where the confidential lawyer-client communication is taking place, nor can the suspect or the accused be asked subsequently by a police officer or detention authority official to disclose what went on during the consultation.

The right to communicate with counsel from the time the person is arrested and the right to inform counsel of the arrest are also contained in Article 172.

Article 71: Right to Presence of Counsel during Interviews

A suspect or an accused has the right to the presence of his or her counsel during all interviews with the police or the prosecutor, if counsel has been retained or appointed.

Commentary

Under international human rights law, it is unclear if the right to have contact or communication with counsel (as set out in Article 71) extends to the interview of a suspect or an accused by the police or the prosecutor. There is no defined right to have counsel present during interviews under international human rights law. That said, many commentators believe that it does in fact apply to the interviews of suspects and is part of the overall right to a fair trial contained in international human rights law and set out in Article 62. As discussed in the commentary to Article 62, the right to a fair trial comprises more than the sum of the rights set out in international human rights law and may include other rights, such as the right to presence of counsel during interviews, that are not contained in the various provisions set out in conventions or treaties on the subject. Moreover, many states around the world have long integrated the presence of counsel during interviews into their criminal procedure law. The presence of counsel during interviews not only facilitates the right of the suspect or the accused to defend himself or herself (as set out in Article 65) but also helps to protect the accused’s right to freedom from coercion, duress, threat, torture or cruel, inhuman, or degrading treatment (as set out in Article 58). The European Committee for the Pre-

vention of Torture and Inhuman or Degrading Treatment or Punishment (CPT), in support of the presence of counsel during interviews, has stated that “access to a lawyer for persons in police custody should include the right to contact and be visited by the lawyer (in both cases under conditions guaranteeing the confidentiality of their discussions) as well as, in principle, the right for the person concerned to have the lawyer present during interrogation” (*Second General Report, CPT/Inf [1992]*, page 3, paragraph 38). For the foregoing reasons, the drafters of the Model Codes were of the view that the presence of counsel during interviews was a best practice standard and therefore should be integrated into the MCCP.