

HUMAN RIGHTS MANUAL FOR PROSECUTORS

INTERNATIONAL ASSOCIATION OF PROSECUTORS

HUMAN RIGHTS MANUAL FOR PROSECUTORS

*Egbert Myjer
Barry Hancock,
Nicolas Cowdery (Eds.)*



INTERNATIONAL ASSOCIATION OF PROSECUTORS

Human Rights Manual for Prosecutors.

Egbert Myjer, Barry Hancock, Nicolas Cowdery (Eds.).

Published by the International Association of Prosecutors in cooperation with
Wolf Legal Publishers (WLP), 2009.

ISBN: 978-90-5850-459-3

1st edition (2003)

2nd completely revised edition (2009)

International Association of Prosecutors

Hartogstraat 13

2514 EP The Hague

The Netherlands

Tel. +31 70 3630345

+31 70 3630352

Fax. +31 70 3630367

e-mail: sg@iap.nl.com

info@iap.nl.com

Publisher:

Published by:

René & Willem-Jan van der Wolf

Wolf Legal Publishers (WLP)

P.O.Box 31051

6503 CB Nijmegen

The Netherlands

Tel: +31 24-3551904

Fax: +31 24-3554827;

E-Mail: info@wolfpublishers.nl

[Http://www.wolfpublishers.com](http://www.wolfpublishers.com)

Disclaimer: Whilst the authors, editors and publisher have tried to ensure the accuracy of this publication, the publisher, authors and editors cannot accept responsibility for any errors, omissions, misstatements, or mistakes and accept no responsibility for the use of the information presented in this work.

CONTENTS

| | |
|---|-----|
| FOREWORD | I |
| INTRODUCTION | III |
| <i>International instruments cited in the present manual</i> | v |
| <i>Cases of the European Court of Human Rights</i> | IX |
| <i>Abbreviations</i> | XI |
| | |
| ‘HUMAN RIGHTS ON DUTY’: AN INTRODUCTION | I |
| | |
| INTERNATIONAL HUMAN RIGHTS LAW | 5 |
| | |
| INTERNATIONAL STANDARDS FOR THE INDEPENDENCE OF THE JUDICIARY AND THE LEGAL PROFESSION | 9 |
| | |
| HUMAN RIGHTS AND THE RIGHT TO LIFE | 17 |
| | |
| HUMAN RIGHTS AND THE INVESTIGATION OF OFFENCES | 39 |
| | |
| HUMAN RIGHTS DURING ARREST AND PRE-TRIAL DETENTION | 71 |
| | |
| HUMAN RIGHTS AND PRE-TRIAL PROCEDURES | 97 |
| | |
| HUMAN RIGHTS AND TRIAL PROCEDURES | 123 |
| | |
| HUMAN RIGHTS AND SENTENCING | 145 |
| | |
| HUMAN RIGHTS AND THE TREATMENT OF PRISONERS | 153 |
| | |
| ADMINISTRATION OF CRIMINAL JUSTICE UNDER STATES OF EMERGENCY | 165 |
| | |
| HUMAN RIGHTS AND THE FIGHT AGAINST TERRORISM | 173 |

| | |
|---|-----|
| HUMAN RIGHTS AND JUVENILE JUSTICE | 185 |
| DISCRIMINATION IN THE JUSTICE SYSTEM | 203 |
| EQUALITY FOR WOMEN IN THE ADMINISTRATION OF JUSTICE | 215 |

APPENDICES

| | |
|---|-----|
| - GUIDELINES ON THE ROLE OF PROSECUTORS | 219 |
| - RECOMMENDATION REC(2000) 19 OF THE COMMITTEE OF MINISTERS TO MEMBER STATES ON THE ROLE OF PUBLIC PROSECUTION IN THE CRIMINAL JUSTICE SYSTEM | 225 |
| - STANDARDS OF PROFESSIONAL RESPONSIBILITY AND STATEMENT OF THE ESSENTIAL DUTIES AND RIGHTS OF PROSECUTORS | 235 |
| - USEFUL INTERNET ADDRESSES | 240 |

FOREWORD

The U.N. *Vienna Declaration* of 1993 declared that all human rights and fundamental freedoms are universal, indivisible, interdependent and interrelated and should be promoted and implemented in a fair and equitable manner. The prime responsibility for doing so falls upon States. Prosecutors are agents of States.

This Manual advances the objectives of the U.N. *Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms* of 1998. The Declaration requires States to create the necessary conditions and provide legal guarantees to ensure that all persons under their jurisdictions are able to enjoy those rights and freedoms in practice. The Manual will assist prosecutors, especially, to advance the achievement of those ends.

This Manual is a practical aid. The principles to be applied by prosecutors in their daily work are to be found in international instruments, regional instruments and in domestic law. The Manual introduces practitioners to issues and principles of universal and regional application – practitioners in individual jurisdictions may then marry the applicable principles to provisions of the domestic laws of their own jurisdictions and thus obtain a complete code of conduct for any part of the world and for any official procedure.

The IAP pays tribute to Professor Myjer and his assistants for the production of the Manual. It is a major work of great significance and value in the field and should find a place on the shelf (or in the electronic library) of every prosecutor. This second edition includes updates of international law and ‘soft law’ and recent jurisprudence of the European Court of Human Rights where Professor Myjer is now a judge.

Since the publication of the first edition of the Manual in 2003 it has become a standard reference book for prosecutors and has been translated into six

languages. It remains a significant step for the International Association of Prosecutors in its endeavours to promote the effective, fair, impartial and efficient prosecution of criminal offences and to assist prosecutors internationally in the fight against crime.

François Falletti

President International Association of Prosecutors

INTRODUCTION TO THE 2ND EDITION

Following the adoption of the IAP Standards (1999), the theme of the 5th IAP Annual Conference in Cape Town (2000) was Human Rights and the Prosecutor. One of the outcomes of the conference was the establishment of the IAP Human Rights Forum. The first project of the Forum was the compilation of an IAP Human Rights Manual specifically for prosecutors. All main international texts and principles, at both the UN-level and regional levels, which might be of interest to prosecutors all over the world, were to be compiled and discussed in the Manual.

Accordingly, in this IAP Human Rights Manual for Prosecutors the prosecutor will find a compilation of international texts on human rights, at both the UN and regional levels, which may be relevant for his/her daily practice. The Manual also contains excerpts from relevant non-binding documents (so-called “soft” international law) which might be of use and interest to prosecutors, and some helpful commentaries, including authoritative general comments on the ICCPR by the Human Rights Committee.

Since the *Human Rights Manual for Prosecutors* (“*the Manual*”) appeared in 2003, the manual has also been translated into the French, Russian, Ukrainian, Arabic and Turkish languages. Parts of it have also been translated into Chinese. The IAP has asked us, as we approach the fifth anniversary, to update the first edition. We have kept intact the original text, correcting textual errors and omitting superfluous duplication.

The update mainly concerns relevant international texts which have appeared since first publication. To the European practice we have added some new case-law from the European Court of Human Rights. The Court is the oldest and busiest international human rights tribunal. Up to the end of 2007 it had delivered 9031 judgments involving the 47 Contracting European States. In a future update of the manual no doubt attention will also be paid to the growing case-law of the Inter-American Court of Human Rights which up to the end of 2007 had delivered 174 judgments. Also by that time it is

anticipated that the African Court on Human and People's Rights will have started to deliver its decisions and judgments.

Because of the important role of prosecutors in the fight against terrorism, some 'soft law' has been added on human rights and the fight against terrorism. By making only minor changes we have ensured that the *Manual* still focuses mainly on the ethical and procedural aspects of the profession of the prosecutor. We resisted the temptation to add chapters relating to other fundamental rights with which the prosecutor may be faced during his or her professional work, such as freedom of thought, conscience and religion, freedom of expression and freedom of assembly and association. Neither did we pay attention to the role of the public prosecutor in the protection of human rights outside the criminal law field. (See the proceedings of the Conference of Prosecutors General of Europe, held in Saint Petersburg July 2008, and the report by Andras Sz. Varga, The role of the public prosecution service outside the field of criminal justice, to be consulted via www.coe.int/t/dgi/legalcooperation/ccpe/conferences/2008/.)

The appendices contain the updated version of the IAP *Standards of professional responsibility and statement of the essential duties and rights of prosecutors*. We have also included the *Standards of Conduct and Training*, which are laid down in the *Draft Regulation* of the Office of the Prosecutor of the International Criminal Court. Although the latter are directed only to the international prosecutor, they may be a valuable source of inspiration for national prosecution services.

We are no longer a member of the Executive Committee, General Counsel or President of the IAP respectively. However, we have enjoyed being able to show our commitment to the goals of the IAP by preparing this second edition. The texts in the first edition were compiled by Marnix Alink, at the time a law student at the Amsterdam Free University.

Egbert Myjer, *Judge at the European Court of Human Rights (elected in respect of The Netherlands)*.

Barry Hancock, *Special Adviser to the IAP*.

Nicholas Cowdery, *Director of Public Prosecutions, New South Wales, Australia*.

INTERNATIONAL INSTRUMENTS CITED IN THE PRESENT MANUAL

UN-LEVEL

- Basic Principles on the Independence of the Judiciary (Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders; Milan, 6 September 1985)
- Basic Principles for the Treatment of Prisoners (General Assembly resolution 45/III of 14 December 1990)
- Basic Principles on the Role of Lawyers (Eight Congress report, chap. I, sect. B.3 of 7 September 1990)
- Basic Principles on the Use of Force and Firearms by Law Enforcement Officials (Eight Congress report, chap. I, sect. B.2 of 7 September 1990)
- Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment (General Assembly resolution 43/173 of 9 December 1988)
- Code of Conduct for Law Enforcement Officials (General Assembly resolution 34/169 of 17 December 1979)
- Convention on the Elimination of All Forms of Discrimination Against Women (General Assembly resolution 34/180 of 18 December 1979; entry into force, 3 September 1981)
- Convention on the Elimination of All Forms of Racial Discrimination (General Assembly resolution 2106 (XX) of 21 December 1965; entry into force, 4 January 1969)
- Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (General Assembly resolution 39/46 of 10 December 1984; entry into force, 26 June 1987)

- Convention on the Rights of the Child (General Assembly resolution 44/25 of 20 November 1989; entry into force, 2 September 1990)
- Declaration on the Protection of All Persons from Enforced Disappearances (General Assembly resolution 47/133 of 18 December 1992)
- Declaration on the Rights of Disabled Persons (General Assembly resolution 3447/30 of 1975)
- Declaration on the Rights of Mentally Retarded Persons (General Assembly resolution 2856/26 of 1971)
- General Comments adopted by the Human Rights Committee (under article 40, para.4, of the International Covenant on Civil and Political Rights)
- Guidelines on the Role of Prosecutors (Eighth Congress report, chap. I, sect. C, resolution 26 of 7 September 1990)
- International Covenant on Civil and Political Rights (New York, 16 December 1966; entry into force, 23 March 1976)
- International Guidelines on HIV/AIDS and Human Rights (U.N.C.H.R. res. 1997/33 of 1997)
- Principles of Medical Ethics relevant to the Role of Health Personnel, particularly Physicians, in the Protection of Prisoners and Detainees against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (General Assembly resolution 37/194 of 1982)
- Principles for the Protection of Persons with Mental Illness and for the Improvement of Mental Health Care (General Assembly resolution 46/119 of 17 December 1991)
- Safeguards Guaranteeing Protection of the Rights of Those Facing the Death Penalty (Economic and Social Council resolution 1984/50 of 1984)
- Standard Minimum Rules for the Treatment of Prisoners (First United Nations Congress on the Prevention of Crime and the Treatment of Offenders: report by the Secretariat; adopted 30 August 1955)

- Universal Declaration of Human Rights (General Assembly resolution 217 A (III) of 10 December 1948)
- United Nations Guidelines for the Prevention of Juvenile Delinquency, 'Riyadh Guidelines' (General Assembly resolution 45/112 of 14 December 1990)
- United Nations Rules for the Protection of Juveniles Deprived of their Liberty (General Assembly resolution 45/113 of 14 December 1990)
- United Nations Standard Minimum Rules for the Administration of Juvenile Justice, 'Beijing Rules' (General Assembly resolution 40/33 of 29 November 1985)
- United Nations Standard Minimum Rules for Non Custodial Measures, 'Tokyo Rules' (General Assembly resolution 45/110 of 14 December 1990)

REGIONAL LEVEL

- African Charter on Human and Peoples' Rights (Nairobi, 26 June 1981; entry into force, 21 October 1986)
- African Charter on the Rights and Welfare of the Child (of 1990; entry into force, 29 November 1999)
- American Convention on Human Rights (San José, 22 November 1969; entry into force, 18 July 1978)
- Arab Charter on Human Rights (Cairo, 15 September 1994)
- Cairo Declaration on Human Rights in Islam (Cairo, 5 August 1990)
- Charter of Fundamental Rights in the European Union (2000 O.J. (C364) 1, entry into force, 7 December 2000)
- European Convention for the Protection of Human Rights and Fundamental Freedoms (213 U.N.T.S. 222, entry into force 3 September 1953) plus additional protocols
- European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (entry into force, 1 February 1989)

- Inter-American Convention to Prevent and Punish Torture (O.A.S. Treaty Series No. 36, 1144 U.N.T.S. 123)
- Recommendation 'On the Role of Public Prosecution in the Criminal Justice System' (Council of Europe recommendation of 2000)
- Guidelines of the Committee of Ministers of the Council of Europe on human rights and the fight against terrorism (11 July 2002)
- Guidelines of the Committee of Ministers of the Council of Europe on the protection of victims of terrorist acts (2 March 2005)
- Protocol to the African Charter on Human and People's Rights on the Establishment of an African Court on Human and People's Rights (9 June 1998; entry into force 1 January 2004)
- Recommendation Rec(2006)2 of the Committee of Ministers of the Council of Europe to member states on the European Prison Rules (adopted on 11 January 2006)
- Recommendation Rec(2006)13 of the Committee of Ministers of the Council of Europe to member states on the use of remand in custody, the conditions in which it takes place and the provision of safeguards against abuse (adopted on 27 September 2006)
- Fourteenth Protocol to the European Convention for the protection of Human Rights and Fundamental Freedoms (signed by all member states, ratified by all member states but Russia; entry into force after ratification by all member states)

NGO's

- Standards of Professional Responsibility and Statement of the Essential Duties and Rights of Prosecutors (International Association of Prosecutors, adopted on 23 April 1999)

CASES OF THE EUROPEAN COURT OF HUMAN RIGHTS

Cited in the present manual, in alphabetical order:

- *Aksoy* (Judgment of 18 December 1996)
- *Allenet de Ribemont* (Judgment of 10 February 1995)
- *Brannigan and McBride* (Judgment of 26 May 1993)
- *Brogan* (Judgment of 29 November 1988)
- *Doorson* (Judgment of 20 February 1996)
- *Dougoz* (Judgment of 6 March 2001)
- *Fox, Campbell and Hartley* (Judgment of 30 August 1990)
- *Gäfgen v. Germany* (Judgment of 30 June 2008)
- *Hirst* (Judgment of 6 October 2005 (Grand Chamber))
- *Harutyunyan* (Judgment of 28 June 2007)
- *Ireland v. the UK* (Judgment of 18 January 1978)
- *Jalloh* (Judgment of 11 July 2007 (Grand Chamber))
- *Kelly* (Judgment of 4 May 2001)
- *Kiliç* (Judgment of 28 March 2000)
- *Klamecki* (2) (Judgment of 3 April 2003)
- *Kostovski* (Judgment of 20 November 1989)
- *Lawless* (Judgment of 1 July 1961)
- *Letellier* (Judgment of 26 June 1991)
- *Matznetter* (Judgment of 10 November 1969)
- *Mechelen, Van* (Judgment of 23 April 1997)
- *McCann* (Judgment of 27 September 1995)
- *McKay* (Judgment of 3 October 2006 (Grand Chamber))
- *Murray* (Judgment of 8 February 1996)
- *Neumeister* (Judgment of (27 June 1968)
- *Ocalan*: 12 May 2005 (Judgment of Grand Chamber)
- *Osman* (Judgment of 20 October 1998)
- *Öztürk* (Judgment of 21 February 1984)
- *Peers* (Judgment of 19 April 2001)
- *Piersack* (Judgment of 1 October 1982)
- *Ramsahai* (Judgment of 15 May 2007 (Grand Chamber)
- *Saadi v. Italy* (Judgment of 28 February 2008 (Grand Chamber)
- *Saunders* (Judgment of 20 October 1997)
- *Schiesser* (Judgment of 4 December 1979)

- *Schönenberger and Durmaz* (Judgment of 20 June 1988)
- *Smirnova* (Judgment of 24 July 2003)
- *Soering* (Judgment of 7 July 1989)
- *Tomasi* (Judgment of 27 August 1992)
- *Weber and Saravia*, (admissibility decision 29 June 2006)
- *Zimmerman and Steiner* (Judgment of 13 July 1983)

ABBREVIATIONS

| | |
|-------|--|
| CPT | Committee for the Prevention of Torture |
| ECHR | European Convention on Human Rights |
| IAP | International Association of Prosecutors |
| ICCPR | International Convention on Civil and Political Rights |
| NGO | Non Governmental Organisation |
| OAS | Organisation of American States |
| UN | United Nations |

‘HUMAN RIGHTS ON DUTY’: AN INTRODUCTION

The criminal justice system plays a key role in safeguarding the rule of law and within it an important task has been given to public prosecutors. In the Council of Europe Recommendation *On the rôle of public prosecution in the criminal justice system* this task has been described as follows: “Public prosecutors are public authorities who, on behalf of society and in the public interest, ensure the application of the law where the breach of the law carries a criminal sanction, taking into account both the rights of the individual and the necessary effectiveness of the criminal justice system”.¹ This means that public prosecutors apply the law and see that it is applied. By doing so, the public prosecutor operates not on his or her own behalf nor on behalf of any political authority, but on behalf of society, and must therefore observe two essential requirements: on the one hand, the rights of the individual and, on the other, the necessary effectiveness of the criminal justice system, for which the public prosecutor is partly accountable.

Although public prosecutors play a key rôle in all criminal justice systems, their specific tasks, laid down in the national criminal justice legislation of each different country, differ. There are great differences in the institutional position of the public prosecutor from one country to another; first, in terms of its relationship with the executive power of the state (which can range from subordination to independence); and, second, with regard to the relationship between prosecutors and judges. In some systems prosecutors and judges belong to a single professional corps while in others they are entirely separate.²

There are differences on other levels as well. In some countries the police service is independent of the public prosecution, and enjoys considerable discretion not only in the conduct of investigations but also often in deciding whether to prosecute. In others, policing is supervised, or indeed directed, by the public prosecutor. For example, sometimes the prosecutor acts in

¹ Recommendation Rec(2000)19 of the Committee of Ministers to member states ‘*On the rôle of public prosecution in the criminal justice system*’, adopted on 6 October 2000.

² Council of Europe Explanatory Memorandum to Rec(2000)19 of the Committee of Ministers to member states ‘*On the rôle of public prosecution in the criminal justice system*’, adopted on 6 October 2000, p.3.

investigations only when his attention has been drawn to violations of criminal law by the investigating police authorities, while at other times it is possible for the prosecutor to make the first move and play an active rôle in identifying breaches of the law.³

The public prosecutor's rôle also varies in relation to the execution of court decisions. In some jurisdictions, the public prosecutor orders that the court decision be executed; in other cases, he or she supervises the execution. In yet others, he or she has no rôle at all.

Despite all the existing differences around the world in a prosecutor's tasks, a prosecutor has to respect and guarantee the rights of the individual. The public prosecutor plays a key rôle not only in the enforcement of laws but more importantly in giving full effect to rights, including, of course, human rights. Whatever his specific task may be in the national criminal justice system, it is certainly one of 'Human Rights on Duty'.⁴ In this manual emphasis is given to international human rights law and judgments or comments from international bodies because they are the common sources for the current human rights standards. However, as prosecutors, we should always keep in mind that human rights are best protected and upheld domestically. Public prosecutors should play a vital rôle as guardians of human rights at the practical level in their states.

The public prosecutor, being a public authority, has to set an example to society in the protection of human rights. This is important not only for the profession itself but also for the reliability and credibility of the government as a whole.

Therefore, the behaviour of the public prosecutor has to be in conformity with international human rights law. This consists of imperative international law, such as international human rights treaties (for instance the U.N. *International Covenant on Civil and Political Rights* and regional treaties like the *European Convention on Human Rights*), but also those international standards, which have not been laid down in treaties as such, but do aim directly to the profession of prosecution, such as the U.N. *Guidelines on the Role of Prosecutors* and the text of the recommendation by the Council of

³ Council of Europe Explanatory Memorandum to Rec(2000)19 of the Committee of Ministers to member states 'On the role of public prosecution in the criminal justice system', adopted on 6 October 2000, p.17.

⁴ There exists a poster by the Council of Europe with hereunder the text: 'Human Rights on Duty'.

Europe’s *On the rôle of public prosecution in the criminal justice system*. Those two instruments are so-called ‘soft international law’, meaning that there exists international agreement that these standards should actually be applied but a country is not legally obliged to conform these standards, because for that to happen an international treaty needs to exist.

More importantly, there are, in addition to these political standards aimed at the profession of public prosecution, the standards adopted by the International Association of Prosecutors. The adoption of the *Standards of Professional Responsibility and Statement of the Essential Duties and Rights of Prosecutors (IAP Standards)* in 1999 was unique since the IAP is neither a governmental, nor a political organisation, but is the first and only world association of prosecutors. The *IAP Standards* do not reflect an international agreement by governments about how the profession of prosecution should act but are a statement by the profession itself proclaiming a set of (minimum) norms and values for which it stands. The more or less vague norms in international human rights treaties that prosecution should be ‘fair’ have now been described in detail in the *IAP Standards*. The message is clear: irrespective of how the criminal justice system is organised and what specific tasks have been given to the public prosecution at the national level, these are the (minimum) standards and values for which we, as prosecutors from all over the world, stand.

Although the International Association of Prosecutors does not yet represent all prosecutors of the world, as prominent members of public prosecution from all over the world and representing different systems of the administration of justice have been involved, the *IAP Standards* can be seen as representing the profession.⁵ The *IAP Standards* will, of course, be cited frequently in this *Manual* in addition to the other above-mentioned instruments aimed at the public prosecution. Other international human rights texts in the broadest perspective and without further regard to any specific system of criminal justice, whether more general or specifically aimed at public prosecution, will also be cited.

Both United Nations and regional instruments are mentioned and, as will be seen, many similarities can be found between texts from different parts of the world. This *Manual* aims at promoting respect for and compliance with the cited texts by showing, on the one hand, the already existing similarities in

⁵ Mr. B.E.P. Myjer in his introduction to the IAP standards, 5-10 September 1999, Trema 1999, nr. 7.

human rights protection in the world and, on the other, making all the world's prosecutors aware of developments in human rights protection.

INTERNATIONAL HUMAN RIGHTS LAW

AN OVERVIEW

United Nations

When the Second World War ended, the victorious nations determined to introduce into international law new concepts designed to outlaw such horrific and systematic abuses of human rights for the future, in order to make their recurrence at least less probable. To achieve this object new intergovernmental organisations such as the United Nations were established and within these organisations the development of a new branch of international law.³ The signing of the *United Nations Charter* in 1945 was a clear attempt to provide more comprehensive protection for all individuals.

The *United Nations Charter* begins with these words: 'We the Peoples of the United Nations determined ... to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women ...'. This acknowledgement of the importance of human rights by all States that ratify the United Nations Charter has done much to stimulate the large amount of international law protecting human rights now in place.⁴ The protection of human rights in international law has generally developed subsequently to the *United Nations Charter*, since it requires States to promote and encourage respect for human rights and fundamental freedoms, although this is more as a moral than a legal obligation.

The first major statement after the *United Nations Charter* on the international legal protection of human rights was the *Universal Declaration of Human Rights* adopted by the General Assembly on 10 November 1948. The *Universal Declaration of Human Rights* has in fact become the genesis for later international human rights instruments. The provisions in the *Universal Declaration* enunciating civil and political rights, although regarded as a

³ The International Law of Human Rights, P. Sieghart, Clarendon Press/ Oxford (1983), 14.

⁴ Cases & Materials on International Law, M. Dixon & R. McCorquodale, Blackstone Press Limited (2000), 183.

statement of a relatively distant ideal which involved few legal obligations, have been closely followed by other international instruments which do contain binding and detailed rules of law.

The first treaty open to all U.N. nations to translate the civil and political rights principles of the *Universal Declaration* into legally binding rights was the *International Covenant on Civil and Political Rights (ICCPR)* adopted by the United Nations in 1966. The *ICCPR* provides for a monitoring system and established a Human Rights Committee which comments on articles and State reports under the *ICCPR*. The *ICCPR* is accompanied by the *International Covenant on Economic, Social and Cultural Rights (ICESCR)*, also adopted in 1966, which imposes reporting requirements for States in this area, but does not provide an individual complaint mechanism.

Beside the *ICCPR* and the *ICESCR*, there is a vast array of international human rights treaties and other instruments adopted by the United Nations. These instruments protect specific rights or a series of rights relating to a specific matter such as the U.N. *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment* and the *Convention on the Rights of the Child*.

The United Nations system for the promotion and protection of human rights consists of two main types of body: bodies created under the UN Charter, including the former Commission on Human Rights which has been replaced since 2006 by the newly created Human Rights Council; and bodies created under the international human rights treaties. There are seven human rights treaty bodies which monitor implementation of the core international law treaties. For the purposes of this manual the most important are: the Human Rights Committee (HRC), the Committee on the Elimination of Racial Discrimination (CERD) and the Committee against Torture (CAT).

Regional

Conflicting ideologies and interests sometimes make it difficult to reach agreement at the United Nations about human rights. Agreement is easier to reach at the regional level, where states have more common values and interests. Regional treaties are sometimes seen to reflect the cultures and societies of those within a State better than an international human rights treaty. For this reason several regional human rights treaties and standards have been established – the *European Convention on Human Rights*, the *African Charter for Human and Peoples' Rights*, the *Arab Charter on Human Rights* and the *American Convention on Human Rights* are the regional treaties mentioned

in this manual – and these have been ratified by many if not most States in each region (except for the *Arab Charter*). As can be seen (especially in this manual) the regional treaties all cover much the same ground as the *Universal Declaration of Human Rights*.⁵

The supervisory mechanisms for each of the regional human rights treaties are different. The European Convention, with the changes effected by Protocol II, now provides for a full-time court with a right to individual complaint directly to that court. The judgments of the Court are binding to the State concerned (Article 46 European Convention on Human Rights).

The American Convention has a two-tier system with an Interamerican Commission on Human Rights and the Inter-American Court on Human Rights. The African Charter has a Commission investigating and reporting on human rights violations. The protocol establishing the African Court on Human Rights and People's Rights entered into force on 1 January 2004.

The European Convention on Human Rights is at this time the most sophisticated and practically advanced international system for the protection of human rights and, therefore, this manual cites the leading cases of the European Court of Human Rights with respect to good practice.

‘Soft’ international law

Many international human rights instruments, apart from legally binding treaties and conventions, consist of so-called ‘soft’ international law. Declarations, recommendations and guidelines are not legally binding upon states. Rather, they encompass those principles, policies and expressions of intent that may well govern the conduct of states in certain situations, albeit that no legal obligation exists. Nevertheless, ‘soft’ law principles do reflect the intention of states in a given matter. For instance U.N. recommendations and declarations can be regarded as obligations of co-operation and good faith. These concepts are ‘soft’ because they lack the imperative quality of law, although they may acquire that status in due course through their transformation by the formal sources of law.⁶

⁵ Akehurst's Modern Introduction to International Law, P. Malanczuk, Routledge (1997), 217-219.

⁶ Cases & Materials on International Law, M. Dixon & R. McCorquodale, Blackstone Press Limited (2000), 54-56.

Non-governmental organisations

It is impossible to determine the exact correlation between the efforts of non-governmental organisations and the protection of human rights, but it is very clear that they do influence states in promoting and protecting human rights whether through fact-finding, publicity or information provided to human rights bodies. Additionally, as will be shown in this manual, NGOs which are participants in the legal profession have set up their own human rights standards. For instance, the International Association of Prosecutors has adopted a set of human rights standards for prosecutors to take into account. These *IAP Standards* will be mentioned frequently in this manual.

INTERNATIONAL STANDARDS FOR THE INDEPENDENCE OF THE JUDICIARY AND THE LEGAL PROFESSION

RELEVANT TEXTS

Article 14 of the *ICCPR* provides that “everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law.”

SOFT INTERNATIONAL LAW

U.N. Level

This Article 14 of the *ICCPR* provision is elaborated in an important, although not binding document: the 1985 U.N. *Basic Principles on the Independence of the Judiciary* state very clearly in principle 1 regarding respect for the independence of the judiciary:

1. ‘The independence of the judiciary shall be guaranteed by the State and enshrined in the Constitution or the law of the country. It is the duty of all governmental and other institutions to respect and observe the independence of the judiciary’.

The following principles of the document elaborate on this provision:

2. ‘The judiciary shall decide matters before them impartially, on the basis of facts and in accordance with the law, without any restrictions, improper influences, inducements, pressures, threats or interferences, direct or indirect, from any quarter or for any reason.
3. The judiciary shall have jurisdiction over all issues of a judicial nature and shall have exclusive authority to decide whether an issue submitted for its decision is within its competence as defined by law.

4. There shall not be any inappropriate or unwarranted interference with the judicial process, nor shall judicial decisions by the courts be subject to revision. This principle is without prejudice to judicial review or to mitigation or commutation by competent authorities of sentences imposed by the judiciary, in accordance with the law.
5. Everyone shall have the right to be tried by ordinary courts or tribunals using established legal procedures. 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.
6. The principle of the independence of the judiciary entitles and requires the judiciary to ensure that judicial proceedings are conducted fairly and that the rights of the parties are respected’.

The 1990 U.N. *Guidelines on the Role of Prosecutors* contain safeguards to guarantee the independence of prosecutors in their profession. Some provisions are aimed at the state to secure independence for the prosecutor. What is important is a prosecutor’s freedom from improper interference or influence upon his work. The relevant provisions read:

3. ‘Prosecutors, as essential agents of the administration of justice, shall at all times maintain the honour and dignity of their profession.
4. States shall ensure that prosecutors are able to perform their professional functions without intimidation, hindrance, harassment, improper interference or unjustified exposure to civil, penal or other liability.
5. Prosecutors and their families shall be physically protected by the authorities when their personal safety is threatened as a result of the discharge of prosecutorial functions’.

The *Guidelines* leave no room for doubt about the profession of public prosecutor in relation to judicial functions since principle 10 states:

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

For lawyers, the 1990 *Basic Principles on the Role of Lawyers* guarantee the independent exercise of their profession by requiring States to take the following positive steps:

16. 'Governments shall ensure that lawyers (a) are able to perform all of their professional functions without intimidation, hindrance, harassment or improper interference; (b) are able to travel and to consult with their clients freely both within their own country and abroad; and (c) shall not suffer, or be threatened with, prosecution or administrative, economic or other sanctions for any action taken in accordance with recognized professional duties, standards and ethics.
17. Where the security of lawyers is threatened as a result of discharging their functions, they shall be adequately safeguarded by the authorities.
18. Lawyers shall not be identified with their clients or their clients' causes as a result of discharging their functions.
19. No court or administrative authority before whom the right to counsel is recognized shall refuse to recognize the right of a lawyer to appear before it for his or her client unless that lawyer has been disqualified in accordance with national law and practice and in conformity with these principles.
20. Lawyers shall enjoy civil and penal immunity for relevant statements made in good faith in written or oral pleadings or in their professional appearances before a court, tribunal or other legal or administrative authority.
21. It is the duty of the competent authorities to ensure lawyers access to appropriate information, files and documents in their possession or control in sufficient time to enable lawyers to provide effective legal assistance to their clients. Such access should be provided at the earliest appropriate time.
22. Governments shall recognize and respect that all communications and consultations between lawyers and their clients within their professional relationship are confidential'.

Europe

The 2000 Council of Europe Recommendation *On the Role of Public Prosecution in the Criminal Justice System* is a very important regional document on this matter. This document provides for several safeguards for

prosecutors on the independent exercise of their profession. The relevant provisions read:

11. 'States should take appropriate measures to ensure that public prosecutors are able to perform their professional duties and responsibilities without unjustified interference or unjustified exposure to civil, penal or other liability. However, the public prosecution should account periodically and publicly for its activities as a whole and, in particular, the way in which its priorities were carried out.
12. Public prosecutors should not interfere with the competence of the legislative and the executive powers.
13. Where the public prosecution is part of or subordinate to the government, states should take effective measures to guarantee that:
 - a) the nature and the scope of the powers of the government with respect to the public prosecution are established by law;
 - b) government exercises its powers in a transparent way and in accordance with international treaties, national legislation and general principles of law;
 - c) where government gives instructions of a general nature, such instructions must be in writing and published in an adequate way;
 - d) where the government has the power to give instructions to prosecute a specific case, such instructions must carry with them adequate guarantees that transparency and equity are respected in accordance with national law, the government being under a duty, for example:
 - to seek prior written advice from either the competent public prosecutor or the body that is carrying out the public prosecution;
 - duly to explain its written instructions, especially when they deviate from the public prosecutor's advices and to transmit them through the hierarchical channels;
 - to see to it that, before the trial, the advice and the instructions become part of the file so that the other parties may take cognisance of it and make comments;
 - e. public prosecutors remain free to submit to the court any legal arguments of their choice, even where they are under a duty to reflect in writing the instructions received;
 - f. instructions not to prosecute in a specific case should, in principle, be prohibited. Should that not be the case, such instructions must remain exceptional and be subjected not only to the requirements indicated in

paragraphs d. and e. above but also to an appropriate specific control with a view in particular to guaranteeing transparency.

14. In countries where the public prosecution is independent of the government, the state should take effective measures to guarantee that the nature and the scope of the independence of the public prosecution is established by law.
15. In order to promote the fairness and effectiveness of crime policy, public prosecutors should co-operate with government agencies and institutions in so far as this is in accordance with the law.
16. Public prosecutors should, in any case, be in a position to prosecute without obstruction public officials for offences committed by them, particularly corruption, unlawful use of power, grave violations of human rights and other crimes recognised by international law’.

The document also contains important provisions about the relationship between the profession of public prosecutor and that of court judge:

17. ‘States should take appropriate measures to ensure that the legal status, the competencies and the procedural role of public prosecutors are established by law in a way that there can be no legitimate doubt about the independence and impartiality of the court judges. In particular states should guarantee that a person cannot at the same time perform duties as a public prosecutor and as a court judge.
18. However, if the legal system so permits, states should take measures in order to make it possible for the same person to perform successively the functions of public prosecutor and those of judge or vice versa. Such changes in functions are only possible at the explicit request of the person concerned and respecting the safeguards.
19. Public prosecutors must strictly respect the independence and the impartiality of judges; in particular they shall neither cast doubts on judicial decisions nor hinder their execution, save where exercising their rights of appeal or invoking some other declaratory procedure.
20. Public prosecutors must be objective and fair during court proceedings. In particular, they should ensure that the court is provided with all relevant facts and legal arguments necessary for the fair administration of justice’.

IAP

The 1999 *IAP Standards* contain paragraphs both on independence and on impartiality. Since the profession itself adopted the provisions set forth in this document, they are important to take into account.

The paragraph on independence reads:

- 2.1 'The use of prosecutorial discretion, when permitted in a particular jurisdiction, should be exercised independently and be free from political interference.
- 2.2 If non-prosecutorial authorities have the right to give general or specific instructions to prosecutors, such instructions should be:
 - transparent;
 - consistent with lawful authority;
 - subject to established guidelines to safeguard the actuality and the perception of prosecutorial independence.
- 2.3 Any right of non-prosecutorial authorities to direct the institution of proceedings or to stop legally instituted proceedings should be exercised in similar fashion'.

The paragraph on impartiality reads:

- 'Prosecutors shall perform their duties without fear, favour or prejudice. In particular they shall:
- a. carry out their functions impartially;
 - b. remain unaffected by individual or sectional interests and public or media pressures and shall have regard only to the public interest;
 - c. act with objectivity;
 - d. have regard to all relevant circumstances, irrespective of whether they are to the advantage or disadvantage of the suspect;
 - e. in accordance with local law or the requirements of a fair trial, seek to ensure that all necessary and reasonable enquiries are made and the result disclosed, whether that points towards the guilt or the innocence of the suspect;
 - f. always search for the truth and assist the court to arrive at the truth and to do justice between the community, the victim and the accused according to law and the dictates of fairness.'

INTERPRETATIONS AND CONCLUSION

As these texts clearly show, the independence of the judiciary and the legal profession as a whole is an important issue. Court judges, public prosecutors and defence lawyers must be able to perform their professional duties free from improper interference or influence from the outside. To achieve this object standards have been developed and adopted which provide for safeguards against these interferences. Here lies an important task for governments, since they will have to provide the safeguards so that legal practitioners will be able to work independently and impartially.

However, as the cited texts also show, the legal practitioners themselves are obliged to perform their profession independently and impartially. The prosecutor must also be separated from judicial functions.

HUMAN RIGHTS AND THE RIGHT TO LIFE

The IAP acknowledges that there are differing views worldwide about the punishment of execution. In some criminal jurisdictions the death penalty has never been prescribed; in some it has been or is being abolished; in some it is practised and is regarded not as a violation of human rights norms but as an appropriate means of achieving the ends of deterrence, retribution and punishment. These are matters of great controversy internationally and prosecutors must act in accordance with domestic requirements. The IAP does not endorse a particular policy or approach to the matter, in deference to the views of its members. This chapter addresses the subject in the context of international and regional human rights instruments and guidelines where those apply.

INTRODUCTION

In the recognition of the inherent dignity of human life, the right to life is the most supreme of all fundamental human rights. In almost all international human rights texts the right to life is the starting point. The right to life has, of course, a strained relationship with the issue of capital punishment. Therefore, the relevant international provisions on the right to life sometimes contain paragraphs regarding capital punishment, either on conditions for capital punishment or recommendations on its abolition, while several treaties have additional protocols prohibiting execution.

RELEVANT TEXTS AT THE UN-LEVEL

The *Universal Declaration on Human Rights* contains the right to life in article 3:

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

In the *International Covenant on Civil and Political Rights* this principle has been translated into a right. Article 6 para.1 states:

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

Regarding capital punishment para.2 states:

‘In countries which have not abolished the death penalty, sentence of death may be imposed only for the most serious crimes in accordance with the law in force at the time of the commission of the crime and not contrary to the provisions of the present Covenant and to the Convention on the Prevention and Punishment of the Crime of Genocide. This penalty can only be carried out pursuant to a final judgment rendered by a competent court’.

This is elaborated in para. 3:

‘When deprivation of life constitutes the crime of genocide, it is understood that nothing in this article shall authorize any State Party to the present Covenant to derogate in any way from any obligation assumed under the provisions of the Convention on the Prevention and Punishment of the Crime of Genocide’.

Paragraph 4 then follows with some additional rights for anyone who is sentenced to death:

‘Anyone sentenced to death shall have the right to seek pardon or commutation of the sentence. Amnesty, pardon or commutation of the sentence of death may be granted in all cases’.

Paragraph 5 makes it very clear that capital punishment shall not be imposed for crimes committed by minors or on pregnant women:

‘Sentence of death shall not be imposed for crimes committed by persons below eighteen years of age and shall not be carried out on pregnant women’.

Finally, para.6 strongly suggests the abolition of capital punishment by stating:

‘Nothing in this article shall be invoked to delay or to prevent the abolition of capital punishment by any State Party to the present Covenant’.

In 1989 the *Second Optional Protocol to the International Covenant on Civil and Political Rights*, aiming at the abolition of the death penalty, entered into force. The preamble reads:

‘The States Parties to the present Protocol,
Believing that abolition of the death penalty contributes to enhancement of human dignity and progressive development of human rights, (..)
Noting that article 6 of the International Covenant on Civil and Political Rights refers to abolition of the death penalty in terms that strongly suggest that abolition is desirable,
Convinced that all measures of abolition of the death penalty should be considered as progress in the enjoyment of the right to life,
Desirous to undertake hereby an international commitment to abolish the death penalty,(..)’

Article 1 of the *Protocol* then simply states:

1. ‘No one within the jurisdiction of a State Party to the present Protocol shall be executed.
2. Each State Party shall take all necessary measures to abolish the death penalty within its jurisdiction’.

According to Article 2, a reservation to the *Protocol* is only allowed for war crimes:

1. ‘No reservation is admissible to the present Protocol, except for a reservation made at the time of ratification or accession that provides for the application of the death penalty in time of war pursuant to a conviction for a most serious crime of a military nature committed during wartime’.

The 1990 *Convention on the Rights of the Child* prohibits the imposition of capital punishment for offences committed by children. It states very clearly in article 37 (a):

‘No child shall be subjected to torture or other cruel, inhuman or degrading treatment or punishment. Neither capital punishment nor life imprisonment without possibility of release shall be imposed for offences committed by persons below eighteen years of age’.

RELEVANT TEXTS AT THE REGIONAL LEVEL

Europe

The *European Convention for the Protection of Human Rights and Fundamental Freedoms* contains the right to life in article 2. This article leaves some space for imposing the death penalty when it states:

1. 'Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.
2. Deprivation of life shall not be regarded as inflicted in contravention of this article when it results from the use of force which is no more than absolutely necessary:
 - a). in defence of any person from unlawful violence;
 - b). in order to effect a lawful arrest or to prevent the escape of a person lawfully detained;
 - c). in action lawfully taken for the purpose of quelling a riot or insurrection'.

By the late sixties a consensus began to emerge in Europe that the death penalty should be abolished as soon as possible. The result was the *6th Protocol to the Convention* concerning the abolition of the death penalty that entered into force in 1985. The relevant provisions of this *Protocol* read:

'Article 1 - The death penalty shall be abolished. No one shall be condemned to such penalty or executed.

Article 2 - A State may make provision in its law for the death penalty in respect of acts committed in time of war or of imminent threat of war; such penalty shall be applied only in the instances laid down in the law and in accordance with its provisions. The State shall communicate to the Secretary General of the Council of Europe the relevant provisions of that law.

Article 3 - No derogation from the provisions of this Protocol shall be made under Article 15 of the Convention (3)'.

Since 1994 one of the conditions for new states joining the Council of Europe has been the immediate institution of a moratorium on executions with a commitment to sign and ratify *Protocol No.6* within one to three years.

In 2002 *Protocol No.13 to the Convention* was adopted concerning the abolition of the death penalty in *all* circumstances. This entered into force on 1 July 2003.

In the *European Union Charter of Fundamental Rights* it is reiterated that no one may be condemned to the death penalty. Article 2 reads:

1. 'Everyone has the right to life.
2. No one shall be condemned to the death penalty, or executed'.

Africa

The *African Charter on Human and Peoples' Rights* contains only general provisions on the right to life. It does not specifically mention the death penalty. Article 4 reads:

'Human beings are inviolable. Every human being shall be entitled to respect for his life and the integrity of his person. No one may be arbitrarily deprived of this right'.

However, in the 1990 *African Charter on the Rights and Welfare of the Child* the death penalty for crimes committed by children is explicitly prohibited in article 5:

1. 'Every child has an inherent right to life. This right shall be protected by law.
2. States Parties to the present Charter shall ensure, to the maximum extent possible, the survival, protection and development of the child.
3. The death sentence shall not be pronounced for crimes committed by children'.

Arab world

The *Cairo Declaration on Human Rights in Islam* contains the right to life in article 2 (a), stating that:

‘Life is a God-given gift and the right to life is guaranteed to every human being. It is the duty of individuals, societies and states to safeguard this right against any violation, and it is prohibited to take away life except for a shari’ah prescribed reason’.

In the *Arab Charter on Human Rights* on the other hand more provisions can be found on the right to life as well as on the death penalty. Article 5 states on the right to life:

‘Every individual has the right to life, liberty and security of person. These rights shall be protected by law’.

Article 10 then proceeds on the death penalty:

‘The death penalty may be imposed only for the most serious crimes and anyone sentenced to death shall have the right to seek pardon or commutation of the sentence’.

Article 11 prohibits the death penalty for political offences:

‘The death penalty shall under no circumstances be imposed for a political offence’.

Finally, article 12 prohibits the imposition of capital punishment on children and pregnant women:

‘The death penalty shall not be inflicted on a person under 18 years of age, on a pregnant woman prior to her delivery or on a nursing mother within two years from the date on which she gave birth’.

The Americas

Article 4 of the *American Convention on Human Rights* contains the right to life. Paragraph 1 of this article reads:

‘Every person has the right to have his life respected. This right shall be protected by law and, in general, from the moment of conception. No one shall be arbitrarily deprived of his life’.

Article 4 contains further restrictions on the application of the death penalty:

2. ‘In countries that have not abolished the death penalty, it may be imposed only for the most serious crimes and pursuant to a final judgment rendered by a competent court and in accordance with a law establishing such punishment, enacted prior to the commission of the crime. The application of such punishment shall not be extended to crimes to which it does not presently apply.
3. The death penalty shall not be re-established in states that have abolished it.
4. In no case shall capital punishment be inflicted for political offences or related common crimes.
5. Capital punishment shall not be imposed upon persons who, at the time the crime was committed, were under 18 years of age or over 70 years of age; nor shall it be applied to pregnant women.
6. Every person condemned to death shall have the right to apply for amnesty, pardon, or commutation of sentence, which may be granted in all cases. Capital punishment shall not be imposed while such a petition is pending decision by the competent authority’.

In 1990 a *Protocol to the American Convention on Human Rights to ‘Abolish the Death Penalty’* was adopted and opened for signature. The *Protocol* describes in its preamble why the death penalty should indeed be abolished:

‘Considering:

That Article 4 of the American Convention on Human Rights recognizes the right to life and restricts the application of the death penalty;

That everyone has the inalienable right to respect for his life, a right that cannot be suspended for any reason;

That the tendency among the American States is to be in favor of abolition of the death penalty;

That application of the death penalty has irrevocable consequences, forecloses the correction of judicial error, and precludes any possibility of changing or rehabilitating those convicted;

That the abolition of the death penalty helps to ensure more effective protection of the right to life (..)'.

Article 1 of the Protocol then firmly states:

'The States Parties to this Protocol shall not apply the death penalty in their territory to any person subject to their jurisdiction'.

However, Article 2 leaves some space for reservations to the Protocol for extremely serious crimes of a military nature:

'No reservations may be made to this Protocol. However, at the time of ratification or accession, the States Parties to this instrument may declare that they reserve the right to apply the death penalty in wartime in accordance with international law, for extremely serious crimes of a military nature'.

SOFT INTERNATIONAL LAW

U.N. Level

In the 1982 *General Comment 6 of the U.N. Human Rights Committee*, these provisions are commented upon as follows:

1. 'The right to life enunciated in article 6 of the Covenant has been dealt with in all State reports. It is the supreme right from which no derogation is permitted even in time of public emergency which threatens the life of the nation (art. 4). However, the Committee has noted that quite often the information given concerning article 6 was limited to only one or other aspect of this right. It is a right which should not be interpreted narrowly.

2. The protection against arbitrary deprivation of life which is explicitly required by the third sentence of article 6 (1) is of paramount importance. The Committee considers that States parties should take measures not only to prevent and punish deprivation of life by criminal acts, but also to prevent arbitrary killing by their own security forces. The deprivation of life by the authorities of the State is a matter of the utmost gravity. Therefore, the law must strictly control and limit the circumstances in which a person may be deprived of his life by such authorities.

4. States parties should also take specific and effective measures to prevent the disappearance of individuals, something which unfortunately has become all too frequent and leads too often to arbitrary deprivation of life. Furthermore, States should establish effective facilities and procedures to investigate thoroughly cases of missing and disappeared persons in circumstances which may involve a violation of the right to life'.

The Human Rights Committee commented on those provisions relating to capital punishment in paras.6 and 7 and strongly suggests the abolition of the death penalty:

6. While it follows from article 6 (2) to (6) that States parties are not obliged to abolish the death penalty totally they are obliged to limit its use and, in particular, to abolish it for other than the "most serious crimes". Accordingly, they ought to consider reviewing their criminal laws in this light and, in any event, are obliged to restrict the application of the death penalty to the "most serious crimes". The article also refers generally to abolition in terms which strongly suggest (paras. 2 (2) and (6)) that abolition is desirable. The Committee concludes that all measures of abolition should be considered as progress in the enjoyment of the right to life within the meaning of article 40, and should as such be reported to the Committee. The Committee notes that a number of States have already abolished the death penalty or suspended its application. Nevertheless, States' reports show that progress made towards abolishing or limiting the application of the death penalty is quite inadequate.

7. The Committee is of the opinion that the expression "most serious crimes" must be read restrictively to mean that the death penalty should be a quite exceptional measure. It also follows from the express terms

of article 6 that it can only be imposed in accordance with the law in force at the time of the commission of the crime and not contrary to the Covenant. The procedural guarantees therein prescribed must be observed, including the right to a fair hearing by an independent tribunal, the presumption of innocence, the minimum guarantees for the defence, and the right to review by a higher tribunal. These rights are applicable in addition to the particular right to seek pardon or commutation of the sentence’.

In the 1992 *General Comment 20* on article 7 ICCPR (comprising the prohibition of torture and other inhuman or degrading treatment), the Human Rights Committee also commented on capital punishment by adding:

6. ‘Moreover, when the death penalty is applied by a State party for the most serious crimes, it must not only be strictly limited in accordance with article 6 but it must be carried out in such a way as to cause the least possible physical and mental suffering’.

The 1984 U.N. ‘*Safeguards Guaranteeing Protection of the Rights of Those Facing the Death Penalty*’ provide for both restrictions to the application of the death penalty and for additional rights for those facing the death penalty. This important document reads as follows:

1. ‘In countries which have not abolished the death penalty, capital punishment may be imposed only for the most serious crimes, it being understood that their scope should not go beyond intentional crimes with lethal or other extremely grave consequences.
2. Capital punishment may be imposed only for a crime for which the death penalty is prescribed by law at the time of its commission, it being understood that if, subsequent to the commission of the crime, provision is made by law for the imposition of a lighter penalty, the offender shall benefit thereby.
3. Persons below 18 years of age at the time of the commission of the crime shall not be sentenced to death, nor shall the death sentence be carried out on pregnant women, or on new mothers, or on persons who have become insane.

4. Capital punishment may be imposed only when the guilt of the person charged is based upon clear and convincing evidence leaving no room for an alternative explanation of the facts.
5. Capital punishment may only be carried out pursuant to a final judgment rendered by a competent court after legal process which gives all possible safeguards to ensure a fair trial, at least equal to those contained in article 14 of the International Covenant on Civil and Political Rights, including the right of anyone suspected of or charged with a crime for which capital punishment may be imposed to adequate legal assistance at all stages of the proceedings.
6. Anyone sentenced to death shall have the right to appeal to a court of higher jurisdiction, and steps should be taken to ensure that such appeals shall become mandatory.
7. Anyone sentenced to death shall have the right to seek pardon, or commutation of sentence; pardon or commutation of sentence may be granted in all cases of capital punishment.
8. Capital punishment shall not be carried out pending any appeal or other recourse procedure or other proceeding relating to pardon or commutation of the sentence.
9. Where capital punishment occurs, it shall be carried out so as to inflict the minimum possible suffering’.

The 1992 UN *Declaration on the Protection of All Persons from Enforced Disappearance* contains a provision in which it states that any act of enforced disappearance constitutes a threat to the right to life. Article 1 para.2 reads:

‘Any act of enforced disappearance places the persons subjected thereto outside the protection of the law and inflicts severe suffering on them and their families. It constitutes a violation of the rules of international law guaranteeing, inter alia, the right to recognition as a person before the law, the right to liberty and security of the person and the right not to be subjected to torture and other cruel, inhuman or degrading treatment or punishment. It also violates or constitutes a grave threat to the right to life’.

Article 2 then simply prohibits a state from allowing enforced disappearances:

1. 'No State shall practise, permit or tolerate enforced disappearances.
2. States shall act at the national and regional levels and in cooperation with the United Nations to contribute by all means to the prevention and eradication of enforced disappearance'.

EUROPEAN PRACTICE

The European Court of Human Rights has dealt with the provisions of article 2 of the *European Convention* on several occasions. The provisions of article 2 have been addressed particularly in cases concerning the fight against criminal and terrorist activities. The Court has ruled that the use of force by agents of a state must be absolutely necessary but also that operations against criminal suspects as a whole have to respect the requirements of article 2 of the *European Convention*. In the *McCann* case (Judgment of 27 September 1995) the Court considered in para.200:

'It considers that the use of force by agents of the State in pursuit of one of the aims delineated in paragraph 2 of Article 2 (art. 2-2) of the Convention may be justified under this provision (art. 2-2) where it is based on an honest belief which is perceived, for good reasons, to be valid at the time but which subsequently turns out to be mistaken. To hold otherwise would be to impose an unrealistic burden on the State and its law-enforcement personnel in the execution of their duty, perhaps to the detriment of their lives and those of others'.

The Court then proceeded in para.201:

'The question arises, however, whether the anti-terrorist operation as a whole was controlled and organised in a manner which respected the requirements of Article 2 (art. 2) and whether the information and instructions given to the soldiers which, in effect, rendered inevitable the use of lethal force, took adequately into consideration the right to life of the three suspects'.

In addition, the jurisprudence of the European Court of Human Rights on the right to life has developed the doctrine of 'positive obligations'. According to the Court, the state's obligation under Article 2 to protect the right to life

should be read in conjunction with its general duty under article 1 of the *Convention* to give effect to the rights laid down in the *Convention*. In certain circumstances, it may be expected that a state party to the *European Convention* undertakes positive action to offer protection to a citizen. The putting in place of effective criminal law provisions can be part of this action. In the *Osman* case (Judgment of 20 October 1998) the Court stated with respect to these 'positive obligations'. Paragraphs 115 and 116 of that judgment read:

'The Court notes that the first sentence of Article 2 § 1 enjoins the State not only to refrain from the intentional and unlawful taking of life, but also to take appropriate steps to safeguard the lives of those within its jurisdiction (...). It is common ground that the State's obligation in this respect extends beyond its primary duty to secure the right to life by putting in place effective criminal-law provisions to deter the commission of offences against the person backed up by law-enforcement machinery for the prevention, suppression and sanctioning of breaches of such provisions. It is thus accepted by those appearing before the Court that Article 2 of the Convention may also imply in certain well-defined circumstances a positive obligation on the authorities to take preventive operational measures to protect an individual whose life is at risk from the criminal acts of another individual. The scope of this obligation is a matter of dispute between the parties.

For the Court, and bearing in mind the difficulties involved in policing modern societies, the unpredictability of human conduct and the operational choices which must be made in terms of priorities and resources, such an obligation must be interpreted in a way which does not impose an impossible or disproportionate burden on the authorities. Accordingly, not every claimed risk to life can entail for the authorities a Convention requirement to take operational measures to prevent that risk from materialising. Another relevant consideration is the need to ensure that the police exercise their powers to control and prevent crime in a manner which fully respects the due process and other guarantees which legitimately place restraints on the scope of their action to investigate crime and bring offenders to justice, including the guarantees contained in Articles 5 and 8 of the Convention (Article 5: right to liberty and security; Article 8: right to respect for private and family life).

In the opinion of the Court where there is an allegation that the authorities have violated their positive obligation to protect the right to life in the

context of their above-mentioned duty to prevent and suppress offences against the person (see paragraph 115 above), it must be established to its satisfaction that the authorities knew or ought to have known at the time of the existence of a real and immediate risk to the life of an identified individual or individuals from the criminal acts of a third party and that they failed to take measures within the scope of their powers which, judged reasonably, might have been expected to avoid that risk.(..)'

The Court added in the *Kilic* case (Judgment of 28 March 2000) that a State has a positive obligation to carry out an effective investigation into the circumstances surrounding a person's death. Paragraph 78 of this case reads:

'The Court reiterates that the obligation to protect life under Article 2 of the Convention, read in conjunction with the State's general duty under Article 1 of the Convention "to secure to everyone within [its] jurisdiction the rights and freedoms defined in [the] Convention", requires by implication that there should be some form of effective official investigation when individuals have been killed as a result of the use of force (..).'

Furthermore, the Court elaborated in the *Kelly* case (Judgment of 4 May 2001) that the investigation into the surroundings of one's death must be independent. Paragraph 95 reads:

'For an investigation into alleged unlawful killing by State agents to be effective, it may generally be regarded as necessary for the persons responsible for and carrying out the investigation to be independent from those implicated in the events (..). This means not only a lack of hierarchical or institutional connection but also a practical independence (see for example the case of *Ergi v. Turkey* (Judgment of 28 July 1998, Reports 1998-IV, §§ 83-84) where the public prosecutor investigating the death of a girl during an alleged clash showed a lack of independence through his heavy reliance on the information provided by the gendarmes implicated in the incident).

The investigation must also be effective in the sense that it is capable of leading to a determination of whether the force used in such cases was or was not justified in the circumstances (e.g. the *Kaya v Turkey* judgment cited above) and to the identification and punishment of those responsible. This is not an obligation of result but of means. The authorities must have taken the reasonable steps available to them to

secure the evidence concerning the incident and, *inter alia*, eye witness testimony, forensic evidence and, where appropriate, an autopsy which provides a complete and accurate record of injury and an objective analysis of clinical findings., including the cause of death (see concerning autopsies, e.g. *Salman v Turkey* cited above concerning witnesses e.g. *Tanrikulu v Turkey* [GC], no.23763/94, ECHR 199-IV, 109; concerning forensic evidence e.g. *Gül v Turkey*, 22676/93 [Section 4], 89). Any deficiency in the investigation which undermines its ability to establish the cause of death or the person responsible will risk falling foul of this standard.

A requirement of promptness and reasonable expedition is implicit in this context (see *Yasa v Turkey* – the judgment of 2 September 1998, *Reports* 1998-IV, pp.2439-2440, 102-104; *Cakici v Turkey* cited above ; *Tanrikulu v Turkey* cited above ; *Mahmut Kaya v Turkey* no.22535/93, [Section 1] ECHR 2000-III, 106-107). It must be accepted that there may be obstacles or difficulties which prevent progress in an investigation in a particular situation. However, a prompt response by the authorities in investigating a use of lethal force may generally be regarded as essential in maintaining public confidence in their adherence to the rule of law and in preventing any appearance of collusion in or tolerance of unlawful acts.

For the same reasons, there must be a sufficient element of public scrutiny of the investigation or its results to secure accountability in practice as well as in theory. The degree of public scrutiny required may well vary from case to case. In all cases, however, the next of kin of the victim must be involved in the procedure to the extent necessary to safeguard his or her legitimate interests (see *Güleç v Turkey*, cited above , where the father of the victim was not informed of the decisions not to prosecute; *Öğur v Turkey*, cited above , where the family of the victim had no access to the investigation and court documents; *Gül v Turkey*, cited above’

In the *Ramsahai*-case (Judgment of the Grand Chamber of 15 May 2007) the Court added in para’s 324 and 325:

In order to be “effective” as this expression is to be understood in the context of Article 2 of the Convention, an investigation into a death that engages the responsibility of a Contracting Party under that Article must firstly be adequate. That is, it must be capable of leading to the identification and punishment of those responsible. This is not an obligation of result, but one of means. The authorities must have taken the reasonable steps available to them to secure the evidence concerning the incident. Any deficiency in the investigation which undermines its ability

to identify the perpetrator or perpetrators will risk falling foul of this standard (cf. *Tahsin Acar v. Turkey* [GC], no. 26307/95, § 223, ECHR 2004-III).

Secondly, for the investigation to be “effective” in this sense it may generally be regarded as necessary for the persons responsible for it and carrying it out to be independent from those implicated in the events. This means not only a lack of hierarchical or institutional connection but also a practical independence (cf. *Tahsin Acar*, cited above, § 222). What is at stake here is nothing less than public confidence in the state's monopoly on the use of force.

For a prosecutor this means that, depending on the way in which his responsibilities with respect to the investigation are phrased at a national level, he will sometimes have to undertake independent action as an ‘authority’ in order to have a thorough independent investigation carried out. This must be not only into whether in a particular case state officials have refrained from the intentional and unlawful taking of life, or whether the authorities have complied sufficiently with their positive obligations, but also more generally into the circumstances surrounding the death.

As far as the death penalty is concerned, applicants to the European Court have in the past tried in vain to argue that the application of the death penalty constitutes torture and inhuman or degrading treatment within the meaning of article 3 of the European Convention. This argument has been used especially in cases where a person faced extradition to a country where he would face the death penalty. The Court ruled in para.103 of the *Soering* case (Judgment of 7 July 1989):

‘The Convention is to be read as a whole and Article 3 should therefore be construed in harmony with the provisions of Article 2 (...). On this basis Article 3 evidently cannot have been intended by the drafters of the Convention to include a general prohibition of the death penalty since that would nullify the clear wording of Article 2 § 1.

Subsequent practice in national penal policy, in the form of a generalised abolition of capital punishment, could be taken as establishing the agreement of the Contracting States to abrogate the exception provided for under Article 2 § 1 and hence to remove a textual limit on the scope for evolutive interpretation of Article 3. However, Protocol No. 6, as a subsequent written agreement, shows that the intention of the

Contracting Parties as recently as 1983 was to adopt the normal method of amendment of the text in order to introduce a new obligation to abolish capital punishment in time of peace and, what is more, to do so by an optional instrument allowing each State to choose the moment when to undertake such an engagement. In these conditions, notwithstanding the special character of the Convention, Article 3 cannot be interpreted as generally prohibiting the death penalty’.

However, in the same case the Court left space open for circumstances relating to the death penalty to give rise to an issue under article 3. With a view to the so-called ‘death row phenomenon’ the Court ruled in para.104:

‘That does not mean however that circumstances relating to a death sentence can never give rise to an issue under Article 3. The manner in which it is imposed or executed, the personal circumstances of the condemned person and a disproportionality to the gravity of the crime committed, as well as the conditions of detention awaiting execution, are examples of factors capable of bringing the treatment or punishment received by the condemned person within the proscription under Article 3. Present-day attitudes in the Contracting States to capital punishment are relevant for the assessment whether the acceptable threshold of suffering or degradation has been exceeded’.

In para. 162-165 of the Öcalan-case (Judgment of the Grand Chamber of 12 May 2005) the Court elaborated on the issue of the legal significance of the practice of the Contracting Parties to the European Convention on Human Rights in relation to the death penalty:

“The Court must first address the applicant's submission that the practice of the Contracting States in this area can be taken as establishing an agreement to abrogate the exception provided for in the second sentence of Article 2 § 1, which explicitly permits capital punishment under certain conditions. In practice, if Article 2 is to be read as permitting capital punishment, notwithstanding the almost universal abolition of the death penalty in Europe, Article 3 cannot be interpreted as prohibiting the death penalty since that would nullify the clear wording of Article 2 § 1 (see *Soering*, cited above, pp. 40-41, § 103).”

The Grand Chamber agrees with the following conclusions of the Chamber on this point (see paragraphs 190-96 of the Chamber judgment):

“... The Court reiterates that it must be mindful of the Convention's special character as a human rights treaty and that the Convention cannot be interpreted in a vacuum. It should so far as possible be interpreted in harmony with other rules of public international law of which it forms part (see, *mutatis mutandis*, *Al-Adsani v. the United Kingdom* [GC], no. 35763/97, § 55, ECHR 2001-XI, and *Loizidou v. Turkey*, judgment of 18 December 1996, *Reports* 1996-VI, p. 2231, § 43). It must, however, confine its primary attention to the issues of interpretation and application of the provisions of the Convention that arise in the present case.

... It is recalled that the Court accepted in *Soering* that an established practice within the member States could give rise to an amendment of the Convention. In that case the Court accepted that subsequent practice in national penal policy, in the form of a generalised abolition of capital punishment, could be taken as establishing the agreement of the Contracting States to abrogate the exception provided for under Article 2 § 1 and hence remove a textual limit on the scope for evolutive interpretation of Article 3 (*ibid.*, pp. 40-41, § 103). It was found, however, that Protocol No. 6 showed that the intention of the States was to adopt the normal method of amendment of the text in order to introduce a new obligation to abolish capital punishment in time of peace and to do so by an optional instrument allowing each State to choose the moment when to undertake such an engagement. The Court accordingly concluded that Article 3 could not be interpreted as generally prohibiting the death penalty (*ibid.*, pp. 40-41, §§ 103-04).

... The applicant takes issue with the Court's approach in *Soering*. His principal submission was that the reasoning is flawed since Protocol No. 6 represents merely one yardstick by which the practice of the States may be measured and that the evidence shows that all member States of the Council of Europe have, either *de facto* or *de jure*, effected total abolition of the death penalty for all crimes and in all circumstances. He contended that as a matter of legal theory there was no reason why the States should not be capable of abolishing the death penalty both by abrogating the right to rely on the second sentence of Article 2 § 1 through their practice and by formal recognition of that process in the ratification of Protocol No. 6.

... The Court reiterates that the Convention is a living instrument which must be interpreted in the light of present-day conditions and that the increasingly high standard being required in the area of the protection of human rights and fundamental liberties correspondingly and inevitably requires greater firmness in assessing breaches of the

fundamental values of democratic societies (see *Selmouni v. France* [GC], no. 25803/94, § 101, ECHR 1999-V).

... It reiterates that in assessing whether a given treatment or punishment is to be regarded as inhuman or degrading for the purposes of Article 3 it cannot but be influenced by the developments and commonly accepted standards in the penal policy of the member States of the Council of Europe in this field (see *Soering*, cited above, p. 40, § 102). Moreover, the concepts of inhuman and degrading treatment and punishment have evolved considerably since the Convention came into force in 1953 and indeed since the Court's judgment in *Soering* in 1989.

... Equally the Court observes that the legal position as regards the death penalty has undergone a considerable evolution since *Soering* was decided. The *de facto* abolition noted in that case in respect of twenty-two Contracting States in 1989 has developed into a *de jure* abolition in forty-three of the forty-four Contracting States and a moratorium in the remaining State that has not yet abolished the penalty, namely Russia. This almost complete abandonment of the death penalty in times of peace in Europe is reflected in the fact that all the Contracting States have signed Protocol No. 6 and forty-one States have ratified it, that is to say, all except Turkey, Armenia and Russia⁶. It is further reflected in the policy of the Council of Europe, which requires that new member States undertake to abolish capital punishment as a condition of their admission into the organisation. As a result of these developments the territories encompassed by the member States of the Council of Europe have become a zone free of capital punishment.

... Such a marked development could now be taken as signalling the agreement of the Contracting States to abrogate, or at the very least to modify, the second sentence of Article 2 § 1, particularly when regard is had to the fact that all Contracting States have now signed Protocol No. 6 and that it has been ratified by forty-one States. It may be questioned whether it is necessary to await ratification of Protocol No. 6 by the three remaining States before concluding that the death penalty exception in Article 2 § 1 has been significantly modified. Against such a consistent background, it can be said that capital punishment in peacetime has come to be regarded as an unacceptable ... form of punishment that is no longer permissible under Article 2."

¹ At the date of the Chamber's judgment of 12 March 2003, Protocol No. 6 has now been ratified by forty-four member States of the Council of Europe (including Turkey) and signed by two others, Monaco and Russia (see paragraph 58 above).

The Court notes that, by opening for signature Protocol No. 13 concerning the abolition of the death penalty in all circumstances, the Contracting States have chosen the traditional method of amendment of the text of the Convention in pursuit of their policy of abolition. At the date of this judgment, three member States have not signed this Protocol and sixteen have yet to ratify it. However, this final step towards complete abolition of the death penalty – that is to say both in times of peace and in times of war – can be seen as confirmation of the abolitionist trend in the practice of the Contracting States.

For the time being, the fact that there is still a large number of States who have yet to sign or ratify Protocol No. 13 may prevent the Court from finding that it is the established practice of the Contracting States to regard the implementation of the death penalty as inhuman and degrading treatment contrary to Article 3 of the Convention, since no derogation may be made from that provision, even in times of war. However, the Grand Chamber agrees with the Chamber that it is not necessary for the Court to reach any firm conclusion on these points since, for the reasons given, it would be contrary to the Convention, even if Article 2 were to be construed as still permitting the death penalty, to implement a death sentence following an unfair trial.

The Court added however that in that particular case the death penalty has been imposed on the applicant following an unfair procedure which cannot be considered to conform to the strict standards of fairness required in cases involving a capital sentence and, moreover, that he had to suffer the consequences of the imposition of that sentence for nearly three years. Consequently, the Court concluded that the imposition of the death sentence on the applicant following an unfair trial by a court whose independence and impartiality were open to doubt amounted to inhuman treatment in violation of Article 3 of the Convention.

INTERPRETATION AND CONCLUSIONS

The European Court of Human Rights has stated in its case-law that the right to life implies both a positive obligation for States to protect this right and an obligation to carry out a prompt, independent, effective and adequate investigation when individuals have been killed as a result of the use of force.

The European Court of Human Rights has stated in its case law that the right to life implies both a positive obligation for States to protect this right and an obligation to carry out an effective investigation when individuals have been killed as a result of the use of force.

The right to life has, of course, a strained relation with capital punishment. Although the death penalty has not yet been abolished everywhere, in those countries still using the death penalty its use is surrounded with severe restrictions.

However, the optional protocols adopted by several international texts give the international approach towards the death penalty an abolitionist impetus.

HUMAN RIGHTS AND THE INVESTIGATION OF OFFENCES

INTRODUCTION

The public prosecutor should play an active role in criminal proceedings. This may include, dependant on local law and tradition, that part of proceedings constituting the investigation of offences. In his investigating work the prosecutor has to uphold human rights himself and ensure that others do not violate human rights. This is clearly stated in Principles 11 and 12 of the 1990 U.N. *Guidelines on the Role of Prosecutors*:

11. 'Prosecutors shall perform an active role in criminal proceedings, including institution of prosecution and, where authorized by law or consistent with local practice, in the investigation of crime, supervision over the legality of these investigations, supervision of the execution of court decisions and the exercise of other functions as representatives of the public interest.
12. Prosecutors shall, in accordance with the law, perform their duties fairly, consistently and expeditiously, and respect and protect human dignity and uphold human rights, thus contributing to ensuring due process and the smooth functioning of the criminal justice system'.

The investigation of offences contains both that stage of procedures in which the privacy of a suspect can be at issue (for instance during a house search) and the stage in which a suspect is investigated through interrogations. In both stages human rights come into play. First, infringement of a person's privacy can only be justified under specific conditions. Second, torture and inhuman or degrading treatment during interrogations are strictly prohibited.

Therefore, this chapter is divided into two parts; the first part on the matter of privacy during the investigation of offences, the second part on human rights during interrogations.

PRIVACY AND THE INVESTIGATION OF OFFENCES

RELEVANT TEXTS AT THE U.N. LEVEL

The *Universal Declaration of Human Rights* mentions privacy in Article 12:

‘No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation. Everyone has the right to the protection of the law against such interference or attacks’.

The *International Covenant on Civil and Political Rights* reiterates this provision in its Article 17:

1. ‘No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.
2. Everyone has the right to the protection of the law against such interference or attacks’.

RELEVANT TEXTS AT THE REGIONAL LEVEL

Europe

The *European Convention for the Protection of Human Rights and Fundamental Freedoms* mentions the right to respect for private and family life in article 8:

1. ‘Everyone has the right to respect for his private and family life, his home and his correspondence.
2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others’.

At the level of the European Union the *Charter of Fundamental Rights* holds a similar provision in article 7:

‘Everyone has the right to respect for his or her private and family life, home and communications’.

Africa

The *African Charter on Human and People’s Rights* does not contain any provisions regarding privacy. It does mention the position of the family in the community, but those provisions are not relevant to this manual.

Arab world

The *Cairo Declaration on Human Rights in Islam* mentions provisions on privacy in Article 18. Paragraphs (b) and (c) read:

‘Everyone shall have the right to privacy in the conduct of his private affairs, in his home, among his family, with regard to his property and his relationships. It is not permitted to spy on him, to place him under surveillance or to besmirch his good name. The State shall protect him from arbitrary interference.

A private residence is inviolable in all cases. It will not be entered without permission from its inhabitants or in any unlawful manner, nor shall it be demolished or confiscated and its dwellers evicted’.

In the *Arab Charter on Human Rights* the provisions on privacy can be found in Article 17 and read as follows:

‘Privacy shall be inviolable and any infringement thereof shall constitute an offence. This privacy includes private family affairs, the inviolability of the home and the confidentiality of correspondence and other private means of communication’.

The Americas

Article 11 of the *American Convention on Human Rights* states on privacy:

- I. ‘Everyone has the right to have his honor respected and his dignity recognized.

2. No one may be the object of arbitrary or abusive interference with his private life, his family, his home, or his correspondence, or of unlawful attacks on his honor or reputation.
3. Everyone has the right to the protection of the law against such interference or attacks’.

SOFT INTERNATIONAL LAW

U.N. Level

The 1979 U.N. *Code of Conduct for Law Enforcement Officials* states the following in Article 4 with regard to privacy:

‘Matters of a confidential nature in the possession of law enforcement officials shall be kept confidential, unless the performance of duty or the needs of justice strictly require otherwise’.

The same document comments on this article as follows:

‘By the nature of their duties, law enforcement officials obtain information which may relate to private lives or be potentially harmful to the interests, and especially the reputation, of others. Great care should be exercised in safeguarding and using such information, which should be disclosed only in the performance of duty or to serve the needs of justice. Any disclosure of such information for other purposes is wholly improper’.

The 1990 U.N. *Guidelines on the Role of Prosecutors* state in para.13 under (c) with respect to privacy:

‘In the performance of their duties, prosecutors shall (..): Keep matters in their possession confidential, unless the performance of duty or the needs of justice require otherwise;’

The Human Rights Committee, in its 1988 General Comment 16, has commented on article 17 of the *ICCPR*. The Committee starts in para.1 with a general requirement to State Parties:

‘Article 17 provides for the right of every person to be protected against arbitrary or U.N.lawful interference with his privacy, family, home or correspondence as well as against U.N.lawful attacks on his honour and

reputation. In the view of the Committee this right is required to be guaranteed against all such interferences and attacks whether they emanate from State authorities or from natural or legal persons. The obligations imposed by this article require the State to adopt legislative and other measures to give effect to the prohibition against such interferences and attacks as well as to the protection of this right'.

Paragraphs 3, 4 and 5 then comment on several phrases in article 17:

3. 'The term "unlawful" means that no interference can take place except in cases envisaged by the law. Interference authorized by States can only take place on the basis of law, which itself must comply with the provisions, aims and objectives of the Covenant.
4. The expression "arbitrary interference" is also relevant to the protection of the right provided for in article 17. In the Committee's view the expression "arbitrary interference" can also extend to interference provided for under the law. The introduction of the concept of arbitrariness is intended to guarantee that even interference provided for by law should be in accordance with the provisions, aims and objectives of the Covenant and should be, in any event, reasonable in the particular circumstances.
5. Regarding the term "family", the objectives of the Covenant require that for purposes of article 17 this term be given a broad interpretation to include all those comprising the family as understood in the society of the State party concerned. The term "home" in English, "manzel" in Arabic, "zhùzhái" in Chinese, "domicile" in French, "zhilische" in Russian and "domicilio" in Spanish, as used in article 17 of the Covenant, is to be understood to indicate the place where a person resides or carries out his usual occupation. In this connection, the Committee invites States to indicate in their reports the meaning given in their society to the terms "family" and "home".'

Paragraph 8 provides for comments that are especially relevant during investigations:

'Even with regard to interferences that conform to the Covenant, relevant legislation must specify in detail the precise circumstances in which such interferences may be permitted. A decision to make use of such authorized interference must be made only by the authority designated under the law,

and on a case-by-case basis. Compliance with article 17 requires that the integrity and confidentiality of correspondence should be guaranteed *de jure* and *de facto*. Correspondence should be delivered to the addressee without interception and without being opened or otherwise read. Surveillance, whether electronic or otherwise, interceptions of telephonic, telegraphic and other forms of communication, wire-tapping and recording of conversations should be prohibited. Searches of a person's home should be restricted to a search for necessary evidence and should not be allowed to amount to harassment. So far as personal and body search is concerned, effective measures should ensure that such searches are carried out in a manner consistent with the dignity of the person who is being searched. Persons being subjected to body search by State officials, or medical personnel acting at the request of the State, should only be examined by persons of the same sex'.

Finally, para.10 states on protection of personal information:

'The gathering and holding of personal information on computers, databanks and other devices, whether by public authorities or private individuals or bodies, must be regulated by law. Effective measures have to be taken by States to ensure that information concerning a person's private life does not reach the hands of persons who are not authorized by law to receive, process and use it, and is never used for purposes incompatible with the Covenant. In order to have the most effective protection of his private life, every individual should have the right to ascertain in an intelligible form, whether, and if so, what personal data is stored in automatic data files, and for what purposes. Every individual should also be able to ascertain which public authorities or private individuals or bodies control or may control their files. If such files contain incorrect personal data or have been collected or processed contrary to the provisions of the law, every individual should have the right to request rectification or elimination'.

Europe

The Council of Europe Recommendation Rec 2000(19) *On the role of public prosecution* contains relevant provisions on how a public prosecutor should fulfil his or her duty during the investigation of offences. In para.3 a general provision one finds:

‘In certain criminal justice systems, public prosecutors also: (..) conduct, direct or supervise investigations;’

Paragraphs 21 to 23 then provide more detail on the relationship between prosecutors and the police during investigations:

21. ‘In general, public prosecutors should scrutinise the lawfulness of police investigations at the latest when deciding whether a prosecution should commence or continue. In this respect, public prosecutors will also monitor the observance of human rights by the police.
22. In countries where the police is placed under the authority of the public prosecution or where police investigations are either conducted or supervised by the public prosecutor, that state should take effective measures to guarantee that the public prosecutor may:
 - a) give instructions as appropriate to the police with a view to an effective implementation of crime policy priorities, notably with respect to deciding which categories of cases should be dealt with first, the means used to search for evidence, the staff used, the duration of investigations, information to be given to the public prosecutor, etc.;
 - b) where different police agencies are available, allocate individual cases to the agency that it deems best suited to deal with it;
 - c) carry out evaluations and controls in so far as these are necessary in order to monitor compliance with its instructions and the law;
 - d) sanction or promote sanctioning, if appropriate, of eventual violations.
23. States where the police is independent of the public prosecution should take effective measures to guarantee that there is appropriate and functional co-operation between the Public Prosecution and the police’.

IAP

The 1999 *IAP Standards of Professional Responsibility and Statement of the Essential Duties and Rights of Prosecutors* provide for some relevant general provisions regarding the role prosecutors should play in guaranteeing a person’s privacy during the investigation of offences. Paragraphs 4.1 and 4.2 (on the role in criminal proceedings) read:

4.1 'Prosecutors shall perform their duties fairly, consistently and expeditiously.

4.2 Prosecutors shall perform an active role in criminal proceedings as follows:

- a). where authorised by law or practice to participate in the investigation of crime, or to exercise authority over the police or other investigators, they will do so objectively, impartially and professionally;
- b). when supervising the investigation of crime, they should ensure that the investigating services respect legal precepts and fundamental human rights; when giving advice, they will take care to remain impartial and objective;'

EUROPEAN PRACTICE

The European Court of Human Rights has ruled on the notion of 'private life', as set forth in Article 8 of the *European Convention for the Protection of Human Rights and Fundamental Freedoms*, that this notion should not be interpreted too narrowly. In the *Niemietz* case (Judgment of 16 December 1992) the Court stated in para.29:

'The Court does not consider it possible or necessary to attempt an exhaustive definition of the notion of "private life". However, it would be too restrictive to limit the notion to an "inner circle" in which the individual may live his own personal life as he chooses and to exclude therefrom entirely the outside world not encompassed within that circle. Respect for private life must also comprise to a certain degree the right to establish and develop relationships with other human beings.

There appears, furthermore, to be no reason of principle why this understanding of the notion of "private life" should be taken to exclude activities of a professional or business nature since it is, after all, in the course of their working lives that the majority of people have a significant, if not the greatest, opportunity of developing relationships with the outside world. This view is supported by the fact that, as was rightly pointed out by the Commission, it is not always possible to distinguish clearly which of an individual's activities form part of his professional or business life and which do not. Thus, especially in the case of a person exercising a liberal profession, his work in that context may form part and

parcel of his life to such a degree that it becomes impossible to know in what capacity he is acting at a given moment of time. (..)'

In its judgment of 16 April 2002 in the *Colas Est* case, the European Court even extended the protection of art. 8 to the premises of business enterprises.

In the *Klass* case (Judgment of 6 September 1978) the Court pronounced on secret surveillance of citizens and whether such interference can be justified under article 8. Paragraph 42 reads:

'The cardinal issue arising under Article 8 (art. 8) in the present case is whether the interference so found is justified by the terms of paragraph 2 of the Article (art. 8-2). This paragraph, since it provides for an exception to a right guaranteed by the Convention, is to be narrowly interpreted. Powers of secret surveillance of citizens, characterising as they do the police state, are tolerable under the Convention only in so far as strictly necessary for safeguarding the democratic institutions'.

In para. 93-95 of its admissibility decision of 29 June 2006 in the case *Weber and Saravia*, the Court elaborated on secret surveillance:

"The Court reiterates that foreseeability in the special context of secret measures of surveillance, such as the interception of communications, cannot mean that an individual should be able to foresee when the authorities are likely to intercept his communications so that he can adapt his conduct accordingly (see, inter alia, *Leander*, cited above, p. 23, § 51). However, especially where a power vested in the executive is exercised in secret, the risks of arbitrariness are evident (see, inter alia, *Malone*, cited above, p. 32, § 67; *Huvig*, cited above, pp. 54-55, § 29; and *Rotaru*, cited above, § 55). It is therefore essential to have clear, detailed rules on interception of telephone conversations, especially as the technology available for use is continually becoming more sophisticated (see *Kopp v. Switzerland*, judgment of 25 March 1998, Reports 1998-II, pp. 542-43, § 72, and *Valenzuela Contreras v. Spain*, judgment of 30 July 1998, Reports 1998-V, pp. 1924-25, § 46). The domestic law must be sufficiently clear in its terms to give citizens an adequate indication as to the circumstances in which and the conditions on which public authorities are empowered to resort to any such measures (see *Malone*, *ibid.*; *Kopp*, cited above, p. 541, § 64; *Huvig*, cited above, pp. 54-55, § 29; and *Valenzuela Contreras*, *ibid.*).

Moreover, since the implementation in practice of measures of secret surveillance of communications is not open to scrutiny by the individuals concerned or the public at large, it would be contrary to the rule of law for the legal discretion granted to the executive or to a judge to be expressed in terms of an unfettered power. Consequently, the law must indicate the scope of any such discretion conferred on the competent authorities and the manner of its exercise with sufficient clarity to give the individual adequate protection against arbitrary interference (see, among other authorities, *Malone*, cited above, pp.32-33, § 68; *Leander*, cited above, p. 23, § 51; and *Huvig*, cited above, pp. 54-55, § 29).

In its case-law on secret measures of surveillance, the Court has developed the following minimum safeguards that should be set out in statute law in order to avoid abuses of power: the nature of the offences which may give rise to an interception order; a definition of the categories of people liable to have their telephones tapped; a limit on the duration of telephone tapping; the procedure to be followed for examining, using and storing the data obtained; the precautions to be taken when communicating the data to other parties; and the circumstances in which recordings may or must be erased or the tapes destroyed (see, *inter alia*, *Huvig*, cited above, p. 56, § 34; *Amann*, cited above, § 76; *Valenzuela Contreras*, cited above, pp.1924-25, § 46; and *Prado Bugallo v. Spain*, no.58496/00, § 30, 18 February 2003)."

Again in the *Klass* judgment the Court ruled that in order for the 'interference' not to infringe Article 8, it must first have been 'in accordance with the law' and secondly 'necessary in a democratic society in the interests of national security' and/or 'for the prevention of disorder or crime'. The Court further ruled in para.55:

'The rule of law implies, *inter alia*, that an interference by the executive authorities with an individual's rights should be subject to an effective control which should normally be assured by the judiciary, at least in the last resort, judicial control offering the best guarantees of independence, impartiality and a proper procedure'.

On secret surveillance, the Court ruled the following in para.58.

'In the opinion of the Court, it has to be ascertained whether it is even feasible in practice to require subsequent notification in all cases. The activity or danger against which a particular series of surveillance measures is directed may continue for years, even decades, after the

suspension of those measures. Subsequent notification to each individual affected by a suspended measure might well jeopardise the long-term purpose that originally prompted the surveillance. Furthermore, (..) such notification might serve to reveal the working methods and fields of operation of the intelligence services and even possibly to identify their agents. In the Court's view, in so far as the "interference" resulting from the contested legislation is in principle justified under Article 8 para. 2 (art. 8-2) (..), the fact of not informing the individual once surveillance has ceased cannot itself be incompatible with this provision since it is this very fact which ensures the efficacy of the "interference". (..)'

Finally, in the *Kruslin* case (Judgment of 24 April 1990) the Court added the following in relation to telephone tapping and respect for private life:

'Tapping and other forms of interception of telephone conversations represent a serious interference with private life and correspondence and must accordingly be based on a "law" that is particularly precise. It is essential to have clear, detailed rules on the subject, especially as the technology available for use is continually becoming more sophisticated'.

HUMAN RIGHTS AND INTERROGATIONS

RELEVANT TEXTS AT THE U.N.-LEVEL

The *Universal Declaration of Human Rights* states very clearly in Article 5:

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

The *International Covenant on Civil and Political Rights* more or less repeats this provision in Article 7:

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

Furthermore the *ICCPR* states in article 14 para.3:

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

Not to be compelled to testify against himself or to confess guilt’.

Convention against Torture

Article 1 para.1 of the 1984 *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* defines ‘torture’:

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

Article 11 states specifically on interrogation:

‘Each State Party shall keep under systematic review interrogation rules, instructions, methods and practices as well as arrangements for the custody and treatment of persons subjected to any form of arrest, detention or imprisonment in any territory under its jurisdiction, with a view to preventing any cases of torture’.

RELEVANT TEXTS AT THE REGIONAL LEVEL

Europe

Article 3 of the *European Convention for the Protection of Human Rights and Fundamental Freedoms* contains the prohibition of torture:

‘No one shall be subjected to torture or to inhuman or degrading treatment or punishment’.

Africa

The *African Charter on Human and Peoples’ Rights* states in article 5:

‘Every individual shall have the right to the respect of the dignity inherent in a human being and to the recognition of his legal status. All forms of exploitation and degradation of man particularly slavery, slave trade, torture, cruel, inhuman or degrading punishment and treatment shall be prohibited’.

Arab world

Article 2 para.(d) of the *Cairo Declaration on Human Rights in Islam* guarantees safety from bodily harm:

‘Safety from bodily harm is a guaranteed right. It is the duty of the state to safeguard it, and it is prohibited to breach it without a Shari'ah-prescribed reason’.

Article 20 then proceeds on the matter:

‘It is not permitted without legitimate reason to arrest an individual, or restrict his freedom, to exile or to punish him. It is not permitted to subject him to physical or psychological torture or to any form of maltreatment, cruelty or indignity. (..)’

The *Arab Charter on Human Rights* states in Article 13 para.(a):

‘The States parties shall protect every person in their territory from being subjected to physical or mental torture or cruel, inhuman or degrading treatment. They shall take effective measures to prevent such acts and shall regard the practice thereof, or participation therein, as a punishable offence’.

The Americas

The *American Convention on Human Rights* contains the right to humane treatment in Article 5:

1. ‘Every person has the right to have his physical, mental, and moral integrity respected.
2. ‘No one shall be subjected to torture or to cruel, inhuman, or degrading punishment or treatment. All persons deprived of their liberty shall be treated with respect for the inherent dignity of the human person. (..)’

Article 8 then continues on ‘nemo tenetur’ in para.2:

‘(..)During the proceedings, every person is entitled, with full equality, to the following minimum guarantees:(..)

g. the right not to be compelled to be a witness against himself or to plead guilty. (..)’

SOFT INTERNATIONAL LAW

U.N. Level

The 1982 U.N. *Principles of Medical Ethics relevant to the Role of Health Personnel, particularly Physicians, in the Protection of Prisoners and Detainees against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, mentions interrogation in Principle 4:

‘It is a contravention of medical ethics for health personnel, particularly physicians:

(a) To apply their knowledge and skills in order to assist in the interrogation of prisoners and detainees in a manner that may adversely affect the physical or mental health or condition of such prisoners or detainees and which is not in accordance with the relevant international instruments (..’).

The 1979 U.N. *Code of Conduct for Law Enforcement Officials* is an important document on the role of public prosecutors during interrogations. Article 5 leaves no room for doubt:

‘No law enforcement official may inflict, instigate or tolerate any act of torture or other cruel, inhuman or degrading treatment or punishment, nor may any law enforcement official invoke superior orders or exceptional circumstances such as a state of war or a threat of war, a threat to national security, internal political instability or any other public emergency as a justification of torture or other cruel, inhuman or degrading treatment or punishment’.

Several relevant provisions on interrogation can be found in the 1988 U.N. *Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment*. Principle 21 states:

1. 'It shall be prohibited to take undue advantage of the situation of a detained or imprisoned person for the purpose of compelling him to confess, to incriminate himself otherwise or to testify against any other person.
2. No detained person while being interrogated shall be subject to violence, threats or methods of interrogation which impair his capacity of decision or his judgement.'

Then Principle 23 specifies on interrogation:

1. 'The duration of any interrogation of a detained or imprisoned person and of the intervals between interrogations as well as the identity of the officials who conducted the interrogations and other persons present shall be recorded and certified in such form as may be prescribed by law.
2. A detained or imprisoned person, or his counsel when provided by law, shall have access to the information described in paragraph 1 of the present principle'.

Principle 27 explains the consequence for non-compliance in these terms:

'Non-compliance with these principles in obtaining evidence shall be taken into account in determining the admissibility of such evidence against a detained or imprisoned person'.

The 1990 U.N. *Guidelines on the Role of Prosecutors* contain a more general provision:

12. 'Prosecutors shall, in accordance with the law, perform their duties fairly, consistently and expeditiously, and respect and protect human dignity and uphold human rights, thus contributing to ensuring due process and the smooth functioning of the criminal justice system'.

The Human Rights Committee in its 1992 *General Comment 20* has commented upon Article 7 of the ICCPR. Paragraph 11 of the Comment mentions interrogation:

'In addition to describing steps to provide the general protection against acts prohibited under article 7 to which anyone is entitled, the State party

should provide detailed information on safeguards for the special protection of particularly vulnerable persons. It should be noted that keeping under systematic review interrogation rules, instructions, methods and practices as well as arrangements for the custody and treatment of persons subjected to any form of arrest, detention or imprisonment is an effective means of preventing cases of torture and ill-treatment. To guarantee the effective protection of detained persons, provisions should be made for detainees to be held in places officially recognized as places of detention and for their names and places of detention, as well as for the names of persons responsible for their detention, to be kept in registers readily available and accessible to those concerned, including relatives and friends. To the same effect, the time and place of all interrogations should be recorded, together with the names of all those present and this information should also be available for purposes of judicial or administrative proceedings. Provisions should also be made against incommunicado detention. In that connection, States parties should ensure that any places of detention be free from any equipment liable to be used for inflicting torture or ill-treatment. The protection of the detainee also requires that prompt and regular access be given to doctors and lawyers and, under appropriate supervision when the investigation so requires, to family members’.

Regarding the provision on ‘nemo tenetur’ (the right not to be compelled to testify against oneself) as set forth in article 14 *ICCPR*, the Human Rights Committee has commented in the 1984 General Comment 13 para.14:

‘Subparagraph 3 (g) provides that the accused may not be compelled to testify against himself or to confess guilt. In considering this safeguard the provisions of article 7 and article 10, paragraph 1, should be borne in mind. In order to compel the accused to confess or to testify against himself, frequently methods which violate these provisions are used. The law should require that evidence provided by means of such methods or any other form of compulsion is wholly unacceptable.

Another important U.N. document here is the 1990 *Guidelines on The Role of Prosecutors*. This document requires prosecutors to take appropriate action against public officials guilty of human rights violations. Paragraph 15 reads:

‘Prosecutors shall give due attention to the prosecution of crimes committed by public officials, particularly corruption, abuse of power, grave violations of human rights and other crimes recognized by

international law and, where authorized by law or consistent with local practice, the investigation of such offences’.

Paragraph 16 then proceeds with the prosecutor’s duty to exclude evidence obtained through unlawful methods and to take the necessary steps against those responsible for using such methods:

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

Europe

The Council of Europe Recommendation (Rec 2000(19)) *On the role of public prosecution* mentions relevant provisions on how a public prosecutor should fulfil his duty during the investigation of offences. These provisions are of a general nature and the same as mentioned above with regard to Privacy.

IAP

The *IAP Standards* provide for some relevant general provisions on the role a prosecutor should play in guaranteeing a person’s rights during the investigation of offences. These provisions are the same as mentioned above with regard to privacy.

EUROPEAN PRACTICE

The European Court of Human Rights has ruled several times on cases in which police treatment was claimed to be contrary to article 3 of the *European Convention for the Protection of Human Rights and Fundamental Freedoms*. The first important case on this matter was the *Ireland v. the UK* case (Judgment of 18 January 1978). In this case the Court condemned several interrogation techniques used by the British police. According to the Court these techniques were contrary to the meaning of Article 3.

In the Tomasi case (Judgment of 27 August 1992) the Court ruled on the evidence necessary to prove a violation of article 3. Paragraph 115 reads:

‘(..) It finds it sufficient to observe that the medical certificates and reports, drawn up in total independence by medical practitioners, attest to the large number of blows inflicted on Mr Tomasi and their intensity; these are two elements which are sufficiently serious to render such treatment inhuman and degrading. The requirements of the investigation and the undeniable difficulties inherent in the fight against crime, particularly with regard to terrorism, cannot result in limits being placed on the protection to be afforded in respect of the physical integrity of individuals.’

In the *Aksoy* case (Judgment of 18 December 1996) the Court for the first time considered that police behaviour during interrogation of a person constituted ‘torture’ as set out in Article 3. The relevant paragraphs of the Court’s judgement read:

‘In order to determine whether any particular form of ill-treatment should be qualified as torture, the Court must have regard to the distinction drawn in Article 3 (art. 3) between this notion and that of inhuman or degrading treatment. As it has remarked before, this distinction would appear to have been embodied in the Convention to allow the special stigma of "torture" to attach only to deliberate inhuman treatment causing very serious and cruel suffering (..)

The Court recalls that the Commission found, *inter alia*, that the applicant was subjected to "Palestinian hanging", in other words, that he was stripped naked, with his arms tied together behind his back, and suspended by his arms (..). In the view of the Court this treatment could only have been deliberately inflicted; indeed, a certain amount of preparation and exertion would have been required to carry it out. It would appear to have been administered with the aim of obtaining admissions or information from the applicant. In addition to the severe pain which it must have caused at the time, the medical evidence shows that it led to a paralysis of both arms which lasted for some time (..). The Court considers that this treatment was of such a serious and cruel nature that it can only be described as torture’.

Concerning ‘*nemo tenetur*’, the Court considered in the *Murray* case (Judgment of 8 February 1996) that although the European Convention does not specifically mention the privilege against self-incrimination, the right to

remain silent during interrogations is nevertheless guaranteed under Article 6 (regarding fair trial) of the *Convention*. Paragraph 45 of the *Murray* case reads:

‘Although not specifically mentioned in Article 6 (art. 6) of the Convention, there can be no doubt that the right to remain silent under police questioning and the privilege against self-incrimination are generally recognised international standards which lie at the heart of the notion of a fair procedure under Article 6 (art. 6). By providing the accused with protection against improper compulsion by the authorities these immunities contribute to avoiding miscarriages of justice and to securing the aims of Article 6 (art. 6)’.

In its judgment of 5 November 2002 in the case of *Allan* the Court elaborated:

‘While the right to silence and the privilege against self-incrimination are primarily designed to protect against improper compulsion by the authorities and the obtaining of evidence through methods of coercion or oppression in defiance of the will of the accused, the scope of the right is not confined to cases where duress has been brought to bear on the accused or where the will of the accused has been directly overborne in some way. The right, which the Court has previously observed is at the heart of the notion of a fair procedure, serves in principle to protect the freedom of a suspected person to choose whether to speak or to remain silent under police questioning. Such freedom is effectively undermined in a case in which the suspect, having elected to remain silent during questioning, the authorities use subterfuge to elicit from the suspect confessions or other statements of an incriminatory nature which they were unable to obtain during such questioning and where the confessions or statements thereby obtained are adduced in evidence at trial.’

In the *Brennan* case (Judgment of 16 October 2001) the Court repeated:

‘although Article 6 will normally require that the accused be allowed to benefit from the assistance of a lawyer already at the initial stages of police interrogation, this right, which is not explicitly set out in the Convention, may be subject to restriction for good cause.’

It added:

‘recording of interviews provides a safeguard against police misconduct, as does the attendance of the suspect’s lawyer. However, it is not persuaded

that these are an indispensable precondition of fairness within the meaning of Article 6 1 of the Convention.’

In para. 67-74 of the Grand Chamber-judgment in the Jalloh-case (Judgment of 11 July 2007) (a case concerning the forceful administering of emetics in order to retrieve evidence (drugs) from his body) the Court elaborated on art. 3 issues and the force used by policemen:

“According to the Court’s well-established case-law, ill-treatment must attain a minimum level of severity if it is to fall within the scope of Article 3. The assessment of this minimum level of severity is relative; it depends on all the circumstances of the case, such as the duration of the treatment, its physical and mental effects and, in some cases, the sex, age and state of health of the victim (see, *inter alia*, *Price v. the United Kingdom*, no. 33394/96, § 24, ECHR 2001-VII; *Mouisel v. France*, no. 67263/01, § 37, ECHR 2002-IX; *Gennadi Naoumenko v. Ukraine*, no. 42023/98, § 108, 10 February 2004). Allegations of ill-treatment must be supported by appropriate evidence (see, *mutatis mutandis*, *Klaas v. Germany*, judgment of 22 September 1993, Series A no. 269, pp. 17-18, § 30). To assess this evidence, the Court adopts the standard of proof “beyond reasonable doubt” but adds that such proof may follow from the coexistence of sufficiently strong, clear and concordant inferences or of similar un rebutted presumptions of fact (see *Ireland v. the United Kingdom*, judgment of 18 January 1978, Series A no. 25, pp. 64-65, § 161 *in fine*; *Labita*, cited above, § 121).

Treatment has been held by the Court to be “inhuman” because, *inter alia*, it was premeditated, was applied for hours at a stretch and caused either actual bodily injury or intense physical and mental suffering (see *Labita v. Italy* [GC], no. 26772/95, § 120, ECHR 2000-IV). Treatment has been considered “degrading” when it was such as to arouse in its victims feelings of fear, anguish and inferiority capable of humiliating and debasing them and possibly breaking their physical or moral resistance (see *Hurtado v. Switzerland*, Commission’s report of 8 July 1993, Series A no. 280, p. 14, § 67), or when it was such as to drive the victim to act against his will or conscience (see, for example, *Denmark, Norway, Sweden and the Netherlands v. Greece* (“the Greek case”), nos. 3321/67 *et al.*, Commission’s report of 5 November 1969, Yearbook 12, p. 186; *Keenan v. the United Kingdom*, no. 27229/95, § 110, ECHR 2001-III). Furthermore, in considering whether treatment is “degrading” within the meaning of Article 3, one of the factors which the Court will take into account is the

question whether its object was to humiliate and debase the person concerned, although the absence of any such purpose cannot conclusively rule out a finding of violation of Article 3 (see *Raninen v. Finland*, judgment of 16 December 1997, *Reports of Judgments and Decisions* 1997-VIII, pp. 2821-22, § 55; *Peers v. Greece*, no. 28524/95, §§ 68 and 74, ECHR 2001-III; *Price*, cited above, § 24). In order for a punishment or treatment associated with it to be “inhuman” or “degrading”, the suffering or humiliation involved must in any event go beyond that inevitable element of suffering or humiliation connected with a given form of legitimate treatment or punishment (see *Labita*, cited above, § 120).

With respect to medical interventions to which a detained person is subjected against his or her will, Article 3 of the Convention imposes an obligation on the State to protect the physical well-being of persons deprived of their liberty, for example by providing them with the requisite medical assistance. The persons concerned nevertheless remain under the protection of Article 3, whose requirements permit of no derogation (*Mouisel*, cited above, § 40; *Gennadi Naoumenko*, cited above, § 112). A measure which is of therapeutic necessity from the point of view of established principles of medicine cannot in principle be regarded as inhuman and degrading (see, in particular, *Herczegfalvy v. Austria*, judgment of 24 September 1992, Series A no. 244, pp. 25-26, § 82; *Gennadi Naoumenko*, cited above, § 112). This can be said, for instance, about force-feeding that is aimed at saving the life of a particular detainee who consciously refuses to take food. The Court must nevertheless satisfy itself that a medical necessity has been convincingly shown to exist and that procedural guarantees for the decision, for example to force-feed, exist and are complied with (*Nevmerzhitsky v. Ukraine*, no. 54825/00, § 94, 5 April 2005).

Even where it is not motivated by reasons of medical necessity, Articles 3 and 8 of the Convention do not as such prohibit recourse to a medical procedure in defiance of the will of a suspect in order to obtain from him evidence of his involvement in the commission of a criminal offence. Thus, the Convention institutions have found on several occasions that the taking of blood or saliva samples against a suspect’s will in order to investigate an offence did not breach these Articles in the circumstances of the cases examined by them (see, *inter alia*, *X. v. the Netherlands*, no. 8239/78, Commission decision of 4 December 1978, *Decisions and Reports* (DR) 16, pp. 187-189; *Schmidt v. Germany* (dec.), no. 32352/02, 5 January 2006).

However, any recourse to a forcible medical intervention in order to obtain evidence of a crime must be convincingly justified on the facts of a particular case. This is especially true where the procedure is intended to retrieve from inside the individual's body real evidence of the very crime of which he is suspected. The particularly intrusive nature of such an act requires a strict scrutiny of all the surrounding circumstances. In this connection, due regard must be had to the seriousness of the offence at issue. The authorities must also demonstrate that they took into consideration alternative methods of recovering the evidence. Furthermore, the procedure must not entail any risk of lasting detriment to a suspect's health (see, *mutatis mutandis*, *Nevmerzhitsky*, cited above, §§ 94, 97; *Schmidt*, cited above).

Moreover, as with interventions carried out for therapeutic purposes, the manner in which a person is subjected to a forcible medical procedure in order to retrieve evidence from his body must not exceed the minimum level of severity prescribed by the Court's case-law on Article 3 of the Convention. In particular, account has to be taken of whether the person concerned experienced serious physical pain or suffering as a result of the forcible medical intervention (see *Peters v. the Netherlands*, no. 21132/93, Commission decision of 6 April 1994; *Schmidt*, cited above; *Nevmerzhitsky*, cited above, §§ 94, 97).

Another material consideration in such cases is whether the forcible medical procedure was ordered and administered by medical doctors and whether the person concerned was placed under constant medical supervision (see, for instance, *Ilykov v. Bulgaria*, no. 33977/96, Commission decision of 20 October 1997).

A further relevant factor is whether the forcible medical intervention resulted in any aggravation of his or her state of health and had lasting consequences for his or her health (see *Ilykov*, cited above, and, *mutatis mutandis*, *Krastanov v. Bulgaria*, no. 50222/99, § 53, 30 September 2004.)

In para. 99-102 of the same case the Court ruled on the consequences of the use of evidence obtained via torture or inhuman or degrading treatment:

“An issue may arise under Article 6 § 1 in respect of evidence obtained in violation of Article 3 of the Convention, even if the admission of such evidence was not decisive in securing the conviction (see *İçöz v. Turkey* (dec.), no. 54919/00, 9 January 2003; and *Koç v. Turkey* (dec.), no. 32580/96, 23 September 2003). The Court reiterates in this

connection that Article 3 enshrines one of the most fundamental values of democratic societies. Even in the most difficult circumstances, such as the fight against terrorism and organised crime, the Convention prohibits in absolute terms torture and inhuman or degrading treatment or punishment, irrespective of the victim's conduct. Unlike most of the substantive clauses of the Convention, Article 3 makes no provision for exceptions and no derogation from it is permissible under Article 15 § 2 even in the event of a public emergency threatening the life of the nation (see, *inter alia*, *Chahal v. the United Kingdom*, judgment of 15 November 1996, *Reports* 1996-V, p.1855, § 79; and *Selmouni v. France* [GC], no. 25803/94, § 95, ECHR 1999-V).

As regards the use of evidence obtained in breach of the right to silence and the privilege against self-incrimination, the Court recalls that these are generally recognised international standards which lie at the heart of the notion of a fair procedure under Article 6. Their rationale lies, *inter alia*, in the protection of the accused against improper compulsion by the authorities, thereby contributing to the avoidance of miscarriages of justice and to the fulfilment of the aims of Article 6. The right not to incriminate oneself, in particular, presupposes that the prosecution in a criminal case seek to prove their case against the accused without resort to evidence obtained through methods of coercion or oppression in defiance of the will of the accused (see, *inter alia*, *Saunders v. the United Kingdom*, judgment of 17 December 1996, *Reports* 1996-VI, p. 2064, § 68; *Heaney and McGuinness*, cited above, § 40; *J.B. v. Switzerland*, no. 31827/96, § 64, ECHR 2001-III; and *Allan*, cited above, § 44).

In examining whether a procedure has extinguished the very essence of the privilege against self-incrimination, the Court will have regard, in particular, to the following elements: the nature and degree of the compulsion, the existence of any relevant safeguards in the procedures and the use to which any material so obtained is put (see, for example, *Tirado Ortiz and Lozano Martin v. Spain* (dec.), no. 43486/98, ECHR 1999-V; *Heaney and McGuinness*, cited above, §§ 51-55; and *Allan*, cited above, § 44).

The Court has consistently held, however, that the right not to incriminate oneself is primarily concerned with respecting the will of an accused person to remain silent. As commonly understood in the legal systems of the Contracting Parties to the Convention and

elsewhere, it does not extend to the use in criminal proceedings of material which may be obtained from the accused through the use of compulsory powers but which has an existence independent of the will of the suspect such as, *inter alia*, documents acquired pursuant to a warrant, breath, blood, urine, hair or voice samples and bodily tissue for the purpose of DNA testing (see *Saunders*, cited above, pp. 2064-65, § 69; *Choudhary v. the United Kingdom* (dec.), no. 40084/98, 4 May 1999; *J.B. v. Switzerland*, cited above, § 68; and *P.G. and J.H. v. the United Kingdom*, cited above, § 80)."

In applying these principles to the particular case, the Court concluded in para 103-123:

"In determining whether in the light of these principles the criminal proceedings against the applicant can be considered fair, the Court notes at the outset that the evidence secured through the administration of emetics to the applicant was not obtained "unlawfully" in breach of domestic law. It recalls in this connection that the national courts found that section 81a of the Code of Criminal Procedure permitted the impugned measure.

The Court held above that the applicant was subjected to inhuman and degrading treatment contrary to the substantive provisions of Article 3 when emetics were administered to him in order to force him to regurgitate the drugs he had swallowed. The evidence used in the criminal proceedings against the applicant was thus obtained as a direct result of a violation of one of the core rights guaranteed by the Convention.

As noted above, the use of evidence obtained in violation of Article 3 in criminal proceedings raises serious issues as to the fairness of such proceedings. The Court has not found in the instant case that the applicant was subjected to torture. In its view, incriminating evidence, whether in the form of a confession or real evidence, obtained as a result of acts of violence or brutality or other forms of treatment which can be characterised as torture – should never be relied on as proof of the victim's guilt, irrespective of its probative value. Any other conclusion would only serve to legitimate indirectly the sort of morally reprehensible conduct which the authors of Article 3 of the Convention sought to proscribe or, as it was so well put in the US Supreme Court's judgment in the *Rochin* case (see paragraph 50 above), to "afford brutality the cloak of law". It notes in this connection that Article 15 of the UN Convention against Torture and

Other Cruel, Inhuman or Degrading Treatment or Punishment provides that statements which are established to have been made as a result of torture shall not be used in evidence in proceedings against the victim of torture.

Although the treatment to which the applicant was subjected did not attract the special stigma reserved to acts of torture, it did attain in the circumstances the minimum level of severity covered by the ambit of the Article 3 prohibition. It cannot be excluded that on the facts of a particular case the use of evidence obtained by intentional acts of ill-treatment not amounting to torture will render the trial against the victim unfair irrespective of the seriousness of the offence allegedly committed, the weight attached to the evidence and the opportunities which the victim had to challenge its admission and use at his trial.

In the present case, the general question whether the use of evidence obtained by an act qualified as inhuman and degrading treatment automatically renders a trial unfair can be left open. The Court notes that, even if it was not the intention of the authorities to inflict pain and suffering on the applicant, the evidence was obtained by a measure which breached one of the core rights guaranteed by the Convention. Furthermore, it was common ground between the parties that the drugs obtained by the impugned measure were the decisive element in securing the applicant's conviction. It is true that, as was equally uncontested, the applicant was given the opportunity, which he took, of challenging the use of the drugs obtained by the impugned measure. However, any discretion on the part of the national courts to exclude that evidence could not come into play as they considered the administration of emetics to be authorised by the domestic law. Moreover, the public interest in securing the applicant's conviction cannot be considered to have been of such weight as to warrant allowing that evidence to be used at the trial. As noted above, the measure targeted a street dealer selling drugs on a relatively small scale who was finally given a six months' suspended prison sentence and probation.

In these circumstances, the Court finds that the use in evidence of the drugs obtained by the forcible administration of emetics to the applicant rendered his trial as a whole unfair.

This finding is of itself a sufficient basis on which to conclude that the applicant was denied a fair trial in breach of Article 6. However,

it considers it appropriate to address also the applicant's argument that the manner in which the evidence was obtained and the use made of it undermined his right not to incriminate himself. To that end, it will examine, firstly, whether this particular right was relevant to the circumstances of the applicant's case and, in the affirmative, whether it has been breached.

As regards the applicability of the principle against self-incrimination in this case, the Court observes that the use at the trial of "real" evidence – as opposed to a confession – obtained by forcible interference with the applicant's bodily integrity is at issue. It notes that the privilege against self-incrimination is commonly understood in the Contracting States and elsewhere to be primarily concerned with respecting the will of the defendant to remain silent in the face of questioning and not to be compelled to provide a statement.

However, the Court has on occasion given the principle of self-incrimination as protected under Article 6 § 1 a broader meaning so as to encompass cases in which coercion to hand over real evidence to the authorities was at issue. In the *Funke* case (cited above, p. 22, § 44), for instance, the Court found that an attempt to compel the applicant to disclose documents, and thereby to provide evidence of offences he had allegedly committed, violated his right not to incriminate himself. Similarly, in *J.B. v. Switzerland* (cited above, §§ 63-71) the Court considered the State authorities' attempt to compel the applicant to submit documents which might have provided information about tax evasion to be in breach of the principle against self-incrimination (in its broader sense).

In the *Saunders* case, the Court considered that the principle against self-incrimination did not cover "material which may be obtained from the accused through the use of compulsory powers but which has an existence independent of the will of the suspect such as, *inter alia*, documents acquired pursuant to a warrant, breath, blood and urine samples and bodily tissue for the purpose of DNA testing" (cited above, pp. 2064-65, § 69).

In the Court's view, the evidence at issue in the present case, namely, drugs hidden in the applicant's body which were obtained by the forcible administration of emetics, could be considered to fall into the category of material having an existence independent of the will of the suspect, the use

of which is generally not prohibited in criminal proceedings. However, there are several elements which distinguish the present case from the examples listed in *Saunders*. Firstly, as with the impugned measures in the *Funke* and *J.B. v. Switzerland* cases, the administration of emetics was used to retrieve real evidence in defiance of the applicant's will. Conversely, the bodily material listed in the *Saunders* case concerned material obtained by coercion for forensic examination with a view to detecting, for example, the presence of alcohol or drugs.

Secondly, the degree of force used in the present case differs significantly from the degree of compulsion normally required to obtain the types of material referred to in the *Saunders* case. To obtain such material, a defendant is requested to endure passively a minor interference with his physical integrity (for example when blood or hair samples or bodily tissue are taken). Even if the defendant's active participation is required, it can be seen from *Saunders* that this concerns material produced by the normal functioning of the body (such as, for example, breath, urine or voice samples). In contrast, compelling the applicant in the instant case to regurgitate the evidence sought required the forcible introduction of a tube through his nose and the administration of a substance so as to provoke a pathological reaction in his body. As noted earlier, this procedure was not without risk to the applicant's health.

Thirdly, the evidence in the present case was obtained by means of a procedure which violated Article 3. The procedure used in the applicant's case is in striking contrast to procedures for obtaining, for example, a breath test or a blood sample. Procedures of the latter kind do not, unless in exceptional circumstances, attain the minimum level of severity so as to contravene Article 3. Moreover, though constituting an interference with the suspect's right to respect for private life, these procedures are, in general, justified under Article 8 § 2 as being necessary for the prevention of criminal offences (see, *inter alia*, *Tirado Ortiz and Lozano Martin*, cited above).

Consequently, the principle against self-incrimination is applicable to the present proceedings.

In order to determine whether the applicant's right not to incriminate himself has been violated, the Court will have regard, in turn, to the following factors: the nature and degree of compulsion used to obtain the evidence; the weight of the public interest in the investigation and

punishment of the offence at issue; the existence of any relevant safeguards in the procedure; and the use to which any material so obtained is put.

As regards the nature and degree of compulsion used to obtain the evidence in the present case, the Court reiterates that forcing the applicant to regurgitate the drugs significantly interfered with his physical and mental integrity. The applicant had to be immobilised by four policemen, a tube was fed through his nose into his stomach and chemical substances were administered to him in order to force him to surrender up the evidence sought by means of a pathological reaction of his body. This treatment was found to be inhuman and degrading and therefore to violate Article 3.

As regards the weight of the public interest in using the evidence to secure the applicant's conviction, the Court observes that, as noted above, the impugned measure targeted a street dealer who was offering drugs for sale on a comparably small scale and was finally given a six months' suspended prison sentence and probation. In the circumstances of the instant case, the public interest in securing the applicant's conviction could not justify recourse to such a grave interference with his physical and mental integrity.

Turning to the existence of relevant safeguards in the procedure, the Court observes that section 81a of the Code of Criminal Procedure prescribed that bodily intrusions had to be carried out *lege artis* by a doctor in a hospital and only if there was no risk of damage to the defendant's health. Although it can be said that domestic law did in general provide for safeguards against arbitrary or improper use of the measure, the applicant, relying on his right to remain silent, refused to submit to a prior medical examination. He could only communicate in broken English, which meant that he was subjected to the procedure without a full examination of his physical aptitude to withstand it.

As to the use to which the evidence obtained was put, the Court reiterates that the drugs obtained following the administration of the emetics were the decisive evidence in his conviction for drug-trafficking. It is true that the applicant was given and took the opportunity to oppose the use at his trial of this evidence. However, and as noted above, any possible discretion the national courts may have had to exclude the evidence could not come

into play, as they considered the impugned treatment to be authorised by national law.

Having regard to the foregoing, the Court would also have been prepared to find that allowing the use at the applicant's trial of evidence obtained by the forcible administration of emetics infringed his right not to incriminate himself and therefore rendered his trial as a whole unfair.

Accordingly, there has been a violation of Article 6 § 1 of the Convention."

In para. 60-67 of its judgment of 28 June 2007 in the case of *Harutyunyan*, the Court elaborated on these Jalloh-principles, in a case in which the national courts had used as evidence a confession which was obtained under duress:

"The Court reiterates that its duty, according to Article 19 of the Convention, is to ensure the observance of the engagements undertaken by the Contracting States to the Convention. In particular, it is not its function to deal with errors of facts or of law allegedly committed by a national court unless and in so far as they may have infringed rights and freedoms protected by the Convention. While Article 6 guarantees the right to a fair hearing, it does not lay down any rules on the admissibility of evidence as such, which is primarily a matter for regulation under national law (see, among other authorities, *Schenk v. Switzerland*, cited above, § 45-46).

It is therefore not the role of the Court to determine, as a matter of principle, whether particular types of evidence – for example, evidence obtained unlawfully in terms of domestic law – may be admissible or, indeed, whether the applicant was guilty or not. The question which must be answered is whether the proceedings as a whole, including the way in which the evidence was obtained, were fair. This involves an examination of the "unlawfulness" in question and, where violation of another Convention right is concerned, the nature of the violation found (see, *inter alia*, *Khan v. the United Kingdom*, no. 35394/97, § 34, ECHR 2000-V, and *P.G. and J.H. v. the United Kingdom*, no. 44787/98, § 76, ECHR 2001-IX).

As regards, in particular, the examination of the nature of the Convention violation found the Court recalls that notably in the cases of *Khan* (cited above, §§ 25-28) and *P.G. and J.H. v. the United Kingdom* (cited above, §§ 37-38) it has found the use of covert listening devices to be in breach of Article 8, since recourse to such devices lacked a legal basis in domestic law and

the interferences with the applicants' right to respect for private life were not "in accordance with the law". Nonetheless, the admission in evidence of information obtained thereby did not in the circumstances of those cases conflict with the requirements of fairness guaranteed by Article 6 § 1.

The Court recalls, however, that different considerations apply to evidence recovered by a measure found to violate Article 3. An issue may arise under Article 6 § 1 in respect of evidence obtained in violation of Article 3 of the Convention, even if the admission of such evidence was not decisive in securing the conviction. The use of evidence obtained in violation of Article 3 in criminal proceedings raises serious issues as to the fairness of such proceedings. Incriminating evidence – whether in the form of a confession or real evidence – obtained as a result of acts of violence or brutality or other forms of treatment which can be characterised as torture should never be relied on as proof of the victim's guilt, irrespective of its probative value. Any other conclusion would only serve to legitimate indirectly the sort of morally reprehensible conduct which the authors of Article 3 of the Convention sought to proscribe or, in other words, to "afford brutality the cloak of law" (see, as the most recent authority, *Jalloh v. Germany* [GC], no. 54810/00, §§ 99 and 105, ECHR 2006-...).

In the present case, the Court notes that the applicant was coerced into making confession statements and witnesses T. and A. into making statements substantiating the applicant's guilt. This fact was confirmed by the domestic courts (see paragraphs 29-36 above) and is not in dispute between the parties. The Court is not called upon to decide in the present case whether the ill-treatment inflicted on the applicant and witnesses T. and A. for the purpose of coercing them into making the above statements amounted to torture within the meaning of Article 3, this question, in any event, falling outside the Court's competence *ratione temporis* (see paragraph 50 above). In this connection, however, the Court notes with approval the findings of the Avan and Nor Nork District Court of Yerevan in its judgment of 9 October 2002, condemning the actions of the police officers and evaluating them as having the attributes of torture (see paragraph 29 above). Furthermore, the Government in their submissions also characterised the ill-treatment inflicted on the applicant and witnesses T. and A. as torture (see paragraph 52 above). Even if the Court lacks competence *ratione temporis* to examine the circumstances surrounding the ill-treatment of the applicant and witnesses T. and A. within the context of Article 3, it is nevertheless not precluded from taking the above

evaluation into account for the purposes of deciding on compliance with the guarantees of Article 6. The Court further recalls its finding that the statements obtained as a result of such treatment were in fact used by the domestic courts as evidence in the criminal proceedings against the applicant (see paragraph 59 above). Moreover, this was done despite the fact that ill-treatment had already been established in parallel proceedings instituted against the police officers in question.

In this respect the Court notes that the domestic courts justified the use of the confession statements by the fact that the applicant confessed to the investigator and not to the police officers who had ill-treated him, the fact that witness T. confirmed his earlier confession at the confrontation of 11 August 1999 and the fact that both witnesses T. and A. made similar statements at the hearing of 26 October 1999 before the Syunik Regional Court. The Court, however, is not convinced by such justification. First of all, in the Court's opinion, where there is compelling evidence that a person has been subjected to ill-treatment, including physical violence and threats, the fact that this person confessed – or confirmed a coerced confession in his later statements – to an authority other than the one responsible for this ill-treatment should not automatically lead to the conclusion that such confession or later statements were not made as a consequence of the ill-treatment and the fear that a person may experience thereafter. Secondly, such justification clearly contradicted the finding made in the judgment convicting the police officers in question, according to which “by threatening to continue the ill-treatment the police officers forced the applicant to confess” (see paragraph 29 above). Finally, there was ample evidence before the domestic courts that witnesses T. and A. were being subjected to continued threats of further torture and retaliation throughout 1999 and early 2000 (see paragraphs 29 and 32-33 above). Furthermore, the fact that they were still performing military service could undoubtedly have added to their fear and affected their statements, which is confirmed by the fact that the nature of those statements essentially changed after demobilisation. Hence, the credibility of the statements made by them during that period should have been seriously questioned, and these statements should certainly not have been relied upon to justify the credibility of those made under torture.

In the light of the foregoing considerations, the Court concludes that, regardless of the impact the statements obtained under torture had on the outcome of the applicant's criminal proceedings, the use of such evidence

rendered his trial as a whole unfair. There has accordingly been a violation of Article 6 § 1 of the Convention.

Having reached this conclusion, the Court does not consider it necessary to address separately the applicant's argument that the use of his confession statements undermined his right not to incriminate himself."

In paragraph 69 of its judgment of 30 June 2008 in the case *Gäfgen*, the Court ruled that the absolute character of the prohibition of torture also applies in so-called 'ticking bomb-situations':

The Court would like to underline (..) that in view of the absolute prohibition of treatment contrary to Article 3 irrespective of the conduct of the person concerned and even in the event of a public emergency threatening the life of the nation – or, *a fortiori*, of an individual – the prohibition on ill-treatment of a person in order to extract information from him applies irrespective of the reasons for which the authorities wish to extract a statement, be it to save a person's life or to further criminal investigations.

INTERPRETATION AND CONCLUSIONS

Looking at the above-mentioned international texts, it is very clear that the public prosecutor may play an active role during the investigation of offences and that, where he/she does, the public prosecutor has to uphold human rights in playing this role. In general, public prosecutors should scrutinise the lawfulness of police investigations as well as monitoring the observance of human rights by the police.

As has been shown, a prosecutor's role during investigations can be divided into two parts. First, a prosecutor should, within his national competencies, guarantee that a person's privacy is not unlawfully violated during police investigations. Second, prosecutors should, within their competence under national law, ensure that torture and other ill-treatment are not used during police interrogations in order to compel a person to confess or for other reasons even in so-called 'ticking bomb-situations'. Furthermore, prosecutors should never use evidence obtained by the use of torture or other cruel, inhuman or degrading treatment. In this light the rule of 'nemo tenetur' is also of importance: during police interrogations one has the right to remain silent and not to incriminate oneself.

HUMAN RIGHTS DURING ARREST AND PRE-TRIAL DETENTION

RELEVANT TEXTS AT THE U.N. LEVEL

The *Universal Declaration on Human Rights* contains several principles which deal with arrest and pre-trial detention. Article 3 of the *Universal Declaration* states:

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

The prohibition of torture and other inhuman or degrading treatment is mentioned in article 5:

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

Article 9 states on arrest and detention:

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

The same attitude towards human rights during arrest and pre-trial detention can be seen in the *International Covenant on Civil and Political Rights*. Article 7 prohibits torture and other inhuman or degrading treatment:

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

With respect to the treatment of persons in pre-trial detention article 10 *ICCPR* states:

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

Article 10 para.2 (a) then proceeds:

‘Accused persons shall, save in exceptional circumstances, be segregated from convicted persons and shall be subject to separate treatment appropriate to their status as unconvicted persons;’

Article 14 para.3 (g) *ICCPR* mentions the rule of ‘*nemo tenetur*’ (the right not to be compelled to testify against oneself):

‘Everyone charged with a criminal offence shall have the right (..) Not to be compelled to testify against himself or to confess guilt’.

Convention against Torture

As people deprived of their liberty are in a vulnerable position, the absence of torture and ill-treatment is the guiding principle behind the standards on the treatment of detainees. Detainees are sometimes subjected to torture and ill-treatment in order to compel them to confess and to divulge information. Therefore, evidence obtained in such a manner should be excluded and allegations of torture must be vigorously investigated.

On this point, the 1984 *UN. Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* contains important provisions for the public prosecutor to take into account. The most relevant is Article 2 which states:

1. ‘Each State Party shall take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction.
2. No exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture.
3. An order from a superior officer or a public authority may not be invoked as a justification of torture’.

Article 4 elaborates on this:

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

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

Article 15 requires the exclusion of evidence obtained by torture and ill-treatment:

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

RELEVANT TEXTS AT THE REGIONAL LEVEL

Europe

Article 3 of the *European Convention for the Protection of Human Rights and Fundamental Freedoms* prohibits torture and other inhuman or degrading treatment:

‘No one shall be subjected to torture or to inhuman or degrading treatment or punishment’.

It is not surprising that at the level of the European Union the same attitude towards torture can be found. Article 4 of the *Charter of Fundamental Rights of the European Union* states very clearly:

‘No one shall be subjected to torture or to inhuman or degrading treatment or punishment’.

Africa

Human rights during arrest and pre-trial detention are also mentioned in the *African Charter on Human and Peoples’ Rights*. The prohibition of torture laid down in article 5 is relevant here:

‘Every individual shall have the right to the respect of the dignity inherent in a human being and to the recognition of his legal status. All forms of exploitation and degradation of man particularly slavery, slave trade, torture, cruel, inhuman or degrading punishment and treatment shall be prohibited’.

Arab world

The *Cairo Declaration on Human Rights in Islam* guarantees the safety from bodily harm and the state's duty to safeguard it in article 2 (d):

'Safety from bodily harm is a guaranteed right. It is the duty of the state to safeguard it, and it is prohibited to breach it without a Shari'ah-prescribed reason'.

Article 20, which prohibits the arbitrary arrest and cruel treatment of detained persons, is of utmost importance. This article prohibits derogation of these provisions even in emergency situations. It reads:

'It is not permitted without legitimate reason to arrest an individual, or restrict his freedom, to exile or to punish him. It is not permitted to subject him to physical or psychological torture or to any form of maltreatment, cruelty or indignity. Nor is it permitted to subject an individual to medical or scientific experiments without his consent or at the risk of his health or of his life. Nor is it permitted to promulgate emergency laws that would provide executive authority for such actions'.

The Americas

Article 5 (Right to Human Treatment) of the *American Convention on Human Rights* contains provisions which the public prosecutor should take into account during arrest and pre-trial detention. The relevant provisions read:

1. 'Every person has the right to have his physical, mental, and moral integrity respected.
2. No one shall be subjected to torture or to cruel, inhuman, or degrading punishment or treatment. All persons deprived of their liberty shall be treated with respect for the inherent dignity of the human person. (..)
4. Accused persons shall, save in exceptional circumstances, be segregated from convicted persons, and shall be subject to separate treatment appropriate to their status as unconvicted persons'.

SOFT INTERNATIONAL LAW

U.N. level

The 1955 *U.N. Standard Minimum Rules for the Treatment of Prisoners* contain the presumption of innocence in rule 84 (2):

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

Rule 85 (1) gives an important consequence of this presumption:

‘Untried prisoners shall be kept separate from convicted prisoners’.

In the 1979 *U.N. Code of Conduct for Law Enforcement Officials* several provisions have been laid down on the conduct of law enforcement officials towards persons for whom they are responsible. The document contains articles with comments. Article 1 on the general responsibility of law enforcement officials states:

‘Law enforcement officials shall at all times fulfill the duty imposed upon them by law, by serving the community and by protecting all persons against illegal acts, consistent with the high degree of responsibility required by their profession’.

The commentary on Article 1 explains what the term “law enforcement officials” includes:

‘The term “law enforcement officials”, includes all officers of the law, whether appointed or elected, who exercise police powers, especially the powers of arrest or detention’.

Clearly, public prosecutors fall under this definition.

Article 2 mentions the duty for law enforcement officials to uphold human rights:

‘In the performance of their duty, law enforcement officials shall respect and protect human dignity and maintain and uphold the human rights of all persons’.

The prohibition on torture and the prohibition on derogation from that in whatever circumstances is mentioned in Article 5:

‘No law enforcement official may inflict, instigate or tolerate any act of torture or other cruel, inhuman or degrading treatment or punishment, nor may any law enforcement official invoke superior orders or exceptional circumstances such as a state of war or a threat of war, a threat to national security, internal political instability or any other public emergency as a justification of torture or other cruel, inhuman or degrading treatment or punishment’.

The commentary on Article 5 then goes more deeply into what constitutes torture and ill-treatment:

- a) ‘This prohibition derives from the Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, adopted by the General Assembly, according to which: “[Such an act is] an offence to human dignity and shall be condemned as a denial of the purposes of the Charter of the United Nations and as a violation of the human rights and fundamental freedoms proclaimed in the Universal Declaration of Human Rights [and other international human rights instruments].”
- b) The Declaration defines torture as follows:

“... torture means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted by or at the instigation of a public official on a person for such purposes as obtaining from him or a third person information or confession, punishing him for an act he has committed or is suspected of having committed, or intimidating him or other persons. It does not include pain or suffering arising only from, inherent in or incidental to, lawful sanctions to the extent consistent with the Standard Minimum Rules for the Treatment of Prisoners.”
- c) The term “cruel, inhuman or degrading treatment or punishment” has not been defined by the General Assembly but should be interpreted so as to extend the widest possible protection against abuses, whether physical or mental’.

Article 6 states on the protection of the health of persons in the custody of law enforcement officials:

‘Law enforcement officials shall ensure the full protection of the health of persons in their custody and, in particular, shall take immediate action to secure medical attention whenever required’.

The commentary then expands on several aspects of this article:

- a) “Medical attention”, which refers to services rendered by any medical personnel, including certified medical practitioners and paramedics, shall be secured when needed or requested.
- b) While the medical personnel are likely to be attached to the law enforcement operation, law enforcement officials must take into account the judgment of such personnel when they recommend providing the person in custody with appropriate treatment through, or in consultation with, medical personnel from outside the law enforcement operation.
- c) It is understood that law enforcement officials shall also secure medical attention for victims of violations of law or of accidents occurring in the course of violations of law’.

Finally, the *Code* contains a very important provision relating to the obligation for law enforcement officials to report violations of human rights. Article 8 reads:

‘Law enforcement officials shall respect the law and the present Code. They shall also, to the best of their capability, prevent and rigorously oppose any violations of them.

Law enforcement officials who have reason to believe that a violation of the present Code has occurred or is about to occur shall report the matter to their superior authorities and, where necessary, to other appropriate authorities or organs vested with reviewing or remedial power’.

The U.N. Human Rights Committee in its 1992 *General Comment 20* has made some very important comments with respect to Article 7 *ICCPR*, providing more detailed provisions on the required treatment of detained persons. The *Comment* reads:

- 1. ‘This general comment replaces general comment 7 (the sixteenth session, 1982) reflecting and further developing it.

2. The aim of the provisions of article 7 of the International Covenant on Civil and Political Rights is to protect both the dignity and the physical and mental integrity of the individual. It is the duty of the State party to afford everyone protection through legislative and other measures as may be necessary against the acts prohibited by article 7, whether inflicted by people acting in their official capacity, outside their official capacity or in a private capacity. The prohibition in article 7 is complemented by the positive requirements of article 10, paragraph 1, of the Covenant, which stipulates that "All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person".
3. The text of article 7 allows of no limitation. The Committee also reaffirms that, even in situations of public emergency such as those referred to in article 4 of the Covenant, no derogation from the provision of article 7 is allowed and its provisions must remain in force. The Committee likewise observes that no justification or extenuating circumstances may be invoked to excuse a violation of article 7 for any reasons, including those based on an order from a superior officer or public authority.
4. The Covenant does not contain any definition of the concepts covered by article 7, nor does the Committee consider it necessary to draw up a list of prohibited acts or to establish sharp distinctions between the different kinds of punishment or treatment; the distinctions depend on the nature, purpose and severity of the treatment applied.
5. The prohibition in article 7 relates not only to acts that cause physical pain but also to acts that cause mental suffering to the victim. In the Committee's view, moreover, the prohibition must extend to corporal punishment, including excessive chastisement ordered as punishment for a crime or as an educative or disciplinary measure. It is appropriate to emphasize in this regard that article 7 protects, in particular, children, pupils and patients in teaching and medical institutions.
6. The Committee notes that prolonged solitary confinement of the detained or imprisoned person may amount to acts prohibited by article 7. As the Committee has stated in its general comment No. 6 (16), article 6 of the Covenant refers generally to abolition of the death penalty in terms that strongly suggest that abolition is desirable. Moreover, when the death penalty is applied by a State party for the

most serious crimes, it must not only be strictly limited in accordance with article 6 but it must be carried out in such a way as to cause the least possible physical and mental suffering.

7. Article 7 expressly prohibits medical or scientific experimentation without the free consent of the person concerned. The Committee notes that the reports of States parties generally contain little information on this point. More attention should be given to the need and means to ensure observance of this provision. The Committee also observes that special protection in regard to such experiments is necessary in the case of persons not capable of giving valid consent, and in particular those under any form of detention or imprisonment. Such persons should not be subjected to any medical or scientific experimentation that may be detrimental to their health.
8. In the view of the Committee, States parties must not expose individuals to the danger of torture or cruel, inhuman or degrading treatment or punishment upon return to another country by way of their extradition, expulsion or refoulement. States parties should indicate in their reports what measures they have adopted to that end.
9. The Committee should be informed how States parties disseminate, to the population at large, relevant information concerning the ban on torture and the treatment prohibited by article 7. Enforcement personnel, medical personnel, police officers and any other persons involved in the custody or treatment of any individual subjected to any form of arrest, detention or imprisonment must receive appropriate instruction and training. States parties should inform the Committee of the instruction and training given and the way in which the prohibition of article 7 forms an integral part of the operational rules and ethical standards to be followed by such persons.
10. In addition to describing steps to provide the general protection against acts prohibited under article 7 to which anyone is entitled, the State party should provide detailed information on safeguards for the special protection of particularly vulnerable persons. It should be noted that keeping under systematic review interrogation rules, instructions, methods and practices as well as arrangements for the custody and treatment of persons subjected to any form of arrest, detention or imprisonment is an effective means of preventing cases of torture and ill-treatment. To guarantee the effective protection of detained

persons, provisions should be made for detainees to be held in places officially recognized as places of detention and for their names and places of detention, as well as for the names of persons responsible for their detention, to be kept in registers readily available and accessible to those concerned, including relatives and friends. To the same effect, the time and place of all interrogations should be recorded, together with the names of all those present and this information should also be available for purposes of judicial or administrative proceedings. Provisions should also be made against incommunicado detention. In that connection, States parties should ensure that any places of detention be free from any equipment liable to be used for inflicting torture or ill-treatment. The protection of the detainee also requires that prompt and regular access be given to doctors and lawyers and, under appropriate supervision when the investigation so requires, to family members.

11. It is important for the discouragement of violations under article 7 that the law must prohibit the use of admissibility in judicial proceedings of statements or confessions obtained through torture or other prohibited treatment.
12. States parties should indicate when presenting their reports the provisions of their criminal law which penalize torture and cruel, inhuman and degrading treatment or punishment, specifying the penalties applicable to such acts, whether committed by public officials or other persons acting on behalf of the State, or by private persons. Those who violate article 7, whether by encouraging, ordering, tolerating or perpetrating prohibited acts, must be held responsible. Consequently, those who have refused to obey orders must not be punished or subjected to any adverse treatment.
13. Article 7 should be read in conjunction with article 2, paragraph 3, of the Covenant. In their reports, States parties should indicate how their legal system effectively guarantees the immediate termination of all the acts prohibited by article 7 as well as appropriate redress. The right to lodge complaints against maltreatment prohibited by article 7 must be recognized in the domestic law. Complaints must be investigated promptly and impartially by competent authorities so as to make the remedy effective. The reports of States parties should provide specific information on the remedies available to victims of maltreatment and

the procedure that complainants must follow, and statistics on the number of complaints and how they have been dealt with.

14. The Committee has noted that some States have granted amnesty in respect of acts of torture. Amnesties are generally incompatible with the duty of States to investigate such acts; to guarantee freedom from such acts within their jurisdiction; and to ensure that they do not occur in the future. States may not deprive individuals of the right to an effective remedy, including compensation and such full rehabilitation as may be possible’.

The Human Rights Committee has also provided for comments on Article 10 ICCPR. Specifically in relation to Article 7, which prohibits torture and other inhuman or other inhuman or degrading treatment, the 1994 *General Comment 21* provides more detailed provisions on the treatment of persons deprived of their liberty. The following paragraphs are relevant:

2. ‘Article 10, paragraph 1, of the International Covenant on Civil and Political Rights applies to any one deprived of liberty under the laws and authority of the State who is held in prisons, hospitals - particularly psychiatric hospitals - detention camps or correctional institutions or elsewhere. States parties should ensure that the principle stipulated therein is observed in all institutions and establishments within their jurisdiction where persons are being held.
3. Article 10, paragraph 1, imposes on States parties a positive obligation towards persons who are particularly vulnerable because of their status as persons deprived of liberty, and complements for them the ban on torture or other cruel, inhuman or degrading treatment or punishment contained in article 7 of the Covenant. Thus, not only may persons deprived of their liberty not be subjected to treatment that is contrary to article 7, including medical or scientific experimentation, but neither may they be subjected to any hardship or constraint other than that resulting from the deprivation of liberty; respect for the dignity of such persons must be guaranteed under the same conditions as for that of free persons. Persons deprived of their liberty enjoy all the rights set forth in the Covenant, subject to the restrictions that are unavoidable in a closed environment.
4. Treating all persons deprived of their liberty with humanity and with respect for their dignity is a fundamental and universally applicable

rule. Consequently, the application of this rule, as a minimum, cannot be dependent on the material resources available in the State party. This rule must be applied without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

5. States parties are invited to indicate in their reports to what extent they are applying the relevant United Nations standards applicable to the treatment of prisoners: the Standard Minimum Rules for the Treatment of Prisoners (1957), the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment (1988), the Code of Conduct for Law Enforcement Officials (1978) and the Principles of Medical Ethics relevant to the Role of Health Personnel, particularly Physicians, in the Protection of Prisoners and Detainees against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1982). (..)

Similar provisions can be found for health personnel responsible for prisoners and detainees in the 1982 U.N. *Principles of Medical Ethics Relevant to the Role of Health Personnel, Particularly Physicians, in the Protection of Prisoners and Detainees against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*. The following principles are most relevant during arrest and pre-trial detention:

‘Principle 1

Health personnel, particularly physicians, charged with the medical care of prisoners and detainees have a duty to provide them with protection of their physical and mental health and treatment of disease of the same quality and standard as is afforded to those who are not imprisoned or detained.

Principle 2

It is a gross contravention of medical ethics, as well as an offence under applicable international instruments, for health personnel, particularly physicians, to engage, actively or passively, in acts which constitute participation in, complicity in, incitement to or attempts to commit torture or other cruel, inhuman or degrading treatment or punishment’.

The role which health personnel can play during interrogations is considered in Principle 4. Public prosecutors should certainly take this provision into account:

'It is a contravention of medical ethics for health personnel, particularly physicians:

- a. To apply their knowledge and skills in order to assist in the interrogation of prisoners and detainees in a manner that may adversely affect the physical or mental health or condition of such prisoners or detainees and which is not in accordance with the relevant international instruments;
- b. To certify, or to participate in the certification of, the fitness of prisoners or detainees for any form of treatment or punishment that may adversely affect their physical or mental health and which is not in accordance with the relevant international instruments, or to participate in any way in the infliction of any such treatment or punishment which is not in accordance with the relevant international instruments'.

Another important U.N. document here is the 1990 *Guidelines on The Role of Prosecutors*. This document requires prosecutors to take appropriate action against public officials guilty of human rights violations. Paragraph 15 reads:

'Prosecutors shall give due attention to the prosecution of crimes committed by public officials, particularly corruption, abuse of power, grave violations of human rights and other crimes recognized by international law and, where authorized by law or consistent with local practice, the investigation of such offences'.

Paragraph 16 then proceeds with the prosecutor's duty to exclude evidence obtained through unlawful methods and to take the necessary steps against those responsible for using such methods:

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

Finally, at the U.N. level the 1992 *Declaration on the Protection of All Persons from Enforced Disappearances* contains relevant provisions on the places of detention. Articles 9 and 10 read:

‘Article 9

1. The right to a prompt and effective judicial remedy as a means of determining the whereabouts or state of health of persons deprived of their liberty and/or identifying the authority ordering or carrying out the deprivation of liberty is required to prevent enforced disappearances under all circumstances, including those referred to in article 7 above.
2. 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.
3. Any other competent authority entitled under the law of the State or by any international legal instrument to which the State is a party may also have access to such places.

Article 10

1. Any person deprived of liberty shall be held in an officially recognized place of detention and, in conformity with national law, be brought before a judicial authority promptly after detention.
2. Accurate information on the detention of such persons and their place or places of detention, including transfers, shall be made promptly available to their family members, their counsel or to any other persons having a legitimate interest in the information unless a wish to the contrary has been manifested by the persons concerned.
3. An official up-to-date register of all persons deprived of their liberty shall be maintained in every place of detention. Additionally, each State shall take steps to maintain similar centralized registers. The information contained in these registers shall be made available to the persons mentioned in the preceding paragraph, to any judicial or other competent and independent national authority and to any other competent authority entitled under the law of the State concerned or

any international legal instrument to which a State concerned is a party, seeking to trace the whereabouts of a detained person’.

Europe

The 2006 (revised) *European Prison Rules (Recommendation Rec (2006) 2* of the Committee of Ministers of the Council of Europe to member states) make very clear statements on the required treatment of prisoners. The nine basic principles are:

1. All persons deprived of their liberty shall be treated with respect for their human rights.
2. Persons deprived of their liberty retain all rights that are not lawfully taken away by the decision sentencing them or remanding them in custody.
3. Restrictions placed on persons deprived of their liberty shall be the minimum necessary and proportionate to the legitimate objective for which they are imposed.
4. Prison conditions that infringe prisoners’ human rights are not justified by lack of resources.
5. Life in prison shall approximate as closely as possible the positive aspects of life in the community.
6. All detention shall be managed so as to facilitate the reintegration into free society of persons who have been deprived of their liberty.
7. Co-operation with outside social services and as far as possible the involvement of civil society in prison life shall be encouraged.
8. Prison staff carry out an important public service and their recruitment, training and conditions of work shall enable them to maintain high standards in their care of prisoners.
9. All prisons shall be subject to regular government inspection and independent monitoring.

As far as remand in custody is concerned, the Committee of Ministers of the Council of Europe adopted the following *Recommendation (Rec (2006) 13* to member states):

Rules on the use of remand in custody, the conditions in which it takes place and the provision of safeguards against abuse

Preamble

The present rules are intended to:

- a) set strict limits on the use of remand in custody;
- b) encourage the use of alternative measures wherever possible;
- c) require judicial authority for the imposition and continued use of remand in custody and alternative measures;
- d) ensure that persons remanded in custody are held in conditions and subject to a regime appropriate to their legal status, which is based on the presumption of innocence;
- e) require the provision of suitable facilities and appropriate management for the holding of persons remanded in custody;
- f) ensure the establishment of effective safeguards against possible breaches of the rules.

The present rules reflect the human rights and fundamental freedoms of all persons but particularly the prohibition of torture and inhuman or degrading treatment, the right to a fair trial and the rights to liberty and security and to respect for private and family life.

The present rules are applicable to all persons suspected of having committed an offence but include particular requirements for juveniles and other especially vulnerable persons.

I. Definitions and general principles

Definitions

1. [1] 'Remand in custody' is any period of detention of a suspected offender ordered by a judicial authority and prior to conviction. It also includes any period of detention pursuant to rules relating to international judicial co-operation and extradition, subject to their specific requirements. It does not include the initial deprivation of liberty by a police or a law enforcement officer (or by anyone else so authorised to act) for the purposes of questioning.

[2] 'Remand in custody' also includes any period of detention after conviction whenever persons awaiting either sentence or the confirmation of conviction or sentence continue to be treated as unconvicted persons.

[3] 'Remand prisoners' are persons who have been remanded in custody and who are not already serving a prison sentence or are detained under any other instrument.

- 2 [1] 'Alternative measures' to remand in custody may include, for example: undertakings to appear before a judicial authority as and when required, not to interfere with the course of justice and not to engage in particular conduct, including that involved in a profession or particular employment; requirements to report on a daily or periodic basis to a judicial authority, the police or other authority; requirements to accept supervision by an agency appointed by the judicial authority; requirements to submit to electronic monitoring; requirements to reside at a specified address, with or without conditions as to the hours to be spent there; requirements not to leave or enter specified places or districts without authorisation; requirements not to meet specified persons without authorisation; requirements to surrender passports or other identification papers; and requirements to provide or secure financial or other forms of guarantees as to conduct pending trial.

[2] Wherever practicable, alternative measures shall be applied in the state where a suspected offender is normally resident if this is not the state in which the offence was allegedly committed.

General principles

3. [1] In view of both the presumption of innocence and the presumption in favour of liberty, the remand in custody of persons suspected of an offence shall be the exception rather than the norm.

[2] There shall not be a mandatory requirement that persons suspected of an offence (or particular classes of such persons) be remanded in custody.

[3] In individual cases, remand in custody shall only be used when strictly necessary and as a measure of last resort; it shall not be used for punitive reasons.

4. In order to avoid inappropriate use of remand in custody the widest possible range of alternative, less restrictive measures relating to the conduct of a suspected offender shall be made available.

5. Remand prisoners shall be subject to conditions appropriate to their legal status; this entails the absence of restrictions other than those

necessary for the administration of justice, the security of the institution, the safety of prisoners and staff and the protection of the rights of others and in particular the fulfilment of the requirements of the European Prison Rules and the other rules set out in Part III of the present text.

II. The use of remand in custody

Justification

6. Remand in custody shall generally be available only in respect of persons suspected of committing offences that are imprisonable.

7. A person may only be remanded in custody where all of the following four conditions are satisfied:

- a. there is reasonable suspicion that he or she committed an offence; and
- b. there are substantial reasons for believing that, if released, he or she would either (i) abscond, or (ii) commit a serious offence, or (iii) interfere with the course of justice, or (iv) pose a serious threat to public order; and
- c. there is no possibility of using alternative measures to address the concerns referred to in b.; and
- d. this is a step taken as part of the criminal justice process.

8. [1] In order to establish whether the concerns referred to in Rule 7b. exist, or continue to do so, as well as whether they could be satisfactorily allayed through the use of alternative measures, objective criteria shall be applied by the judicial authorities responsible for determining whether suspected offenders shall be remanded in custody or, where this has already happened, whether such remand shall be extended.

[2] The burden of establishing that a substantial risk exists and that it cannot be allayed shall lie on the prosecution or investigating judge.

9. [1] The determination of any risk shall be based on the individual circumstances of the case, but particular consideration shall be given to:

- a. the nature and seriousness of the alleged offence;
- b. the penalty likely to be incurred in the event of conviction;
- c. the age, health, character, antecedents and personal and social circumstances of the person concerned, and in particular his or her community ties; and
- d. the conduct of the person concerned, especially how he or she has fulfilled any obligations that may have been imposed on him or her in the course of previous criminal proceedings.

[2] The fact that the person concerned is not a national of, or has no other links with, the state where the offence is supposed to have been

committed shall not in itself be sufficient to conclude that there is a risk of flight.

10. Wherever possible remand in custody should be avoided in the case of suspected offenders who have the primary responsibility for the care of infants.

11. In deciding whether remand in custody shall be continued, it shall be borne in mind that particular evidence which may once have previously made the use of such a measure seem appropriate, or the use of alternative measures seem inappropriate, may be rendered less compelling with the passage of time.

12. A breach of alternative measures may be subject to a sanction but shall not automatically justify subjecting someone to remand in custody. In such cases the replacement of alternative measures by remand in custody shall require specific motivation.

Judicial authorisation

13. The responsibility for remanding someone in custody, authorising its continuation and imposing alternative measures shall be discharged by a judicial authority.

14. [1] After his or her initial deprivation of liberty by a law enforcement officer (or by anyone else so authorised to act), someone suspected of having committed an offence shall be brought promptly before a judicial authority for the purpose of determining whether or not this deprivation of liberty is justified, whether or not it requires prolongation or whether or not the suspected offender shall be remanded in custody or subjected to alternative measures.

[2] The interval between the initial deprivation of liberty and this appearance before such an authority should preferably be no more than forty-eight hours and in many cases a much shorter interval may be sufficient.

15. The existence of an emergency in accordance with Article 15 of the European Convention on Human Rights shall not lead to an interval greater than seven days between the initial deprivation of liberty and the appearance before a judicial authority with a view to remanding in custody unless it is absolutely impossible to hold a hearing.

16. The judicial authority responsible for remanding someone in custody or authorising its continuation, as well as for imposing alternative measures, shall hear and determine the matter without delay.

17. [1] The existence of a continued justification for remanding someone in custody shall be periodically reviewed by a judicial authority, which shall

order the release of the suspected offender where it finds that one or more of the conditions in Rules 6 and 7 a, b, c and d are no longer fulfilled.

[2] The interval between reviews shall normally be no longer than a month unless the person concerned has the right to submit and have examined, at any time, an application for release.

[3] The responsibility for ensuring that such reviews take place shall rest with the prosecuting authority or investigating judicial authority, and in the event of no application being made by the prosecuting authority or investigating judicial authority to continue a remand in custody, any person subject to such a measure shall automatically be released.

18. Any person remanded in custody, as well as anyone subjected to an extension of such remand or to alternative measures, shall have a right of appeal against such a ruling and shall be informed of this right when this ruling is made.

19. [1] A remand prisoner shall have a separate right to a speedy challenge before a court with respect to the lawfulness of his or her detention.

[2] This right may be satisfied through the periodic review of remand in custody where this allows all the issues relevant to such a challenge to be raised.

20. The existence of an emergency in accordance with Article 15 of the European Convention on Human Rights shall not affect the right of a remand prisoner to challenge the lawfulness of his or her detention.

21. [1] Every ruling by a judicial authority to remand someone in custody, to continue such remand or to impose alternative measures shall be reasoned and the person affected shall be provided with a copy of the reasons.

[2] Only in exceptional circumstances shall reasons not be notified on the same day as the ruling.

Duration

22. [1] Remand in custody shall only ever be continued so long as all the conditions in Rules 6 and 7 are fulfilled.

[2] In any case its duration shall not exceed, nor normally be disproportionate to, the penalty that may be imposed for the offence concerned.

[3] In no case shall remand in custody breach the right of a detained person to be tried within a reasonable time.

23. Any specification of a maximum period of remand in custody shall not lead to a failure to consider at regular intervals the actual need for its continuation in the particular circumstances of a given case.

24. [1] It is the responsibility of the prosecuting authority or the investigating judicial authority to act with due diligence in the conduct of an investigation and to ensure that the existence of matters supporting remand in custody is kept under continuous review.
[2] Priority shall be given to cases involving a person who has been remanded in custody.

Assistance by a lawyer, presence of the person concerned and interpretation

25. [1] The intention to seek remand in custody and the reasons for so doing shall be promptly communicated to the person concerned in a language which he or she understands.
[2] The person whose remand in custody will be sought shall have the right to assistance from a lawyer in the remand proceedings and to have an adequate opportunity to consult with his or her lawyer in order to prepare their defence. The person concerned shall be advised of these rights in sufficient time and in a language which he or she understands so that their exercise is practicable.
[3] Such assistance from a lawyer shall be provided at public expense where the person whose remand in custody is being sought cannot afford it.
[4] The existence of an emergency in accordance with Article 15 of the European Convention on Human Rights should not normally affect the right of access to and consultation with a lawyer in the context of remand proceedings.
26. A person whose remand in custody is being sought and his or her lawyer shall have access to documentation relevant to such a decision in good time.
27. [1] A person who is the national of another country and whose remand in custody is being sought shall have the right to have the consul of this country notified of this possibility in sufficient time to obtain advice and assistance from him or her.
[2] This right should, wherever possible, also be extended to persons holding the nationality both of the country where their remand in custody is being sought and of another country.
28. A person whose remand in custody is being sought shall have the right to appear at remand proceedings. Under certain conditions this requirement may be satisfied through the use of appropriate video-links.
29. Adequate interpretation services before the judicial authority considering whether to remand someone in custody shall be made available at public

expense, where the person concerned does not understand and speak the language normally used in those proceedings.

30. Persons appearing at remand proceedings shall be given an opportunity to wash and, in the case of male prisoners, to shave unless there is a risk of this resulting in a fundamental alteration of their normal appearance.

31. The foregoing Rules in this section shall also apply to the continuation of the remand in custody.

Informing the family

32. [1] A person whose remand in custody is being sought (or sought to be continued) shall have the right to have the members of his or her family informed in good time, about the date and the place of remand proceedings unless this would result in a serious risk of prejudice for the administration of justice or for national security.

[2] The decision in any event about contacting family members shall be a matter for the person whose remand in custody is being sought (or sought to be prolonged) unless he or she is not legally competent to make such a decision or there is some other compelling justification.

Deduction of pre-conviction custody from sentence

33. [1] The period of remand in custody prior to conviction, wherever spent, shall be deducted from the length of any sentence of imprisonment subsequently imposed.

[2] Any period of remand in custody could be taken into account in establishing the penalty imposed where it is not one of imprisonment.

[3] The nature and duration of alternative measures previously imposed could equally be taken into account in determining the sentence.

Compensation

34. [1] Consideration shall be given to the provision of compensation to persons remanded in custody who are not subsequently convicted of the offence in respect of which they were so remanded; this compensation might cover loss of income, loss of opportunities and moral damage.

[2] Compensation shall not be required where it is established that either the person remanded had, by his or her behaviour, actively contributed to the reasonableness of the suspicion that he or she had committed an offence or he or she had deliberately obstructed the investigation of the alleged offence.

III. Conditions of remand in custody

General

35. The conditions of remand in custody shall, subject to the Rules set out below, be governed by the European Prison Rules.

Absence from remand institution

36. [1] A remand prisoner shall only leave the remand institution for further investigation if this is authorised by a judge or prosecutor or with the express consent of the remand prisoner and for a limited period.

[2] On return to the remand institution the remand prisoner shall undergo, at his or her request, a thorough physical examination by a medical doctor or, exceptionally, by a qualified nurse as soon as possible.

Continuing medical treatment

37. [1] Arrangements shall be made to enable remand prisoners to continue with necessary medical or dental treatment that they were receiving before they were detained, if so decided by the remand institution's doctor or dentist where possible in consultation with the remand prisoner's doctor or dentist.

[2] Remand prisoners shall be given the opportunity to consult and be treated by their own doctor or dentist if a medical or dental necessity so requires.

[3] Reasons shall be given if an application by a remand prisoner to consult his or her own doctor or dentist is refused.

[4] Such costs as are incurred shall not be the responsibility of the administration of the remand institution.

Correspondence

38. There shall normally be no restriction on the number of letters sent and received by remand prisoners.

Voting

39. Remand prisoners shall be able to vote in public elections and referendums that occur during the period of remand in custody.

Education

40. Remand in custody shall not unduly disrupt the education of children or young persons or unduly interfere with access to more advanced education.

Discipline and punishment

41. No disciplinary punishment imposed on a remand prisoner shall have the effect of extending the length of the remand in custody or interfering with the preparation of his or her defence.

42. The punishment of solitary confinement shall not affect the access to a lawyer and shall allow minimum contact with family outside. It should not affect the conditions of a remand prisoner's detention in respect of bedding, physical exercise, hygiene, access to reading material and approved religious representatives.

Staff

43. Staff who work in a remand institution with remand prisoners shall be selected and trained so as to be able to take full account of the particular status and needs of remand prisoners.

Complaints procedures

44. [1] Remand prisoners shall have avenues of complaint open to them, both within and outside the remand institution, and be entitled to confidential access to an appropriate authority mandated to address their grievances.

[2] These avenues shall be in addition to any right to bring legal proceedings.

[3] Complaints shall be dealt with as speedily as possible.

IAP

The IAP *Standards of Professional Responsibility and Statement of the Essential Duties and Rights of Prosecutors* sets out some relevant provisions which the public prosecutor should take into account during the pre-trial stage. The obligation to refuse the use of evidence obtained through torture can be found in Paragraph 4 on the role of the prosecutor in criminal proceedings;

'Prosecutors shall(..),

examine proposed evidence to ascertain if it has been lawfully or constitutionally obtained;

refuse to use evidence reasonably believed to have been obtained through recourse to unlawful methods which constitute a grave violation of the suspect's human rights and particularly methods which constitute torture or cruel treatment;'

The *IAP Standards* then state very clearly:

'Prosecutors shall(..), seek to ensure that appropriate action is taken against those responsible for using such methods;'

EUROPEAN PRACTICE

Article 5 (1) of the *European Convention* states that a person may be deprived of his liberty only in certain circumstances. Namely "in accordance with a procedure prescribed by law" where there is a "reasonable suspicion" that a person has committed a crime. In the *Fox, Campbell and Hartley* case (Judgment of 30 August 1990) the Court ruled on what constitutes a reasonable suspicion. Paragraph 32 of the judgment reads:

'The "reasonableness" of the suspicion on which an arrest must be based forms an essential part of the safeguard against arbitrary arrest and detention which is laid down in Article 5 § 1 (c) (art. 5-1-c). The Court agrees with the Commission and the Government that having a "reasonable suspicion" presupposes the existence of facts or information which would satisfy an objective observer that the person concerned may have committed the offence. What may be regarded as "reasonable" will however depend upon all the circumstances'.

INTERPRETATION AND CONCLUSIONS

Arrest begins the process of detention and should only occur when authorized by law. All over the world people are arrested and detained on suspicion that they have committed a criminal offence. These people are sometimes held in the worst conditions pending their trial and are especially vulnerable to becoming subjects of torture and ill-treatment, since their contact with the outside world is frequently restricted.

The *Universal Declaration on Human Rights*, a foundational international instrument on human rights, contains several principles on arrest and pre-trial detention. Furthermore, other instruments have been promulgated on crime prevention and control interpreting, specifying and securing the protection of human rights.

The public prosecutor plays an important role during arrest and pre-trial detention and therefore an important role in guaranteeing the rights of people deprived of their liberty. Persons not yet convicted of the crime of which they have been accused are guaranteed the right to separate treatment from people who have already been convicted.

The prohibition on torture and ill-treatment has been laid down in almost all relevant documents concerning arrest and pre-trial detention. The public prosecutor plays a key role in securing the right to freedom from torture and ill-treatment. Not only should a public prosecutor exclude all evidence procured by torture, but also vigorously investigate all allegations of torture and prosecute the perpetrators of torture.

Of course the ‘presumption of innocence’ is the starting point for standards on pre-trial detention and should, therefore, be taken into account where the treatment of detainees is concerned. However, the relevant international provisions about this are mentioned in the chapter on ‘Human Rights and Trial Procedures’.

HUMAN RIGHTS AND PRE-TRIAL PROCEDURES

RELEVANT TEXTS AT THE UN-LEVEL

Arrest begins the process of detention and should only occur when authorized by law. Arrest must always be subject to judicial control and supervision to ensure that it is legal. A court has to assess whether detention until trial is necessary. At the U.N. level there are several provisions which guarantee a persons rights in pre-trial procedures.

The *Universal Declaration of Human Rights* states in Article 9:

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

It then continues on pre-trial procedures in Article 11:

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

No one shall be held guilty of any penal offence on account of any act or omission which did not constitute a penal 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 the penal offence was committed’.

Article 9 of the *International Covenant on Civil and Political Rights* contains similar provisions and states in paras.1 and 2:

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

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

It further requires states to let a judge or officer authorized by law exercise judicial power on the lawfulness of the arrest and a court on the necessity of the detention. Paragraphs 3, 4 and 5 of Article 9 read:

‘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 judgment.

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.

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

In the 1982 *General Comment 8* of the U.N. Human Rights Committee, these provisions are commented upon as follows:

1. ‘(..) The Committee points out that paragraph 1 is applicable to all deprivations of liberty, whether in criminal cases or in other cases such as, for example, mental illness, vagrancy, drug addiction, educational purposes, immigration control, etc. It is true that some of the provisions of article 9 (part of para. 2 and the whole of para. 3) are only applicable to persons against whom criminal charges are brought. But the rest, and in particular the important guarantee laid down in paragraph 4, i.e. the right to control by a court of the legality of the detention, applies to all persons deprived of their liberty by arrest or detention. Furthermore, States parties have in accordance with article 2 (3) also to ensure that an effective remedy is provided in other cases in which an individual claims to be deprived of his liberty in violation of the Covenant.

2. Paragraph 3 of article 9 requires that in criminal cases any person arrested or detained has to be brought "promptly" before a judge or other officer authorized by law to exercise judicial power. More precise time-limits are fixed by law in most States parties and, in the view of the Committee, delays must not exceed a few days. Many States have given insufficient information about the actual practices in this respect.
3. Another matter is the total length of detention pending trial. In certain categories of criminal cases in some countries this matter has caused some concern within the Committee, and members have questioned whether their practices have been in conformity with the entitlement "to trial within a reasonable time or to release" under paragraph 3. Pre-trial detention should be an exception and as short as possible. The Committee would welcome information concerning mechanisms existing and measures taken with a view to reducing the duration of such detention.
4. Also if so-called preventive detention is used, for reasons of public security, it must be controlled by these same provisions, i.e. it must not be arbitrary, and must be based on grounds and procedures established by law (para. 1), information of the reasons must be given (para. 2) and court control of the detention must be available (para. 4) as well as compensation in the case of a breach (para. 5). And if, in addition, criminal charges are brought in such cases, the full protection of article 9 (2) and (3), as well as article 14, must also be granted.'

RELEVANT TEXTS AT THE REGIONAL LEVEL

Europe

The same attitude towards pre-trial procedures can be found within the Council of Europe. The *European Convention for the Protection of Human Rights and Fundamental Freedoms* states very clearly that a judicial authority should decide on the lawfulness and necessity of arrest and detention. Article 5 reads:

1. 'Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:
 - a) the lawful detention of a person after conviction by a competent court;

- b) the lawful arrest or detention of a person for non-compliance with the lawful order of a court or in order to secure the fulfilment of any obligation prescribed by law;
 - c) the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so;
 - d) the detention of a minor by lawful order for the purpose of educational supervision or his lawful detention for the purpose of bringing him before the competent legal authority;
 - e) the lawful detention of persons for the prevention of the spreading of infectious diseases, of persons of unsound mind, alcoholics or drug addicts or vagrants;
 - f) the lawful arrest or detention of a person to prevent his effecting an unauthorized entry into the country or of a person against whom action is being taken with a view to deportation or extradition.
2. Everyone who is arrested shall be informed promptly, in a language which he understands, of the reasons for his arrest and of the charge against him.
 3. 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 authorised 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.
 4. 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.
 5. Everyone who has been the victim of arrest or detention in contravention of the provisions of this article shall have an enforceable right to compensation.'

In the *Charter of Fundamental Rights* of the European Union the following provision can be found in Article 6:

'Everyone has the right to liberty and security of person'.

Africa

The *African Charter on Human and Peoples' Rights* does not specifically mention any provisions on pre-trial procedures, but does contain a more general provision on the lawfulness of detention in Article 6:

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

Arab world

The *Cairo Declaration on Human Rights in Islam* does not contain provisions on pre-trial procedures. It contains only a general provision on arbitrary arrest in Article 20:

'It is not permitted without legitimate reason to arrest an individual, or restrict his freedom, to exile or to punish him'.

The *Arab Charter on Human Rights* adds the right to be brought promptly before a judge. Article 8 states:

'Everyone has the right to liberty and security of person and no one shall be arrested, held in custody or detained without a legal warrant and without being brought promptly before a judge'.

The Americas

The *American Convention on Human Rights* contains very clear provisions on a person's rights during pre-trial detention. The relevant provisions of Article 7 read:

1. 'No one shall be subject to arbitrary arrest or imprisonment.
2. 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.
5. 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.

6. 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’.

SOFT INTERNATIONAL LAW

U.N. Level

The 1988 *Body of Principles for All Persons under Any Form of Detention or Imprisonment* mentions some relevant and detailed provisions for prosecutors to take into account during pre-trial procedures. According to these principles any form of detention should be subject to judicial control. Principle 4 reads:

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

On the exercise of powers by the authorities Principle 9 states:

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

Principle 10 then proceeds with a person’s right to notification of the reason for an arrest:

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

Principle 11 further elaborates on this:

1. 'A person shall not be kept in detention without being given an effective opportunity to be heard promptly by a judicial or other authority. A detained person shall have the right to defend himself or to be assisted by counsel as prescribed by law.
2. A detained person and his counsel, if any, shall receive prompt and full communication of any order of detention, together with the reasons therefor.
3. A judicial or other authority shall be empowered to review as appropriate the continuance of detention'.

Principle 13 requires the authorities to provide a person promptly after arrest an explanation of his rights. It reads:

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

The *Principles on Detention* further indicate that pre-trial detention is strongly discouraged. Instead it encourages non-custodial measures. Principle 36 para.2 states:

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

Principle 37 provides a person's right to appear before a judicial or other authority provided by law which will decide on the lawfulness of detention:

'A person detained on a criminal charge shall be brought before a judicial or other authority provided by law promptly after his arrest. Such

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

Principle 38 states that the length of pre-trial detention should be ‘reasonable’:

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

The principle that pre-trial detention should be an exception is stated in Principle 39:

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

In the 1990 U.N. *Standard Minimum Rules for Non-custodial Measures (The Tokyo Rules)* we find a chapter on the pre-trial stage which contains relevant provisions for prosecutors. It reads:

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

- 6.2 Alternatives to pre-trial detention shall be employed at as early a stage as possible. Pre-trial detention shall last no longer than necessary to achieve the objectives stated under rule 5.1 and shall be administered humanely and with respect for the inherent dignity of human beings.
- 6.3 The offender shall have the right to appeal to a judicial or other competent independent authority in cases where pre-trial detention is employed.

The requirement to bring a detained persons promptly before a judicial authority can also be found in the 1992 U.N. *Declaration on the Protection of All Persons from Enforced Disappearance*, when it states in Article 10:

1. ‘Any person deprived of liberty shall be held in an officially recognized place of detention and, in conformity with national law, be brought before a judicial authority promptly after detention.
2. Accurate information on the detention of such persons and their place or places of detention, including transfers, shall be made promptly available to their family members, their counsel or to any other persons having a legitimate interest in the information unless a wish to the contrary has been manifested by the persons concerned.
3. An official up-to-date register of all persons deprived of their liberty shall be maintained in every place of detention. Additionally, each State shall take steps to maintain similar centralized registers. The information contained in these registers shall be made available to the persons mentioned in the preceding paragraph, to any judicial or other competent and independent national authority and to any other competent authority entitled under the law of the State concerned or any international legal instrument to which a State concerned is a party, seeking to trace the whereabouts of a detained person’.

Access to counsel

The right to the assistance of legal counsel after arrest and during pre-trial detention is laid down in several international soft law instruments. Access to legal counsel is an important means of ensuring that the rights of a detained person are respected.

The 1988 *Body of Principles for the Protection of all Persons under Any Form of Detention or Imprisonment* contains the following relevant principles:

‘Principle 17

1. A detained person shall be entitled to have the assistance of a legal counsel. He shall be informed of his right by the competent authority promptly after arrest and shall be provided with reasonable facilities for exercising it.
2. If a detained person does not have a legal counsel of his own choice, he shall be entitled to have a legal counsel assigned to him by a judicial or other authority in all cases where the interests of justice so require and without payment by him if he does not have sufficient means to pay.

Principle 18

1. A detained or imprisoned person shall be entitled to communicate and consult with his legal counsel.
2. A detained or imprisoned person shall be allowed adequate time and facilities for consultation with his legal counsel.
3. The right of a detained or imprisoned person to be visited by and to consult and communicate, without delay or censorship and in full confidentiality, with his legal counsel may not be suspended or restricted save in exceptional circumstances, to be specified by law or lawful regulations, when it is considered indispensable by a judicial or other authority in order to maintain security and good order.
4. Interviews between a detained or imprisoned person and his legal counsel may be within sight, but not within the hearing, of a law enforcement official.
5. Communications between a detained or imprisoned person and his legal counsel mentioned in the present principle shall be inadmissible as evidence against the detained or imprisoned person unless they are connected with a continuing or contemplated crime’.

The 1990 *Basic Principles on the Role of Lawyers* state very clearly how soon a detained person should have access to counsel. Principle 7 reads:

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

Principle 8 then provides additional rights for the detainee in relation to access to counsel. It sets out very clearly the confidentiality of the consultations between a detainee and his counsel:

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

Europe

The following provision on judicial control over measures taken by a public prosecutor can be found in the Council of Europe Recommendation *On the rôle of public prosecution in the criminal justice system*:

‘Where public prosecutors are entitled to take measures which cause an interference in the fundamental rights and freedoms of the suspect, judicial control over such measures must be possible’.

The (revised) 2006 *European Prison Rules* explicitly mention the following rights of untried prisoners:

Untried prisoners

Status as untried prisoners

94.1 For the purposes of these rules, untried prisoners are prisoners who have been remanded in custody by a judicial authority prior to trial, conviction or sentence.

94.2 A state may elect to regard prisoners who have been convicted and sentenced as untried prisoners if their appeals have not been disposed of finally.

Approach regarding untried prisoners

95.1 The regime for untried prisoners may not be influenced by the possibility that they may be convicted of a criminal offence in the future.

95.2 The rules in this part provide additional safeguards for untried prisoners.

95.3 In dealing with untried prisoners prison authorities shall be guided by the rules that apply to all prisoners and allow untried prisoners to participate in various activities for which these rules provide.

Accommodation

96. As far as possible untried prisoners shall be given the option of accommodation in single cells, unless they may benefit from sharing accommodation with other untried prisoners or unless a court has made a specific order on how a specific untried prisoner should be accommodated.

Clothing

97.1 Untried prisoners shall be allowed to wear their own clothing if it is suitable for wearing in prison.

97.2 Untried prisoners who do not have suitable clothing of their own shall be provided with clothing that shall not be the same as any uniforms that may be worn by sentenced prisoners.

Legal advice

98.1 Untried prisoners shall be informed explicitly of their right to legal advice.

98.2 All necessary facilities shall be provided to assist untried prisoners to prepare their defence and to meet with their legal representatives.

Contact with the outside world

99. Unless there is a specific prohibition for a specified period by a judicial authority in an individual case, untried prisoners:

- a. shall receive visits and be allowed to communicate with family and other persons in the same way as convicted prisoners;
- b. may receive additional visits and have additional access to other forms of communication; and
- c. shall have access to books, newspapers and other news media.

Work

100.1 Untried prisoners shall be offered the opportunity to work but shall not be required to work.

100.2 If untried prisoners elect to work, all the provisions of Rule 26 shall apply to them, including those relating to remuneration.

Access to the regime for sentenced prisoners

101. If an untried prisoner requests to be allowed to follow the regime for sentenced prisoners, the prison authorities shall as far as possible accede to this request.

IAP

Some provisions of the 1999 *Standards of Professional Responsibility and Statement of the Essential Duties and Rights of Prosecutors*, adopted by the International Association of Prosecutors, are relevant during pre-trial procedures. In para.4 on the rôle of prosecutors during pre-trial procedures the *IAP Standards* state under sub. 3:

Prosecutors shall (..):

- a. ' (..) and similarly seek to ensure that any aggrieved party is informed of the right of recourse to some higher authority/court, where that is possible;
- b. safeguard the rights of the accused in co-operation with the court and other relevant agencies;
- c. disclose to the accused relevant prejudicial and beneficial information as soon as reasonably possible, in accordance with the law or the requirements of a fair trial;
- h. in accordance with local law and the requirements of a fair trial, give due consideration to waiving prosecution, discontinuing proceedings conditionally or unconditionally or diverting criminal cases, and particularly those involving young defendants, from the formal justice

system, with full respect for the rights of suspects and victims, where such action is appropriate’.

EUROPEAN PRACTICE

In para. 30-47 of its Grand Chamber-judgment of 3 October 2006 in the case of McKay the European Court of Human Rights summarised its case-law on custody on remand as follows:

“Article 5 of the Convention is, together with Articles 2, 3 and 4, in the first rank of the fundamental rights that protect the physical security of an individual (see, for example, its link with Articles 2 and 3 in disappearance cases *e.g. Kurt v. Turkey*, judgment of 25 May 1998, *Reports of Judgments and Decisions* 1998-III, § 123) and as such its importance is paramount. Its key purpose is to prevent arbitrary or unjustified deprivations of liberty (see *e.g. Lukanov v. Bulgaria*, judgment of 20 March 1997, *Reports* 1997-II, § 41; *Assanidze v. Georgia* [GC], no. 71503/01, § 171, ECHR 2004-II, § 46; *Ilaşcu and Others v. Moldova and Russia* [GC], no. 48787/99, § 461, ECHR 2004-VII). Three strands in particular may be identified as running through the Court's case-law: the exhaustive nature of the exceptions, which must be interpreted strictly (*e.g. Ciulla v. Italy*, judgment of 22 February 1989, Series A no. 148, § 41) and which do not allow for the broad range of justifications under other provisions (Articles 8-11 of the Convention in particular); the repeated emphasis on the lawfulness of the detention, procedurally and substantively, requiring scrupulous adherence to the rule of law (see *Winterwerp v. the Netherlands*, judgment of 24 October 1979, Series A no. 33, § 39); and the importance of the promptness or speediness of the requisite judicial controls (under Article 5 §§ 3 and 4).

Article 5 § 3 as part of this framework of guarantees is structurally concerned with two separate matters: the early stages following an arrest when an individual is taken into the power of the authorities and the period pending eventual trial before a criminal court during which the suspect may be detained or released with or without conditions. These two limbs confer distinct rights and are not on their face logically or temporally linked (see *T.W. v. Malta*, no. 25644/94, judgment of 29 April 1999, § 49).

a. The arrest period

Taking the initial stage under the first limb, the Court's case-law establishes that there must be protection of an individual arrested or detained on suspicion of having committed a criminal offence through judicial control. Such control serves to provide effective safeguards against the risk of ill-treatment, which is at its greatest in this early stage of detention, and against the abuse of powers bestowed on law enforcement officers or other authorities for what should be narrowly restricted purposes and exercisable strictly in accordance with prescribed procedures. The judicial control must satisfy the following requirements.

i. Promptness

The judicial control on the first appearance of an arrested individual must above all be prompt, to allow detection of any ill-treatment and to keep to a minimum any unjustified interference with individual liberty. The strict time constraint imposed by this requirement leaves little flexibility in interpretation, otherwise there would be a serious weakening of a procedural guarantee to the detriment of the individual and the risk of impairing the very essence of the right protected by this provision (*Brogan and Others v. the United Kingdom*, judgment of 29 November 1988, Series A no. 145-B, § 62, where periods of more than four days in detention without appearance before a judge were in violation of Article 5 § 3, even in the special context of terrorist investigations).

ii. Automatic nature of the review

The review must be automatic and cannot depend on the application of the detained person; in this respect it must be distinguished from Article 5 § 4 which gives a detained person the right to apply for release. The automatic nature of the review is necessary to fulfil the purpose of the paragraph, as a person subjected to ill-treatment might be incapable of lodging an application asking for a judge to review their detention; the same might also be true of other vulnerable categories of arrested person, such as the mentally frail or those ignorant of the language of the judicial officer (*e.g. Aquilina v. Malta* [GC], no. 25642/94, § 49, ECHR 1999-III).

iii. *The characteristics and powers of the judicial officer*

The judicial officer must offer the requisite guarantees of independence from the executive and the parties and he or she must have the power to order release, after hearing the individual and reviewing the lawfulness of, and justification for, the arrest and detention (*e.g. Assenov v. Bulgaria*, judgment of 28 October 1998, *Reports* 1998-VIII, § 146). As regards the scope of that review, the formulation which has been at the basis of the Court's long-established case-law dates back to the early case of *Schiesser v. Switzerland* (judgment of 4 December 1979, Series A no. 34, § 31):

“... [U]nder Article 5 § 3, there is both a procedural and a substantive requirement. The procedural requirement places the 'officer' under the obligation of hearing himself the individual brought before him (see, *mutatis mutandis* the above-mentioned Winterwerp judgment, p. 24, § 60); the substantive requirement imposes on him the obligations of reviewing the circumstances militating for or against detention, of deciding, by reference to legal criteria, whether there are reasons to justify detention and of ordering release if there are no such reasons (above-mentioned *Ireland v. the United Kingdom* judgment, p. 76, § 199).”

More recently, this has been expressed by saying “(i)n other words, Article 5 § 3 requires the judicial officer to consider the merits of the detention” (*T.W. v. Malta*, cited above, § 41; *Aquilina*, cited above, § 47).

However, an examination of these cases gives no ground for concluding that the review must, as a matter of automatic obligation, cover the release of the applicant pending trial, with or without conditions, for reasons aside from the lawfulness of the detention or the existence of reasonable suspicion that the applicant has committed a criminal offence. The *Schiesser* case cited above made no reference to bail and although it attributes the general statement of principle above, which on its face appears capable of encompassing bail-type considerations, to *Ireland v. the United Kingdom* (judgment of 18 January 1978, Series A no. 25, § 199), no basis for such statement appears in that judgment. Nor indeed was release on bail in issue in *Schiesser*, which was principally concerned with the question whether the District Attorney offered the guarantees of independence inherent in the notion of an officer authorised by law to exercise judicial power (§§ 33-35). There is nothing therefore to suggest that, when referring to “the circumstances militating for or against detention”, the Court was doing more than indicating that the judicial

officer had to have the power to review the lawfulness of the arrest and detention under domestic law and its compliance with the requirements of Article 5 § 1(c).

As regards the Maltese cases (see *T.W.* and *Aquilina*, cited above), the phrase “merits of the detention” must be read in their context. In both, the applicants appeared promptly before the judicial officer but, as found by the Court, neither the magistrate before whom the applicants first appeared nor any other judicial officer had the power to conduct a review, of his or her motion, of whether there had been compliance with the requirements of Article 5 § 1(c). According to the Government of Malta, release might have been ordered if the detained person faced charges which, according to Maltese law, did not even allow for detention. However the Court held that, even if this were the case, the scope of such powers of review was clearly insufficient to satisfy the requirements of paragraph 3 of Article 5, since, as the Government conceded, the judicial officer had no power to order release if there was no reasonable suspicion that the detained person had committed an offence. Further, the fact relied on by the Government that the applicants could request bail equally did not satisfy paragraph 3 since it depended on a previous application being made by the detained person, whereas the judicial control of the lawfulness and proper basis of the detention under the first limb of paragraph 3 had to be automatic.

This reading of the Grand Chamber's judgments is supported by the subsequent case of *Sabeur Ben Ali v. Malta* (no. 35892/97, judgment of 29 June 2000) where the Court, examining the compatibility with Article 5 § 3 of a similar arrest and detention of an applicant, quoted the relevant passage from *Aquilina* (§ 47, cited above) and found that this requirement had not been complied with since “the applicant could not obtain an automatic ruling by a domestic judicial authority on whether there existed a reasonable suspicion against him”.

Nor, on examination, does the case of *S.B.C. v. the United Kingdom* (no. 39360/98, 19 June 2001) provide persuasive authority for finding that the first obligatory appearance before a judge must encompass the power to grant release on bail. This case concerned the Criminal Justice and Public Order Act 1994, which provided that persons charged with a serious offence such as murder, manslaughter or rape and who had previously been convicted of a similar offence were excluded from the grant of bail under any circumstances. This removal of judicial control

throughout the period of pre-trial detention was found to violate Article 5 § 3 of the Convention. This denial of any access to bail clearly offended against the independent right which is conferred in the second limb of paragraph 3. Insofar as it may be suggested that the power to grant bail was a power which the magistrates had to be able to exercise on the first court appearance of the detained person after arrest, the Grand Chamber is unable to agree with this interpretation.

The initial automatic review of arrest and detention accordingly must be capable of examining lawfulness issues and whether or not there is a reasonable suspicion that the arrested person had committed an offence, in other words, that detention falls within the permitted exception set out in Article 5 § 1(c). When the detention does not, or is unlawful, the judicial officer must then have the power to release.

b. The pre-trial or remand period

The presumption is in favour of release. As established in *Neumeister v. Austria* (judgment of 27 June 1968, Series A no. 8, p.37, § 4), the second limb of Article 5 § 3 does not give judicial authorities a choice between either bringing an accused to trial within a reasonable time or granting him provisional release pending trial. Until conviction, he must be presumed innocent, and the purpose of the provision under consideration is essentially to require his provisional release once his continuing detention ceases to be reasonable.

Continued detention therefore can be justified in a given case only if there are specific indications of a genuine requirement of public interest which, notwithstanding the presumption of innocence, outweighs the rule of respect for individual liberty laid down in Article 5 of the Convention (see, among other authorities, *Kudła v. Poland* [GC], no. 30210/96, § 110 *et seq*, ECHR 2000-XI).

The responsibility falls in the first place to the national judicial authorities to ensure that, in a given case, the pre-trial detention of an accused person does not exceed a reasonable time. To this end they must, paying due regard to the principle of the presumption of innocence, examine all the facts arguing for or against the existence of the above-mentioned demand of public interest justifying a departure from the rule in Article 5 and must set them out in their decisions on the applications for release. It is essentially on the basis of the reasons given in these decisions and of the

established facts stated by the applicant in his appeals that the Court is called upon to decide whether or not there has been a violation of Article 5 § 3 (see, for example, *Weinsztal v. Poland*, no. 43748/98, judgment of 30 May 2006, § 50).

The persistence of reasonable suspicion that the person arrested has committed an offence is a condition *sine qua non* for the lawfulness of the continued detention, but with the lapse of time this no longer suffices and the Court must then establish whether the other grounds given by the judicial authorities continued to justify the deprivation of liberty. Where such grounds were “relevant” and “sufficient”, the Court must also be satisfied that the national authorities displayed “special diligence” in the conduct of the proceedings (see, amongst other authorities, *Letellier v. France*, judgment of 26 June 1991, Series A no. 207, § 35; *Yağcı and Sargın v. Turkey*, judgment of 8 June 1995, Series A no. 319-A, § 50).

In sum, domestic courts are under an obligation to review the continued detention of persons pending trial with a view to ensuring release when circumstances no longer justify continued deprivation of liberty. For at least an initial period, the existence of reasonable suspicion may justify detention but there comes a moment when this is no longer enough. As the question whether or not a period of detention is reasonable cannot be assessed in the abstract but must be assessed in each case according to its special features, there is no fixed time-frame applicable to each case.

The Court's case-law has not had occasion to consider the very early stage of pre-trial detention in this context, presumably as, in the great majority of cases, the existence of suspicion provides a sufficient ground for detention and any unavailability of bail has not been seriously challengeable. It is not in doubt however that there must exist the opportunity for judicial consideration of release pending trial as even at this stage there will be cases where the nature of the offence or the personal circumstances of the suspected offender are such as to render detention unreasonable, or unsupported by relevant or sufficient grounds. There is no express requirement of “promptness” as in the first sentence of paragraph 3 of Article 5. However, such consideration, whether on application by the applicant or by the judge of his or her own motion, must take place with due expedition, in order to keep any unjustified deprivation of liberty to an acceptable minimum.

In order to ensure that the right guaranteed is practical and effective, not theoretical and illusory, it is not only good practice, but highly desirable in order to minimise delay, that the judicial officer who conducts the first automatic review of lawfulness and the existence of a ground for detention, also has the competence to consider release on bail. It is not however a requirement of the Convention and there is no reason in principle why the issues cannot be dealt with by two judicial officers, within the requisite time-frame. In any event, as a matter of interpretation, it cannot be required that the examination of bail take place with any more speed than is demanded of the first automatic review, which the Court has identified as being a maximum four days (see *Brogan and Others*, cited above).

In para 105 of the Klamecki (2) judgment of 3 April 2003 the Court repeated that a prosecutor cannot be considered as a ‘judicial officer’ as meant in Article 5 para. 3:

The Court recalls that in a number of its previous judgments – for instance, those in the cases of *Niedbala v. Poland* (cited above, §§ 48-57) and of *Dacewicz v. Poland* (no. 34611/97, judgment of 2 July 2002, § 21 et seq.) – it has already dealt with the question whether under the Polish legislation in force at the material time a prosecutor could be regarded as a “judicial officer” endowed with attributes of “independence” and “impartiality” required under Article 5 § 3.

The Court has found that a prosecutor did not offer these necessary guarantees because the prosecution authorities not only belonged to the executive branch of the State but also concurrently performed investigative and prosecution functions in criminal proceedings and were a party to such proceedings. Furthermore, it has considered that the fact that the prosecutors in addition acted as guardian of the public interest could not by itself confer on them the status of “officer[s] authorised by law to exercise judicial power”.

After some time the detention on remand can no longer be justified purely on the basis of “reasonable suspicion’ alone. Additional grounds for continuing pre-trial detention have to be assessed.

In the *Letellier* case (Judgment of 26 June 1991), the Court has ruled on the grounds for continuing pre-trial detention. According to the Court, detention has to be based on relevant and sufficient grounds and it is very possible that

after a certain lapse of time these grounds do not longer suffice. This means that further grounds have to be established to continue pre-trial detention:

35. 'It falls in the first place to the national judicial authorities to ensure that, in a given case, the pre-trial detention of an accused person does not exceed a reasonable time. To this end they must examine all the facts arguing for or against the existence of a genuine requirement of public interest justifying, with due regard to the principle of the presumption of innocence, a departure from the rule of respect for individual liberty and set them out in their decisions on the applications for release. It is essentially on the basis of the reasons given in these decisions and of the true facts mentioned by the applicant in his appeals, that the Court is called upon to decide whether or not there has been a violation of Article 5 § 3 (art. 5-3) of the Convention.(..)

The persistence of reasonable suspicion that the person arrested has committed an offence is a condition *sine qua non* for the validity of the continued detention (..), but, after a certain lapse of time, it no longer suffices; the Court must then establish whether the other grounds cited by the judicial authorities continue to justify the deprivation of liberty (..). Where such grounds are "relevant" and "sufficient", the Court must also ascertain whether the competent national authorities displayed "special diligence" in the conduct of the proceedings (..)'.

The Court summarised in para. 59-64 of its *Smirnova*-judgment (24 July 2003) the grounds for continuing pre-trial detention.

"The Convention case-law has developed four basic acceptable reasons for refusing bail: the risk that the accused will fail to appear for trial (see *Stögmüller v. Austria*, judgment of 10 November 1969, Series A no. 9, § 15); the risk that the accused, if released, would take action to prejudice the administration of justice (see *Wemhoff*, cited above, § 14) or commit further offences (see *Matznetter v. Austria*, judgment of 10 November 1969, Series A no. 10, § 9) or cause public disorder (see *Letellier v. France*, judgment of 26 June 1991, Series A no. 207, § 51).

The danger of absconding cannot be gauged solely on the basis of the severity of the possible sentence; it must be assessed with reference to a number of other relevant factors which may either confirm the existence of a danger of absconding or make it appear so slight that it cannot justify

pre-trial detention. In this context regard must be had in particular to the character of the person involved, his morals, his assets, his links with the State in which he is being prosecuted and his international contacts (see *W. v. Switzerland*, judgment of 26 January 1993, Series A no. 254-A, § 33 with further references).

The issue of whether a period of detention is reasonable cannot be assessed in abstract. Whether it is reasonable for an accused to remain in detention must be assessed in each case according to its special features. Continued detention can be justified in a given case only if there are specific indications of a genuine requirement of public interest which, notwithstanding the presumption of innocence, outweighs the rule of respect for individual liberty (see *W. v. Switzerland*, cited above, § 30).

It falls in the first place to the national judicial authorities to ensure that, in a given case, the pre-trial detention of an accused person does not exceed a reasonable time. To this end they must examine all the facts arguing for or against the existence of a genuine requirement of public interest justifying, with due regard to the principle of the presumption of innocence, a departure from the rule of respect for individual liberty and set them out in their decisions on the applications for release. It is essentially on the basis of the reasons given in these decisions and of the true facts mentioned by the applicant in his appeals, that the Court is called upon to decide whether or not there has been a violation of Article 5 § 3 of the Convention (see *Letellier*, cited above, § 35).

Arguments for and against release must not be “general and abstract” (see *Clooth v. Belgium*, judgment of 12 December 1991, Series A no. 225, § 44).

Where a suspect is on remand, he is entitled to have his case given priority and conducted with special diligence (see *Matznetter*, cited above, § 12).

The reasonableness of the length of detention is assessed independently of the reasonableness of the delay before trial and, although the length of time before trial may be ‘reasonable’ under Article 6 para.1 of the Convention, detention for that period may not be. The Court in the *Matznetter* case (Judgment of 10 November 1969) ruled in para.4:

‘Some delays may in effect constitute violations of Article 5 (3) (art. 5-3) while remaining compatible with Article 6 (1) (art. 6-1); (..), the two provisions are not identical with one another’.

Finally, in the *Schöps* case (Judgment of 13 February 2001) the Court ruled on the judicial procedure concerning the lawfulness of a long deprivation of liberty. Counsel must have access to those documents in the investigation file which are essential in order to challenge effectively this lawfulness:

“The Court recalls that arrested or detained persons are entitled to review bearing upon the procedural and substantive conditions which are essential for the “lawfulness”, in the sense of the Convention, of their deprivation of liberty. This means that the competent court has to examine “not only compliance with the procedural requirements set out in domestic law but also the reasonableness of the suspicion grounding the arrest and the legitimacy of the purpose pursued by the arrest and the ensuing detention.”

A court examining an appeal against detention must provide guarantees of a judicial procedure. The proceedings must be adversarial and must always ensure “equality of arms” between the parties, the prosecutor and the detained person. Equality of arms is not ensured if counsel is denied access to those documents in the investigation file which are essential in order effectively to challenge the lawfulness of his client’s detention. In the case of a person whose detention falls within the ambit of Article 5 1 (c), a hearing is required (see, among other authorities, the *Lamy v Belgium* judgment of 30 March 1989, Series A no.151, pp.16-17, 29 and the *Nikolova v Bulgaria* [GC] no 31195/96, 58 CEDH 1999-II).

These requirements are derived from the right to an adversarial trial as laid down in Article 6 of the Convention, which means, in a criminal case, that both the prosecution and the defence must be given the opportunity to have knowledge of and comment on the observations filed and the evidence adduced by the other party. According to the Court’s case law, it follows from the wording of Article 6 – and particularly from the autonomous meaning to be given to the notion of “criminal charge” – that this provision has some application to pre-trial proceedings (see the *Imbrioscia v Switzerland* judgment of 24 November 1993, Series A no.275, p.13, 36). It thus follows that, in view of the dramatic impact of deprivation of liberty on the fundamental rights of the person concerned, proceedings conducted under Article 5 4 of the Convention should in principle also meet, to the largest extent possible under the circumstances of an on-going investigation, the basic requirements of a fair trial, such as the right to an adversarial procedure. While national law may satisfy this requirement in various ways, whatever message is chosen should ensure that the other party will be aware that observations have been filed and

will have a real opportunity to comment thereon (see, *mutatis mutandis*, the *Brandstetter v Austria* judgment of 28 August 1991, Series A no.211, p.27, 67).”

Access to counsel

The European Court has ruled in the *Schönenberger and Durmaz* case (Judgment of 20 June 1988) that the right to counsel includes the right to consultations with counsel which are unsupervised by the authorities of places of detention. This right applies both to personal visits and to correspondence between a detained person and counsel.

INTERPRETATION AND CONCLUSIONS

In effecting human rights in pre-trial procedures a public prosecutor should take two things into account - the conditions that allow arrest and pre-trial detention of a person and the rights which an arrested or detained person has as a result of the arrest or detention. In international human rights documents several provisions have been adopted on these two issues.

In relation to the conditions for arrest and pre-trial detention, the texts leave no doubt for the fact that this should only occur when authorised by law and the reasons and conditions for arrest and detention should be established beforehand. Arbitrary arrest and detention are prohibited.

After arrest or detention a person has several rights which a public prosecutor should ensure. A person must be brought promptly before a judge or other judicial authority, whose function is to assess whether a legal reason exists for a person's arrest or detention. This is an opportunity for a detained person or his counsel to secure release if the arrest and detention are in violation of his rights. The European Court of Human Rights has ruled that a public prosecutor does not meet the requirement of an ‘other judicial authority’ and thus a public prosecutor is not allowed to decide on the lawfulness of an arrest or detention.

On the plain meaning of the word ‘promptly’, the European Court has ruled that a period of four days and six hours did not fulfil the requirement of promptness.

The international documents further show that detention should be an exception for special cases and that in normal circumstances a person should be released pending trial. The European Court has ruled in its case law that during the course of pre-trial detention, the reasons for detention may no longer suffice and other grounds will then have to be established to justify the deprivation of liberty. In this light national authorities have to display 'special diligence' in the conduct of the proceedings.

Furthermore, a detained person has a right to access to counsel during his detention. Additionally, correspondence between a detainee and his counsel should be unsupervised by law enforcement officials.

Finally, a public prosecutor should also take account of the 'presumption of innocence', as laid down in international human rights treaties, during pre-trial procedures. In this manual the provisions on the 'presumption of innocence' are considered in detail in the chapter regarding Human Rights and Trial Procedures.

HUMAN RIGHTS AND TRIAL PROCEDURES

RELEVANT TEXTS AT THE UN-LEVEL

When it comes to human rights and trial procedures the Universal Declaration of Human Rights has stated principles relevant for the public prosecutor in the Articles 10 and 11 of the Declaration. Article 10 states:

‘Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him.’

Article 11 para.1 further states:

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

The principles of the Universal Declaration of Human Rights have been further developed in the International Covenant on Civil and Political Rights. Article 14 ICCPR, on trial proceedings, is of utmost importance for public prosecutors. It reads as follows:

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.

RELEVANT TEXTS AT THE REGIONAL LEVEL

Europe

The *European Convention for the Protection of Human Rights and Fundamental Freedoms* mentions in article 6 (Right to a fair trial) important provisions concerning trial procedures that are relevant for prosecutors. Article 6 ECHR states:

1. ' In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgement shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.
- 2 Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.
- 3 Everyone charged with a criminal offence has the following minimum rights:
 - a) to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him;
 - b) to have adequate time and facilities for the preparation of his defence;
 - c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;
 - d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;
 - e) to have the free assistance of an interpreter if he cannot understand or speak the language used in court.

The same attitude towards human rights in trial procedures exists at the level of the European Union. Provisions that are relevant for the public prosecutor

have been reiterated in the *European Union Charter of Fundamental Rights*. Article 47 (Right to an effective remedy and to a fair trial) states:

‘Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article. Everyone is entitled to a fair and public hearing within reasonable time by an independent and impartial tribunal previously established by law. Everyone shall have the possibility of being advised, defended and represented. Legal aid shall be made available to those who lack sufficient resources in so far as such aid is necessary to ensure effective access to justice.’

Article 48 (Presumption of innocence and the right of defence) is important regarding the prosecutor’s attitude towards a charged person:

‘Everyone who has been charged shall be presumed innocent until proved guilty according to law.

Respect for the rights of the defence of anyone who has been charged shall be guaranteed.’

Africa

The *African Charter on Human and Peoples’ Rights* contains provisions on human rights in trial procedures in article 7 para.1:

- ‘Every individual shall have the right to have his case heard. This comprises:
- a) the right to an appeal to competent national organs against act of violating his fundamental rights as recognised and guaranteed by conventions, laws, regulations and customs in force;
 - b) the right to be presumed innocent until proved guilty by a competent court or tribunal;
 - c) the right to defence, including the right to be defended by counsel of his choice;
 - d) the right to be tried within a reasonable time by an impartial court or tribunal.’

The African Commission on Human and Peoples’ Rights has adopted a Resolution on the Right to Recourse Procedure and Fair Trial (1992) which

elaborates on article 7 (1) of the African Charter and guarantees several additional rights. Most relevant are the following provisions:

2. ‘(..) D. Persons charged with a criminal offence shall be presumed innocent until proved guilty by a competent court. (..)
E. 2) Be tried within in a reasonable time;
- 3) Examine, or have examined, the witnesses against them and to obtain the attendance and examination of witnesses on their behalf under the same conditions as witnesses against them;
- 4) Have the free assistance of an interpreter if they cannot speak the language used in court.’

Arab world

The *Cairo Declaration on Human Rights in Islam* contains a relevant provision in article 19 where it states under (e):

‘A defendant is innocent until his guilt is proven in a fast trial in which he shall be given all guarantees of defence.’

The Council of the League of Arab States has reaffirmed this principle in the *Arab Charter on Human Rights*. Article 7 states:

‘The accused shall be presumed innocent until proved guilty at a lawful trial in which he has enjoyed the guarantees necessary for his defence.’

The Americas

Article 8 (Right to a Fair Trial) of the American Convention on Human Rights contains several relevant provisions for the public prosecutor concerning his role in trial procedures. Article 8 para.1 reads:

‘Every person has the right to a hearing, with due guarantees and within a reasonable time, by a competent, independent, and impartial tribunal, previously established by law, in the substantiation of any accusation of a criminal nature made against him or for the determination of his rights and obligations of a civil, labor, fiscal or any other nature.’

Article 8 para.2 continues with the “presumption of innocence” and minimum guarantees for every person accused of a criminal offence. Relevant for prosecutors is:

‘Every person accused of a criminal offence has the right to be presumed innocent so long as his guilt has not been proven according to law. During the proceedings, every person is entitled, with full equality, to the following minimum guarantees:

- a) the right of the accused to be assisted without charge by a translator or interpreter, if he does not understand or does not speak the language of the tribunal or court;
- b) prior notification in detail to the accused of the charges against him;
- c) adequate time and means for the preparation of his defence;
- d) the right of the accused to defend himself personally or to be assisted by legal counsel of his own choosing, and to communicate freely and privately with his counsel;
- e) the inalienable right to be assisted by counsel provided by the state, paid or not as the domestic law provides, if the accused does not defend himself personally or engage his own counsel within the time period established by law;
- f) the right of the defence to examine witnesses present in the court and to obtain the appearance, as witnesses, of experts or other persons who may throw light on the facts;
- g) the right not to be compelled to be a witness against himself or to plead guilty.’

SOFT INTERNATIONAL LAW

UN-level

The (UN) Human Rights Committee has commented upon article 14 of the Covenant in its 1984 General Comment 13. In the comment the Human Rights Committee concludes that article 14 is of a complex nature and therefore different aspects of the provisions need specific comments on its implementation. Since the comment specifies the provisions on trial proceedings and the prosecutor has an important role in effecting human rights in trial procedures, it is most relevant for public prosecutors. Therefore General Comment 13 follows complete:

1. 'The Committee notes that article 14 of the Covenant is of a complex nature and that different aspects of its provisions will need specific comments. All of these provisions are aimed at ensuring the proper administration of justice, and to this end uphold a series of individual rights such as equality before the courts and tribunals and the right to a fair and public hearing by a competent, independent and impartial tribunal established by law. Not all reports provided details on the legislative or other measures adopted specifically to implement each of the provisions of article 14.
2. In general, the reports of States parties fail to recognize that article 14 applies not only to procedures for the determination of criminal charges against individuals but also to procedures to determine their rights and obligations in a suit at law. Laws and practices dealing with these matters vary widely from State to State. This diversity makes it all the more necessary for States parties to provide all relevant information and to explain in greater detail how the concepts of "criminal charge" and "rights and obligations in a suit at law" are interpreted in relation to their respective legal systems.
3. The Committee would find it useful if, in their future reports, States parties could provide more detailed information on the steps taken to ensure that equality before the courts, including equal access to courts, fair and public hearings and competence, impartiality and independence of the judiciary are established by law and guaranteed in practice. In particular, States parties should specify the relevant constitutional and legislative texts which provide for the establishment of the courts and ensure that they are independent, impartial and competent, in particular with regard to the manner in which judges are appointed, the qualifications for appointment, and the duration of their terms of office; the condition governing promotion, transfer and cessation of their functions and the actual independence of the judiciary from the executive branch and the legislative.
4. The provisions of article 14 apply to all courts and tribunals within the scope of that article whether ordinary or specialized. The Committee notes the existence, in many countries, of military or special courts which try civilians. This could present serious problems as far as the equitable, impartial and independent administration of justice is concerned. Quite often the reason for the establishment of such courts is to enable exceptional procedures to be applied which do not comply

with normal standards of justice. While the Covenant does not prohibit such categories of courts, nevertheless the conditions which it lays down clearly indicate that the trying of civilians by such courts should be very exceptional and take place under conditions which genuinely afford the full guarantees stipulated in article 14. The Committee has noted a serious lack of information in this regard in the reports of some States parties whose judicial institutions include such courts for the trying of civilians. In some countries such military and special courts do not afford the strict guarantees of the proper administration of justice in accordance with the requirements of article 14 which are essential for the effective protection of human rights. If States parties decide in circumstances of a public emergency as contemplated by article 4 to derogate from normal procedures required under article 14, they should ensure that such derogations do not exceed those strictly required by the exigencies of the actual situation, and respect the other conditions in paragraph 1 of article 14.

5. The second sentence of article 14, paragraph 1, provides that "everyone shall be entitled to a fair and public hearing". Paragraph 3 of the article elaborates on the requirements of a "fair hearing" in regard to the determination of criminal charges. However, the requirements of paragraph 3 are minimum guarantees, the observance of which is not always sufficient to ensure the fairness of a hearing as required by paragraph 1.
6. The publicity of hearings is an important safeguard in the interest of the individual and of society at large. At the same time article 14, paragraph 1, acknowledges that courts have the power to exclude all or part of the public for reasons spelt out in that paragraph. It should be noted that, apart from such exceptional circumstances, 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. It should be noted that, even in cases in which the public is excluded from the trial, the judgement must, with certain strictly defined exceptions, be made public.
7. The Committee has noted a lack of information regarding article 14, paragraph 2 and, in some cases, has even observed that the presumption of innocence, which is fundamental to the protection of human rights, is expressed in very ambiguous terms or entails conditions which render it ineffective. By reason of the presumption of

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

8. Among the minimum guarantees in criminal proceedings prescribed by paragraph 3, the first concerns the right of everyone to be informed in a language which he understands of the charge against him (subpara. (a)). The Committee notes that State reports often do not explain how this right is respected and ensured. Article 14 (3) (a) applies to all cases of criminal charges, including those of persons not in detention. The Committee notes further that the right to be informed of the charge "promptly" requires that information is given in the manner described as soon as the charge is first made by a competent authority. In the opinion of the Committee this right must arise when in the course of an investigation a court or an authority of the prosecution decides to take procedural steps against a person suspected of a crime or publicly names him as such. The specific requirements of subparagraph 3 (a) may be met by stating the charge either orally or in writing, provided that the information indicates both the law and the alleged facts on which it is based.
9. Subparagraph 3 (b) provides that the accused must have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing. What is "adequate time" depends on the circumstances of each case, but the 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. When the accused does not want to defend himself in person or request a person or an association of his choice, he should be able to have recourse to a lawyer. Furthermore, this subparagraph requires counsel to communicate with the accused in conditions giving full respect for the confidentiality of their communications. Lawyers should be able to counsel and to represent their clients in accordance with their established professional standards and judgement without any restrictions, influences, pressures or undue interference from any quarter.

10. Subparagraph 3 (c) provides that the accused shall be tried without undue delay. This guarantee relates not only to the time by which a trial should commence, but also the time by which it should end and judgement be rendered; all stages must take place "without undue delay". To make this right effective, a procedure must be available in order to ensure that the trial will proceed "without undue delay", both in first instance and on appeal.
11. Not all reports have dealt with all aspects of the right of defence as defined in subparagraph 3 (d). The Committee has not always received sufficient information concerning the protection of the right of the accused to be present during the determination of any charge against him nor how the legal system assures his right either to defend himself in person or to be assisted by counsel of his own choosing, or what arrangements are made if a person does not have sufficient means to pay for legal assistance. The accused or his lawyer must have the right to act diligently and fearlessly in pursuing all available defences and the right to challenge the conduct of the case if they believe it to be unfair. When exceptionally for justified reasons trials in absentia are held, strict observance of the rights of the defence is all the more necessary.
12. Subparagraph 3 (e) states that the accused shall be entitled to examine or have examined the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him. This provision is designed to guarantee to the accused the same legal powers of compelling the attendance of witnesses and of examining or cross-examining any witnesses as are available to the prosecution.
13. Subparagraph 3 (f) provides that if the accused cannot understand or speak the language used in court he is entitled to the assistance of an interpreter free of any charge. This right is independent of the outcome of the proceedings and applies to aliens as well as to nationals. It 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 defence.
14. Subparagraph 3 (g) provides that the accused may not be compelled to testify against himself or to confess guilt. In considering this safeguard the provisions of article 7 and article 10, paragraph 1, should be borne in mind. In order to compel the accused to confess or to testify against

himself, frequently methods which violate these provisions are used. The law should require that evidence provided by means of such methods or any other form of compulsion is wholly unacceptable.

15. In order to safeguard the rights of the accused under paragraphs 1 and 3 of article 14, judges should have authority to consider any allegations made of violations of the rights of the accused during any stage of the prosecution.
16. Article 14, paragraph 4, provides that 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. Not many reports have furnished sufficient information concerning such relevant matters as the minimum age at which a juvenile may be charged with a criminal offence, the maximum age at which a person is still considered to be a juvenile, the existence of special courts and procedures, the laws governing procedures against juveniles and how all these special arrangements for juveniles take account of "the desirability of promoting their rehabilitation". Juveniles are to enjoy at least the same guarantees and protection as are accorded to adults under article 14.
17. Article 14, paragraph 5, provides that everyone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law. Particular attention is drawn to the other language versions of the word "crime" ("infraction", "delito", "prestuplenie") which show that the guarantee is not confined only to the most serious offences. In this connection, not enough information has been provided concerning the procedures of appeal, in particular the access to and the powers of reviewing tribunals, what requirements must be satisfied to appeal against a judgement, and the way in which the procedures before review tribunals take account of the fair and public hearing requirements of paragraph 1 of article 14.
18. Article 14, paragraph 6, provides for compensation according to law in certain cases of a miscarriage of justice as described therein. It seems from many State reports that this right is often not observed or insufficiently guaranteed by domestic legislation. States should, where necessary, supplement their legislation in this area in order to bring it into line with the provisions of the Covenant.

19. In considering State reports differing views have often been expressed as to the scope of paragraph 7 of article 14. Some States parties have even felt the need to make reservations in relation to procedures for the resumption of criminal cases. It seems to the Committee that most States parties make a clear distinction between a resumption of a trial justified by exceptional circumstances and a re-trial prohibited pursuant to the principle of *ne bis in idem* as contained in paragraph 7. This understanding of the meaning of *ne bis in idem* may encourage States parties to reconsider their reservations to article 14, paragraph 7.

The most important provision in the 1990 UN Guidelines on the Role of Prosecutors for the prosecutor during trial proceedings can be found under para.10:

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

Also of importance during trial procedures is para.16 of the guidelines:

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

The UN Commission on Human Rights has published the study “The right to a fair trial: current recognition and measures for its strengthening”. This study mentions more detailed principles on “fair trial” derived from international texts, instruments and practice. The study therefore contains some relevant provisions for the public prosecutor on his role during trial procedures. On the independence of the Court from the executive branch it states very clear in para.19:

‘A court shall be independent from the executive branch. The executive branch in a State shall not be able to interfere in a court’s proceedings and a court shall not act as an agent for the executive against an individual citizen.’

It continues on impartiality in para.27:

‘A tribunal lacks impartiality if, inter alia, a former public prosecutor or counsel sits as a judge on a case in which he or she prosecuted or served as counsel to a party; a trial judge actively participated in the secret, preparatory investigation of a case; or a judge has some other connection with the case which might bias the decision.’

At last the study provides a clear paragraph on the public prosecutors role during trial procedures when it comes to the ‘presumption of innocence’. Paragraph 59 (b) reads:

‘Public officials shall maintain a presumption of innocence. This provision applies to the judge presiding over the trial and to any other public official who deals with the case in any way. The accused is entitled to the benefit of the doubt during the trial. Public officials, including prosecutors, may inform the public about criminal investigations or charges, but shall not express a view as to the guilt of any suspect.’

Europe

The Council of Europe recommendation ‘on the Role of Public Prosecution in the Criminal Justice system’ (Rec(2000)19) contains several provisions that are important for public prosecutors during trial procedures. Of importance in the relationship between public prosecutors and the executive and legislative powers during trial procedures is para.13 (e) of the recommendation. It states:

‘Public prosecutors remain free to submit to the court any legal arguments of their choice, even where they are under a duty to reflect in writing the instructions received.’

The recommendation further contains relevant provisions on how the relationship between public prosecutors and court judges should be. Both judges and prosecutors should leave no doubt as to their independence and their impartiality. It states very clear in article 17:

‘States should take appropriate measures to ensure that the legal status, the competencies and the procedural role of public prosecutors are established by law in a way that there can be no legitimate doubt about the independence and impartiality of the court judges. In particular states

should guarantee that a person cannot at the same time perform duties as a public prosecutor and as a court judge.’

For the public prosecutor it proceeds in para.19:

‘Public prosecutors must strictly respect the independence and the impartiality of judges; in particular they shall neither cast doubts on judicial decisions nor hinder their execution, save where exercising their rights of appeal or invoking some other declaratory procedure.’

Paragraph 20 of the recommendation states the prosecutor’s role on “fairness”. It leaves no doubt when stating that:

‘Public prosecutors must be objective and fair during court proceedings. In particular, they should ensure that the court is provided with all relevant facts and legal arguments necessary for the fair administration of justice.’

The use of evidence by the public prosecutor is also mentioned in the recommendation. Paragraph 28 reads:

‘Public prosecutors should not present evidence against suspects that they know or believe on reasonable grounds was obtained through recourse to methods which are contrary to the law. In cases of any doubt, public prosecutors should ask the court to rule on the admissibility of such evidence.’

Paragraph 30 then proceeds:

‘Public prosecutors should seek to safeguard the principle of equality of arms, in particular by disclosing to the other parties -save where otherwise provided in the law- any information which they possess which may affect the justice of the proceedings.’

Finally, the recommendation contains some provisions that are relevant for prosecutors on the attitude towards witnesses and victims during trial procedures. Paragraph 32, on the interests of witnesses, states:

‘Public prosecutors should take proper account of the interests of the witnesses, especially take or promote measures to protect their life, safety and privacy, or see to it that such measures have been taken.’

And para.33 proceeding on the interests of victims:

‘Public prosecutors should take proper account of the views and concerns of victims when their personal interests are affected and take or promote actions to ensure that victims are informed of both their rights and developments in the procedure.’

IAP

In the 1999 ‘Standards of Professional Responsibility and Statement of the Essential Duties and Rights of Prosecutors’ produced by the International Association of Prosecutors (IAP) para 1 on Professional Conduct is relevant for prosecutors on trial procedures:

‘Prosecutors shall (..)

f) always protect an accused person's right to a fair trial, and in particular ensure that evidence favourable to the accused is disclosed in accordance with the law or the requirements of a fair trial.’

And under para.3 on Impartiality:

‘Prosecutors shall perform their duties without fear, favour or prejudice.

In particular they shall:

- a) carry out their functions impartially;
- b) remain unaffected by individual or sectional interests and public or media pressures and shall have regard only to the public interest;
- c) act with objectivity;
- d) have regard to all relevant circumstances, irrespective of whether they are to the advantage or disadvantage of the suspect;
- e) in accordance with local law or the requirements of a fair trial, seek to ensure that all necessary and reasonable enquiries are made and the result disclosed, whether that points towards the guilt or the innocence of the suspect;
- f) always search for the truth and assist the court to arrive at the truth and to do justice between the community, the victim and the accused according to law and the dictates of fairness.’

Furthermore the *IAP Standards* provide a provision on the role of considering the interests of both witnesses and victims during criminal proceedings. Paragraph 4.3 on the Role in criminal proceedings states:

‘Prosecutors shall, furthermore;

- a) preserve professional confidentiality;
- b) in accordance with local law and the requirements of a fair trial, consider the views, legitimate interests and possible concerns of victims and witnesses, when their personal interests are, or might be, affected, and seek to ensure that victims and witnesses are informed of their rights;
and similarly seek to ensure that any aggrieved party is informed of the right of recourse to some higher authority/court, where that is possible;
- c) safeguard the rights of the accused in co-operation with the court and other relevant agencies.’

Finally, para.4.3 continues with provisions regarding the use of evidence and the principle of “equality of arms”:

- ‘d) disclose to the accused relevant prejudicial and beneficial information as soon as reasonably possible, in accordance with the law or the requirements of a fair trial;
- e) examine proposed evidence to ascertain if it has been lawfully or constitutionally obtained;
- f) refuse to use evidence reasonably believed to have been obtained through recourse to unlawful methods which constitute a grave violation of the suspect's human rights and particularly methods which constitute torture or cruel treatment;
- g) seek to ensure that appropriate action is taken against those responsible for using such methods;
- h) in accordance with local law and the requirements of a fair trial, give due consideration to waiving prosecution, discontinuing proceedings conditionally or unconditionally or diverting criminal cases, and particularly those involving young defendants, from the formal justice system, with full respect for the rights of suspects and victims, where such action is appropriate.’

EUROPEAN PRACTICE

The European Court of Human Rights has been asked frequently to rule on the provisions of article 6 of the *European Convention for the Protection of Human Rights and Fundamental Freedoms*. Article 6 contains many different aspects which, taken together, to guarantee the right to a ‘fair trial’. The Court has given in its jurisprudence more detailed comments on how the different

aspects of article 6 should be interpreted. Some of the Court's case law regarding article 6 comments on aspects of the article that are relevant for the public prosecutor during trial proceedings. For instance the Court has ruled the following in the *Öztürk* case (Judgement of 21 February 1984) on the definition of 'criminal charge':

'(..)On this point, the Court would simply refer back to its well-established case-law holding that "charge", for the purposes of Article 6, may in general be defined as "the official notification given to an individual by the competent authority of an allegation that he has committed a criminal offence", although "it may in some instances take the form of other measures which carry the implication of such an allegation and which likewise substantially affect the situation of the suspect"(..). '

The Court also ruled on the notion of an 'independent and impartial tribunal' as laid down in para.1 of article 6 of the Convention. The public prosecutor has to take into account that he should perform his procedural role in a way that there can be no legitimate doubt about the independence and impartiality of the court judges. Consequently a public prosecutor should not deal with a given matter in the course of his duties, when he will be judge in the same case. The Court ruled in the *Piersack* case (Judgement 1 October 1982) in para.30 (d):

'(..) In order that the courts may inspire in the public the confidence which is indispensable, account must also be taken of questions of internal organisation. If an individual, after holding in the public prosecutor's department an office whose nature is such that he may have to deal with a given matter in the course of his duties, subsequently sits in the same case as a judge, the public are entitled to fear that he does not offer sufficient guarantees of impartiality.'

The Court didn't consider the extent of the role played by the judge as a prosecutor in the same case of any importance. In para.31 it states very clear:

'It is sufficient to find that the impartiality of the "tribunal" which had to determine the merits of the charge was capable of appearing open to doubt.'

Article 6 para.1 requires a 'fair trial'. The guarantees in para.3 of article 6 are specific aspects of the right to a fair trial as set forth in para.1. The Court has ruled in several cases on the use of evidence from witnesses in relation with

the fairness of trial proceedings. The Court's case law clearly states the importance of adversarial argument and equality of arms during trial proceedings. The prosecution has to take that into account. In the *Kostovski* case (Judgment of 20 November 1989) the Court laid down the limits under the Convention for the use of anonymous witnesses. Paragraph 41 reads:

'In principle, all the evidence must be produced in the presence of the accused at a public hearing with a view to adversarial argument (...). This does not mean, however, that in order to be used as evidence statements of witnesses should always be made at a public hearing in court: to use as evidence such statements obtained at the pre-trial stage is not in itself inconsistent with paragraphs 3 (d) and 1 of Article 6 (art. 6-3-d, art. 6-1) provided the rights of the defence have been respected.

As a rule, these rights require that an accused should be given an adequate and proper opportunity to challenge and question a witness against him, either at the time the witness was making his statement or at some later stage of the proceedings. (...).'

In the *Van Mechelen* case (Judgement 23 April 1997) the Court specified the applicable principles in cases where statements of anonymous witnesses are used as evidence. Paragraphs 54 and 55 of this judgement read:

'However, if the anonymity of prosecution witnesses is maintained, the defence will be faced with difficulties which criminal proceedings should not normally involve. Accordingly, the Court has recognised that in such cases Article 6 para. 1 taken together with Article 6 para. 3 (d) of the Convention (art. 6-1+6-3-d) requires that the handicaps under which the defence labours be sufficiently counterbalanced by the procedures followed by the judicial authorities.

Finally, it should be recalled that a conviction should not be based either solely or to a decisive extent on anonymous statements.'

However, in para 70 of its judgment in the *Doorson* case (Judgment of 20 February 1996) the Court ruled that the interests of witnesses and victims should not be unjustifiably imperilled during the trial:

'It is true that Article 6 (art. 6) does not explicitly require the interests of witnesses in general, and those of victims called upon to testify in particular, to be taken into consideration. However, their life, liberty or

security of person may be at stake, as may interests coming generally within the ambit of Article 8 (art. 8) of the Convention. Such interests of witnesses and victims are in principle protected by other, substantive provisions of the Convention, which imply that Contracting States should organise their criminal proceedings in such a way that those interests are not unjustifiably imperilled. Against this background, principles of fair trial also require that in appropriate cases the interests of the defence are balanced against those of witnesses or victims called upon to testify.'

In the *Edwards* case (Judgment of 16 December 1992) the Court considers that it is a requirement of fairness under paragraph 1 of Article 6 that the prosecution authorities disclose to the defence all material evidence for or against the accused and that the failure to do so may give rise to a defect in the proceedings.

Although it is not expressly mentioned in Article 6, the right to silence and the right not to incriminate oneself is also guaranteed by this provision. The Court has ruled in the *Saunders*-case (Judgement of 17 December 1996) that the right not to incriminate oneself is primarily concerned with the will of an accused person to remain silent, but does not extend to the use of material existing independent of the will of the suspect. With regard to the general principles the Court considered in paras.68 and 69:

'The Court recalls that, although not specifically mentioned in Article 6 of the Convention (art. 6), the right to silence and the right not to incriminate oneself are generally recognised international standards which lie at the heart of the notion of a fair procedure under Article 6 (art. 6). Their rationale lies, *inter alia*, in the protection of the accused against improper compulsion by the authorities thereby contributing to the avoidance of miscarriages of justice and to the fulfilment of the aims of Article 6 (art. 6) (..). The right not to incriminate oneself, in particular, presupposes that the prosecution in a criminal case seek to prove their case against the accused without resort to evidence obtained through methods of coercion or oppression in defiance of the will of the accused. In this sense the right is closely linked to the presumption of innocence contained in Article 6 para. 2 of the Convention (art. 6-2).

The right not to incriminate oneself is primarily concerned, however, with respecting the will of an accused person to remain silent. As commonly understood in the legal systems of the Contracting Parties to the Convention and elsewhere, it does not extend to the use in criminal

proceedings of material which may be obtained from the accused through the use of compulsory powers but which has an existence independent of the will of the suspect such as, inter alia, documents acquired pursuant to a warrant, breath, blood and urine samples and bodily tissue for the purpose of DNA testing.’

Furthermore, the Court has ruled on the length of the trial procedures regarding the provision of ‘reasonable time’ in para.1 of article 6. The public prosecutor should take the reasonableness of the length of proceedings in account as the Court states in para.24 of the *Zimmerman and Steiner* case (Judgment 13 July 1983):

‘The reasonableness of the length of proceedings coming within the scope of Article 6 § 1 (art. 6-1) must be assessed in each case according to the particular circumstances (...). The Court has to have regard, inter alia, to the complexity of the factual or legal issues raised by the case, to the conduct of the applicants and the competent authorities and to what was at stake for the former; in addition, only delays attributable to the State may justify a finding of a failure to comply with the "reasonable time" requirement (...).’

Although the Court ruled that the particular circumstances of each case determine the reasonableness of the length of the proceedings, it leaves no doubt that a prosecutor should take into account the length of proceedings.

Regarding the ‘presumption of innocence’ the Court has ruled that before and during trial proceedings para.2 of article 6 applies to the different public authorities. This of course includes the public prosecutor. The question was raised in the *Allenet de Ribemont* case (Judgment of 10 February 1995) where the Court ruled:

‘The Court considers that the presumption of innocence may be infringed not only by a judge or court but also by other public authorities.’

In the *Barberà, Messegue and Jabardo* case (Judgment of 6 December 1988) the Court stated that the principle of the presumption of innocence:

‘requires, inter alia, that when carrying out their duties, the members of a Court should not start with a preconceived idea that the accused has committed the offence charged; the burden of proof is on the prosecution, and any doubt should benefit the accused.’

However, para.2 of Article 6 does not prohibit rules which transfer the burden of proof to the accused to establish his defence, if the overall burden of establishing guilt remains with the prosecution.

INTERPRETATION AND CONCLUSIONS

The overview of texts show that the in 1948 adopted Universal Declaration on Human Rights has been the genesis for later United Nations' as well as for regional texts and treaties concerning trial procedures and the role of the public prosecutors herein. The Universal Declaration provided principles that have been taken over by almost all regional based treaties and texts. For instance the requirements of a 'fair trial', 'independent and impartial tribunal', and the 'presumption of innocence' have been adopted exactly so or likewise in other treaties and texts and have been further developed and commented upon in time by comments, recommendations, jurisprudence and guidelines from non governmental organisations. Especially General Comment 13 on article 14 ICCPR of the UN Human Rights Committee provides more specified provisions on how the minimum guarantees of article 14 should be interpreted.

Since it is the prosecutor that stands versus a person charged with a criminal offence, it is the prosecutor that interferes with a person's rights. Therefore the role the public prosecutor can play in effecting these rights during trial proceedings is of utmost importance.

In establishing a 'fair trial' the public prosecutor should take into account that the evidence used does not constitute a breach with the charged person's right to adversarial argument and equality of arms during the proceedings. The defence should have the possibility to argue evidence brought to court by the prosecution. The European Court in its case law has further developed this aspect of a 'fair trial'. In regard to the use of evidence it is also considered by several international documents that the public prosecutor should not hold back evidence that can discharge a person standing trial.

International documents further contain provisions on the role of the prosecutor in effecting the right to an 'independent and impartial tribunal'. It is clear that the public prosecutor should leave no doubt as to the independence and impartiality of the court. Therefore the prosecutor should

not conflict with court decisions and not deal with a given matter in the course of his duties, when he will be judge in the same case.

Finally, the public prosecutor should be aware of the ‘presumption of innocence’ as set forth in almost all relevant international documents as well as ruled upon by the European Court of Human Rights. During trial proceedings the prosecutor should treat the person charged of a criminal offence as innocent.

HUMAN RIGHTS AND SENTENCING

INTRODUCTION

The use of capital punishment has been described in the chapter on ‘Human rights and the right to life’ and will not be dealt with here as a sentence.

RELEVANT TEXTS AT THE U.N. LEVEL

The *Universal Declaration of Human Rights* states in Article 5:

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

This means that the punishment of a convicted person must not be cruel, inhuman or degrading. A similar provision can be found in article 7 of the *International Covenant on Civil and Political Rights*:

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

RELEVANT TEXTS AT THE REGIONAL LEVEL

Europe

In the *European Convention for the Protection of Human Rights and Fundamental Freedoms* a provision on punishment can be found in Article 3 that prohibits torture:

‘No one shall be subjected to torture or to inhuman or degrading treatment or punishment’.

Africa

Punishment is also mentioned in the *African Charter on Human and Peoples' Rights*. Article 5 states:

'Every individual shall have the right to the respect of the dignity inherent in a human being and to the recognition of his legal status. All forms of exploitation and degradation of man particularly slavery, slave trade, torture, cruel, inhuman or degrading punishment and treatment shall be prohibited'.

Arab world

The *Arab Charter on Human Rights* contains a provision regarding sentenced persons in Article 15:

'Persons sentenced to a penalty of deprivation of liberty shall be treated with humanity'.

The Americas

Paras.2 and 3 of Article 5 of the *American Convention on Human Rights* are relevant when it comes to human rights and sentencing:

2. 'No one shall be subjected to torture or to cruel, inhuman, or degrading punishment or treatment. All persons deprived of their liberty shall be treated with respect for the inherent dignity of the human person.
3. Punishment shall not be extended to any person other than the criminal'.

SOFT INTERNATIONAL LAW

U.N. Level

The U.N. instruments promote the use of non-custodial measures and alternatives to imprisonment (although in many cases custodial measures remain the only appropriate dispositions). The purposes of punishment are often cited as retribution, deterrence, reform (or rehabilitation) and

protection of the community. Where they are otherwise appropriate, non-custodial measures may better serve the goal of rehabilitation.

The 1990 U.N. *Standard Minimum Rules for Non-Custodial Measures* (also known as the 'Tokyo Rules') set out general as well as more specific provisions on the use of non-custodial measures. In relation to the fundamental aims of the 'Standard Minimum Rules' they state:

- 1.1 'The present Standard Minimum Rules provide a set of basic principles to promote the use of non-custodial measures, as well as minimum safeguards for persons subject to alternatives to imprisonment.
- 1.2 The Rules are intended to promote greater community involvement in the management of criminal justice, specifically in the treatment of offenders, as well as to promote among offenders a sense of responsibility towards society'.

Principle 1.5 then requires member States to develop non-custodial measures within their legal systems:

'Member States shall develop non-custodial measures within their legal systems to provide other options, thus reducing the use of imprisonment, and to rationalize criminal justice policies, taking into account the observance of human rights, the requirements of social justice and the rehabilitation needs of the offender'.

Principle 2.1 then proceeds on the scope of the rules laid down in '*Standard Minimum Rules*':

'The relevant provisions of the present Rules shall be applied to all persons subject to prosecution, trial or the execution of a sentence, at all stages of the administration of criminal justice. For the purposes of the Rules, these persons are referred to as "offenders", irrespective of whether they are suspected, accused or sentenced'.

Principle 2.3 requires States to develop a wide range of non-custodial measures for use in a variety of circumstances:

'In order to provide greater flexibility consistent with the nature and gravity of the offence, with the personality and background of the offender

and with the protection of society and to avoid unnecessary use of imprisonment, the criminal justice system should provide a wide range of non-custodial measures, from pre-trial to post-sentencing dispositions. The number and types of non-custodial measures available should be determined in such a way so that consistent sentencing remains possible’.

Principles 2.4 - 2.7 add further requirements on states in relation to the scope of non-custodial measures:

- 2.4 ‘The development of new non-custodial measures should be encouraged and closely monitored and their use systematically evaluated.
- 2.5 Consideration shall be given to dealing with offenders in the community avoiding as far as possible resort to formal proceedings or trial by a court, in accordance with legal safeguards and the rule of law.
- 2.6 Non-custodial measures should be used in accordance with the principle of minimum intervention.
- 2.7 The use of non-custodial measures should be part of the movement towards depenalization and decriminalization instead of interfering with or delaying efforts in that direction’.

The use of non-custodial measures should be accompanied with legal safeguards for the offender facing them. The most relevant safeguards are mentioned here:

- 3.1¹ The introduction, definition and application of non-custodial measures shall be prescribed by law.
- 3.2 The selection of a non-custodial measure shall be based on an assessment of established criteria in respect of both the nature and gravity of the offence and the personality, background of the offender, the purposes of sentencing and the rights of victims. (..)
- 3.4 Non-custodial measures imposing an obligation on the offender, applied before or instead of formal proceedings or trial, shall require the offender's consent. (..)

- 3.8 Non-custodial measures shall not involve medical or psychological experimentation on, or undue risk of physical or mental injury to, the offender.
- 3.9 The dignity of the offender subject to non-custodial measures shall be protected at all times.
- 3.10 In the implementation of non-custodial measures, the offender's rights shall not be restricted further than was authorized by the competent authority that rendered the original decision'.

With regard to post-sentencing dispositions the 'Standard Minimum Rules' state:

- 9.1 'The competent authority shall have at its disposal a wide range of post-sentencing alternatives in order to avoid institutionalization and to assist offenders in their early reintegration into society.
- 9.2 Post-sentencing dispositions may include:
 - (a) Furlough and half-way houses;
 - (b) Work or education release;
 - (c) Various forms of parole;
 - (d) Remission;
 - (e) Pardon.

Supervision of non-custodial measures is important. Its purpose is to assist the offender's rehabilitation and to prevent a return to crime. Principles 10.1 - 10.4 state:

- 10.1 'The purpose of supervision is to reduce re-offending and to assist the offender's integration into society in a way which minimizes the likelihood of a return to crime.
- 10.2 If a non-custodial measure entails supervision, the latter shall be carried out by a competent authority under the specific conditions prescribed by law.
- 10.3 Within the framework of a given non-custodial measure, the most suitable type of supervision and treatment should be determined for each individual case aimed at assisting the offender to work on his

or her offending. Supervision and treatment should be periodically reviewed and adjusted as necessary.

- 10.4 Offenders should, when needed, be provided with psychological, social and material assistance and with opportunities to strengthen links with the community and facilitate their reintegration into society’.

It is also important for a prosecutor to take into account the conditions for applying non-custodial measures, mentioned in Principles 12.1 - 12.4:

- 12.1 ‘If the competent authority shall determine the conditions to be observed by the offender, it should take into account both the needs of society and the needs and rights of the offender and the victim.
- 12.2 The conditions to be observed shall be practical, precise and as few as possible, and be aimed at reducing the likelihood of an offender relapsing into criminal behaviour and of increasing the offender's chances of social integration, taking into account the needs of the victim.
- 12.3 At the beginning of the application of a non-custodial measure, the offender shall receive an explanation, orally and in writing, of the conditions governing the application of the measure, including the offender's obligations and rights.
- 12.4 The conditions may be modified by the competent authority under the established statutory provisions, in accordance with the progress made by the offender’.

Finally, the provisions relating to a breach of the conditions for a non-custodial measure are mentioned here:

- 14.1 ‘A breach of the conditions to be observed by the offender may result in a modification or revocation of the non-custodial measure.
- 14.2 The modification or revocation of the non-custodial measure shall be made by the competent authority; this shall be done only after a careful examination of the facts adduced by both the supervising officer and the offender.

- 14.3 The failure of a non-custodial measure should not automatically lead to the imposition of a custodial measure.
- 14.4 In the event of a modification or revocation of the non-custodial measure, the competent authority shall attempt to establish a suitable alternative non-custodial measure. A sentence of imprisonment may be imposed only in the absence of other suitable alternatives.
- 14.5 The power to arrest and detain the offender under supervision in cases where there is a breach of the conditions shall be prescribed by law.
- 14.6 Upon modification or revocation of the non-custodial measure, the offender shall have the right to appeal to a judicial or other competent independent authority’.

INTERPRETATIONS AND CONCLUSIONS

All the above-mentioned international human rights texts show that the punishment of a convicted offender may not include torture or be cruel, inhuman or degrading. The public prosecutor, in demanding a sentence for an alleged offender should take this into account. He/she should also be aware of the possible use of non-custodial measures.

The 1990 *U.N. Standard Minimum Rules for Non-Custodial Measures* encourage the promotion and developing of non-custodial measures. This shows that sentencing of offenders should not always involve imprisonment of offenders. Indeed, imprisonment should only be used as a last resort. The use of non-custodial measures can achieve among offenders a sense of responsibility towards society more effectively than imprisonment and, therefore, help offenders with their rehabilitation into society. When non-custodial measures are employed, the requirements of social justice, as well as the rehabilitation needs of the offender, should be taken into account.

The use of the death sentence, although not further mentioned in this chapter, is, of course, also related to human rights and sentencing.

HUMAN RIGHTS AND THE TREATMENT OF PRISONERS

INTRODUCTION

Many United Nations' documents deal with the treatment of prisoners. Although this is not one of the essential tasks of public prosecutors, it is nevertheless important for prosecutors to take into account the most fundamental rights and guarantees for prisoners as set out in international human rights documents. Therefore, this manual addresses the most relevant provisions of those standards.

The principles of the several international texts are divided below into three parts. First we address the more general principles, then the provisions on accommodation of prisoners and finally those principles relating to the protection of health in prison.

As we deal with only the most important provisions, we recommend a reading of the complete documents.

General

Article 10 para.1 of the *International Covenant on Civil and Political Rights* states:

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

A similar provision can be found in the 1988 U.N. *Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment*. Principle 1 of this soft law instrument states:

‘All persons under any form of detention or imprisonment shall be treated in a humane manner and with respect for the inherent dignity of the human person’.

Principle 6 elaborates on this provision:

‘No person under any form of detention or imprisonment shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. No circumstance whatever may be invoked as a justification for torture or other cruel, inhuman or degrading treatment or punishment’.

Principle 1 of the 1990 U.N. *Basic Principles for the Treatment of Prisoners* uses the same words when in states:

‘All prisoners shall be treated with the respect due to their inherent dignity and value as human beings’.

The 1987 *European Prison Rules* (Recommendation No. R (87) 3 of the Committee of Ministers to Member States) contains very important provisions on the treatment and accommodation of prisoners. It states very clearly in principle 1:

‘The deprivation of liberty shall be effected in material and moral conditions which ensure respect for human dignity and are in conformity with these rules’.

Principle 3 then continues:

‘The purposes of the treatment of persons in custody shall be such as to sustain their health and self-respect and, so far as the length of sentence permits, to develop their sense of responsibility and encourage those attitudes and skills that will assist them to return to society with the best chance of leading law-abiding and self-supporting lives after their release’.

Accommodation

The 1977 U.N. *Standard Minimum Rules for the Treatment of Prisoners* provide for several relevant provisions on the accommodation of prisoners. These provisions read:

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

15. Prisoners shall be required to keep their persons clean, and to this end they shall be provided with water and with such toilet articles as are necessary for health and cleanliness.
19. Every prisoner shall, in accordance with local or national standards, be provided with a separate bed, and with separate and sufficient bedding which shall be clean when issued, kept in good order and changed often enough to ensure its cleanliness.
- 21.(1) Every prisoner who is not employed in outdoor work shall have at least one hour of suitable exercise in the open air daily if the weather permits.
 - (3) Young prisoners, and others of suitable age and physique, shall receive physical and recreational training during the period of exercise. To this end space, installations and equipment should be provided.
- 85.(1) Untried prisoners shall be kept separate from convicted prisoners.
 - (3) Young untried prisoners shall be kept separate from adults and shall in principle be detained in separate institutions.
86. Untried prisoners shall sleep singly in separate rooms, with the reservation of different local custom in respect of the climate’.

The 1988 U.N. *Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment* adds some more provisions relating to accommodation of prisoners. Principle 20 states:

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

The 1987 *European Prison Rules* state the following on this subject in principles 14 and 15:

- 14.(1) Prisoners shall normally be lodged during the night in individual cells except in cases where it is considered that there are advantages in sharing accommodation with other prisoners.

- (3) Where accommodation is shared it shall be occupied by prisoners suitable to associate with others in those conditions. There shall be supervision by night, in keeping with the nature of the institution.
- 15. The accommodation provided for prisoners, and in particular all sleeping accommodation, shall meet the requirements of health and hygiene, due regard being paid to climatic conditions and especially the cubic content of air, a reasonable amount of space, lighting, heating and ventilation’.

Medical care

The relevant provisions on medical care in the 1977 U.N. *Standard Minimum Rules for the Treatment of Prisoners* read:

- 22.(1) ‘At every institution there shall be available the services of at least one qualified medical officer who should have some knowledge of psychiatry. The medical services should be organized in close relationship to the general health administration of the community or nation. They shall include a psychiatric service for the diagnosis and, in proper cases, the treatment of states of mental abnormality.
- (2) Sick prisoners who require specialist treatment shall be transferred to specialized institutions or to civil hospitals. Where hospital facilities are provided in an institution, their equipment, furnishings and pharmaceutical supplies shall be proper for the medical care and treatment of sick prisoners, and there shall be a staff of suitable trained officers.
- (3) The services of a qualified dental officer shall be available to every prisoner.
- 23.(1) In women's institutions there shall be special accommodation for all necessary pre-natal and post-natal care and treatment. Arrangements shall be made wherever practicable for children to be born in a hospital outside the institution. If a child is born in prison, this fact shall not be mentioned in the birth certificate.
- (2) Where nursing infants are allowed to remain in the institution with their mothers, provision shall be made for a nursery staffed

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

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

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

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

The protection of the health of prisoners is also mentioned in article 6 of the 1979 U.N. *Code of Conduct for Law Enforcement Officials*:

'Law enforcement officials shall ensure the full protection of the health of persons in their custody and, in particular, shall take immediate action to secure medical attention whenever required'.

In the same document this provision is commented on as follows:

a) "Medical attention", which refers to services rendered by any medical personnel, including certified medical practitioners and paramedics, shall be secured when needed or requested.

b) While the medical personnel are likely to be attached to the law enforcement operation, law enforcement officials must take into account the judgement of such personnel when they recommend providing the person in custody with appropriate treatment through, or in consultation with, medical personnel from outside the law enforcement operation.

- c) It is understood that law enforcement officials shall also secure medical attention for victims of violations of law or of accidents occurring in the course of violations of law’.

The 1982 *Principles of Medical Ethics relevant to the Role of Health Personnel, particularly Physicians, in the Protection of Prisoners and Detainees against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* contains provisions relating to the protection of the health of prisoners. Principle 1 states:

‘Health personnel, particularly physicians, charged with the medical care of prisoners and detainees have a duty to provide them with protection of their physical and mental health and treatment of disease of the same quality and standard as is afforded to those who are not imprisoned or detained’.

Principle 5 then continues:

‘It is a contravention of medical ethics for health personnel, particularly physicians, to participate in any procedure for restraining a prisoner or detainee unless such a procedure is determined in accordance with purely medical criteria as being necessary for the protection of the physical or mental health or the safety of the prisoner or detainee himself, of his fellow prisoners or detainees, or of his guardians, and presents no hazard to his physical or mental health’.

The 1988 U.N. *Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment* also deals with the protection of health of prisoners. The relevant provisions read:

‘Principle 24

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

Principle 25

A detained or imprisoned person or his counsel shall, subject only to reasonable conditions to ensure security and good order in the place of

detention or imprisonment, have the right to request or petition a judicial or other authority for a second medical examination or opinion.

Principle 26

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

Furthermore, principle 9 of the 1990 U.N. *Basic Principles for the Treatment of Prisoners* states:

‘Prisoners shall have access to the health services available in the country without discrimination on the grounds of their legal situation’.

Finally reference should be made to the revised 2006 European Prison Rules.

EUROPEAN PRACTICE

The European Court of Human Rights has considered in its case law that conditions of detention and imprisonment can constitute a violation of article 3 of the *European Convention for the Protection of Human Rights and Fundamental Freedoms*. Lack of water, food, clothing, proper hygiene and adequate medical care can constitute such a violation. The Court considers the conclusions made by the Committee for the Prevention of Torture (CPT), in its reports of its visits to the prisons and places of detention in question, of high importance. When the allegations made by the applicant are corroborated by the conclusions of the CPT’ the Court will almost certainly consider the conditions of detention to be contrary to article 3 of the *Convention* (see paras.42 - 49 of the *Dougoz* case; Judgment of 6 March 2001).

In the *Peers* case (Judgment of 19 April 2001) the Court further ruled that, although it is an important factor, there does not have to be a positive intention to humiliate or degrade a prisoner. Prison conditions in themselves can constitute a violation of article 3 of the *Convention*. The relevant paragraphs of this case read:

‘In the light of the foregoing, the Court considers that in the present case there is no evidence that there was a positive intention of humiliating or

debasement of the applicant. However, the Court notes that, although the question whether the purpose of the treatment was to humiliate or debase the victim is a factor to be taken into account, the absence of any such purpose cannot conclusively rule out a finding of violation of Article 3 (...).

In the *Hirst*-case (Judgment of 6 October 2005, para. 69-71) the Court made it clear that prisoners in general should enjoy all the fundamental rights and freedoms, save for the right to liberty:

In this case, the Court would begin by underlining that prisoners in general continue to enjoy all the fundamental rights and freedoms guaranteed under the Convention save for the right to liberty, where lawfully imposed detention expressly falls within the scope of Article 5 of the Convention. For example, prisoners may not be ill-treated, subjected to inhuman or degrading punishment or conditions contrary to Article 3 of the Convention (see, among many authorities, *Kalashnikov v. Russia*, no. 47095/99, ECHR 2002-VI; *Van der Ven v. the Netherlands*, no. 50901/99, ECHR 2003-II); they continue to enjoy the right to respect for family life (*Ploski v. Poland*, no. 26761/95, judgment of 12 November 2002; *X. v. the United Kingdom*, no. 9054/80, Commission decision of 8 October 1982, DR 30, p. 113), the right to freedom of expression (*Yankov v. Bulgaria*, no. 39084/97, §§ 126-145, ECHR 2003-XII, *T. v. the United Kingdom*, no. 8231/78, Commission report of 12 October 1983, DR 49, p. 5, §§ 44-84), the right to practise their religion (*Poltoratskiy v. Ukraine*, no. 38812/97, §§ 167-171, ECHR 2003-V), the right of effective access to a lawyer or to court for the purposes of Article 6 (*Campbell and Fell v. the United Kingdom*, judgment of 28 June 1984, Series A, no. 80; *Golder v. the United Kingdom*, judgment of 21 February 1975, Series A, no. 18), the right to respect for correspondence (*Silver and Others v. the United Kingdom*, judgment of 25 March 1983, Series A no. 61) and the right to marry (*Hamer v. the United Kingdom*, no. 7114/75, Commission report of 13 December 1979, DR 24, p. 5; *Draper v. the United Kingdom*, no. 8186/78, Commission report of 10 July 1980, DR 24, p. 72). Any restrictions on these other rights require to be justified, although such justification may well be found in the considerations of security, in particular the prevention of crime and disorder, which inevitably flow from the circumstances of imprisonment (see, for example, *Silver*, cited above, §§ 99-105, where broad restrictions on the right of prisoners to correspond fell foul of Article 8 but stopping of specific letters, containing threats or other objectionable references were justifiable in the interests of the prevention of disorder or crime).

There is, therefore, no question that a prisoner forfeits his Convention rights merely because of his status as a person detained following conviction. Nor is there any place under the Convention system, where tolerance and broadmindedness are the acknowledged hallmarks of democratic society, for automatic disenfranchisement based purely on what might offend public opinion.

This standard of tolerance does not prevent a democratic society from taking steps to protect itself against activities intended to destroy the rights or freedoms set forth in the Convention. Article 3 of Protocol No. 1, which enshrines the individual's capacity to influence the composition of the law-making power, does not therefore exclude that restrictions on electoral rights are imposed on an individual who has, for example, seriously abused a public position or whose conduct threatened to undermine the rule of law or democratic foundations (see, for example, no. 6573/74, cited above; and, *mutatis mutandis*, *Glimmerveen and Hagenbeek v. the Netherlands*, applications nos. 8348/78 and 8406/78, Commission decision of 11 October 1979, DR 18, p. 187, where the Commission declared inadmissible two applications concerning the refusal to allow the applicants, who were the leaders of a proscribed organisation with racist and xenophobic traits, to stand for election). The severe measure of disenfranchisement must, however, not be undertaken lightly and the principle of proportionality requires a discernible and sufficient link between the sanction and the conduct and circumstances of the individual concerned. The Court notes in this regard the recommendation of the Venice Commission that the withdrawal of political rights should only be carried out by express judicial decision (see paragraph 32 above). As in other contexts, an independent court, applying an adversarial procedure, provides a strong safeguard against arbitrariness.

Indeed, in the present case, the fact remains that the competent authorities have taken no steps to improve the objectively unacceptable conditions of the applicant's detention. In the Court's view, this omission denotes lack of respect for the applicant. The Court takes particularly into account that, for at least two months, the applicant had to spend a considerable part of each 24-hour period practically confined to his bed in a cell with no ventilation and no window which would at times become unbearably hot. He also had to use the toilet in the presence of another inmate and be present while the toilet was being used by his cellmate.(..) the Court is of the opinion that the prison conditions complained of diminished the applicant's human dignity and arose in him feelings of anguish and inferiority capable of humiliating and debasing

him and possibly breaking his physical or moral resistance. In sum, the Court considers that the conditions of the applicant's (..) amounted to degrading treatment within the meaning of Article 3 of the Convention. There has thus been a breach of this provision'.

EUROPEAN COMMITTEE FOR THE PREVENTION OF TORTURE

In 1989 the *European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment* was published with the aim of establishing a Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT). Article 1 of the *Convention* states the purpose of the CPT.:

'There shall be established a European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (hereinafter referred to as the "Committee"). The Committee shall, by means of visits, examine the treatment of persons deprived of their liberty with a view to strengthening, if necessary, the protection of such persons from torture and from inhuman or degrading treatment or punishment'.

The CPT, therefore, has access to all places where people are being detained or otherwise deprived of their liberty. It is further allowed to make visits, periodically, or when circumstances so require, after a very short notification period to the state in question. The members of the CPT are allowed to interview and speak freely with all people they want to, especially, of course, detainees. The CPT furthermore makes annual reports on all its visits. However, their most important 'weapon' is to make a public statement when prison conditions do not meet the CPT standards. Although a State is not legally obliged to make changes when the CPT requires them, a public statement by the CPT does constitute a 'mobilisation of shame'.

As already shown above, the reports of the CPT are very important since the European Court of Human Rights pays a great deal of attention to CPT reports when it comes to cases before the Court relating to article 3 (Prohibition of torture and other inhuman or degrading treatment) of the *Convention*. This 'good practice' in Europe is at the forefront of and important to the fight against torture.

INTERPRETATIONS AND CONCLUSIONS

People in prison are especially vulnerable to all sorts of maltreatment. Several international human rights texts have therefore been adopted which contain provisions for the protection of prisoners.

First, prisoners should be treated with humanity and respect and should not be subjected to torture and other inhuman or degrading treatment. Next there are provisions on the conditions and accommodation in which prisoners are held. Prisoners should be held in places that meet all health and hygiene requirements.

Several provisions in international human rights texts cover the medical care for prisoners. At all prison institutions there should be medical services available and prisoners in need of medical care should at all times have access to health care by a medical officer.

Recent case law of the European Court makes it clear that a prisoner should not automatically lose other human rights and freedoms than his right to liberty.

As mentioned above the work of the European Committee for the Prevention of Torture and Other Inhuman or Degrading Treatment or Punishment is very important in safeguarding the rights of prisoners. Once again, as only the most relevant provisions are mentioned here, complete reading of the relevant documents is recommended.

ADMINISTRATION OF CRIMINAL JUSTICE UNDER STATES OF EMERGENCY

RELEVANT TEXTS AT THE UN-LEVEL

Article 4 para.1 of the *International Covenant on Civil and Political Rights* provides for the possibility for State Parties to derogate from certain obligations under the *ICCPR* in a state of emergency:

‘In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin’.

Paragraph 2 then prohibits derogation from important articles even in a state of emergency:

‘No derogation from articles 6, 7, 8 (paragraphs 1 and 2), 11, 15, 16 and 18 may be made under this provision’.

Finally, para.3 requires states to inform other states of any derogation:

‘Any State Party to the present Covenant availing itself of the right of derogation shall immediately inform the other States Parties to the present Covenant, through the intermediary of the Secretary-General of the United Nations, of the provisions from which it has derogated and of the reasons by which it was actuated. A further communication shall be made, through the same intermediary, on the date on which it terminates such derogation’.

RELEVANT TEXTS AT THE REGIONAL LEVEL

Europe

Paragraph 1 of Article 15 of the *European Convention for the Protection of Human Rights and Fundamental Freedoms* on derogation from obligations under the *Convention* in time of emergency reads:

‘In time of war or other public emergency threatening the life of the nation any High Contracting Party may take measures derogating from its obligations under this Convention to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law’.

Paragraph 2 then prohibits derogation from certain articles of the *Convention*:

‘No derogation from Article 2, except in respect of deaths resulting from lawful acts of war, or from Articles 3, 4 (paragraph 1) and 7 shall be made under this provision’.

The 1987 U.N. *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* states in Article 2 that the existence of a public emergency shall not be a justification for the use of torture or any other inhuman or degrading treatment:

1. ‘Each State Party shall take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction.
2. No exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture.
3. An order from a superior officer or a public authority may not be invoked as a justification of torture’.

Africa

The *African Charter on Human and Peoples’ Rights* contains no provisions on the administration of justice in time of emergency.

Arab world

The *Cairo Declaration on Human Rights in Islam* prohibits the promulgation of emergency laws derogating from the prohibition on torture. This provision can be found in Article 20:

‘It is not permitted without legitimate reason to arrest an individual, or restrict his freedom, to exile or to punish him. It is not permitted to subject him to physical or psychological torture or to any form of maltreatment, cruelty or indignity. Nor is it permitted to subject an individual to medical or scientific experiments without his consent or at the risk of his health or of his life. Nor is it permitted to promulgate emergency laws that would provide executive authority for such actions’.

The *Arab Charter on Human Rights* contains provisions on the administration of criminal justice in time of emergency in article 4. Derogation from some obligations under the *Charter* is allowed for some fundamental rights but is prohibited for others. Article 4 reads:

- a) ‘No restrictions shall be placed on the rights and freedoms recognized in the present Charter except where such is provided by law and deemed necessary to protect the national security and economy, public order, health or morals or the rights and freedoms of others.
- b) In time of public emergency which threatens the life of the nation, the States Parties may take measures derogating from their obligations under the present Charter to the extent strictly required by the exigencies of the situation.
- c) Such measures or derogations shall under no circumstances affect or apply to the rights and special guarantees concerning the prohibition of torture and degrading treatment, return to one's country, political asylum, trial, the inadmissibility of retrial for the same act, and the legal status of crime and punishment’.

The Americas

The *American Convention on Human Rights* has very clear provisions on the possibility of derogating from obligations under the Convention, as well as on the prohibition on derogating from certain human rights set out in the *Convention*. Article 27 reads:

1. 'In time of war, public danger, or other emergency that threatens the independence or security of a State Party, it may take measures derogating from its obligations under the present Convention to the extent and for the period of time strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law and do not involve discrimination on the ground of race, color, sex, language, religion, or social origin.
2. The foregoing provision does not authorize any suspension of the following articles: Article 3 (Right to Juridical Personality), Article 4 (Right to Life), Article 5 (Right to Humane Treatment), Article 6 (Freedom from Slavery), Article 9 (Freedom from Ex Post Facto Laws), Article 12 (Freedom of Conscience and Religion), Article 17 (Rights of the Family), Article 18 (Right to a Name), Article 19 (Rights of the Child), Article 20 (Right to Nationality), and Article 23 (Right to Participate in Government), or of the judicial guarantees essential for the protection of such rights.
3. Any State Party availing itself of the right of suspension shall immediately inform the other States Parties, through the Secretary General of the Organization of American States, of the provisions the application of which it has suspended, the reasons that gave rise to the suspension, and the date set for the termination of such suspension'.

Furthermore, the 1992 *Inter-American Convention to Prevent and Punish Torture* states in Article 5 that the existence of a state of emergency does not justify the use of torture:

'The existence of circumstances such as a state of war, threat of war, state of siege or of emergency, domestic disturbance or strife, suspension of constitutional guarantees, domestic political instability, or other public emergencies or disasters shall not be invoked or admitted as justification for the crime of torture.

Neither the dangerous character of the detainee or prisoner, nor the lack of security of the prison establishment or penitentiary shall justify torture'.

SOFT INTERNATIONAL LAW

U.N.Level

The 1979 *UN. Code of Conduct for Law Enforcement Officials* addresses the prohibition on torture and other cruel, inhuman or degrading treatment even in a state of public emergency. Article 5 reads:

‘No law enforcement official may inflict, instigate or tolerate any act of torture or other cruel, inhuman or degrading treatment or punishment, nor may any law enforcement official invoke superior orders or exceptional circumstances such as a state of war or a threat of war, a threat to national security, internal political instability or any other public emergency as a justification of torture or other cruel, inhuman or degrading treatment or punishment’.

The Human Rights Committee in its 1981 *General Comment 5* commented on these provisions. The comments provide for very important statements by the Human Rights Committee on how Article 4 *ICCPR* should be interpreted. Paragraphs 1 and 3 of this *Comment* read:

1. ‘Article 4 of the Covenant has posed a number of problems for the Committee when considering reports from some States parties. When a public emergency which threatens the life of a nation arises and it is officially proclaimed, a State party may derogate from a number of rights to the extent strictly required by the situation. The State party, however, may not derogate from certain specific rights and may not take discriminatory measures on a number of grounds. The State party is also under an obligation to inform the other States parties immediately, through the Secretary-General, of the derogations it has made including the reasons therefor and the date on which the derogations are terminated’.

3. The Committee holds the view that measures taken under article 4 are of an exceptional and temporary nature and may only last as long as the life of the nation concerned is threatened and that, in times of emergency, the protection of human rights becomes all the more important, particularly those rights from which no derogations can be made. The Committee also considers that it is equally important for States parties, in times of public emergency, to inform the other States parties of the nature and extent of the derogations they have made and

of the reasons therefor and, further, to fulfil their reporting obligations under article 40 of the Covenant by indicating the nature and extent of each right derogated from together with the relevant documentation’.

EUROPEAN PRACTICE

The European Court of Human Rights has ruled several times on the provisions laid down in Article 15 of the *European Convention for the Protection of Human Rights and Fundamental Freedoms* in relation to emergency situations. Within certain limits, Article 15 of the *Convention* allows States to take measures derogating from their obligations under the *Convention* in time of public emergency. According to Article 15 para.1, derogation measures can only be taken if there is a ‘public emergency threatening the life of the nation’. The Court in para.28 of the *Lawless* case (Judgment of 1 July 1961) interpreted this requirement as follows:

‘Whereas, in the general context of Article 15 (art. 15) of the Convention, the natural and customary meaning of the words "other public emergency threatening the life of the nation" is sufficiently clear; whereas they refer to an exceptional situation of crisis or emergency which affects the whole population and constitutes a threat to the organised life of the community of which the State is composed;(..)’

Article 15 para.3 requires permanent review of the need for emergency measures. The very notion of proportionality requires that the measures will be withdrawn when no longer needed, but the decision to withdraw a derogation is, in principle, a matter within the discretion of the state (see paras.47 and 54 of the *Brannigan & McBride* case (Judgment of 26 May 1993).

In the *Aksoy* case (Judgment of 18 December 1996) the Court ruled that although public emergency situation may exist, the derogating measures that may be taken are limited. In the *Aksoy* case a suspect was held for fourteen days without any judicial intervention. The state claimed an emergency situation and derogated from its obligations under Article 5 para.3 of the *Convention*. According to the Court, such a long period left the suspect vulnerable not only to arbitrary interference with his right to liberty, but also to torture. The relevant paragraph of the Court’s judgement reads:

‘Although the Court is of the view - which it has expressed on several occasions in the past (..) that the investigation of terrorist offences

undoubtedly presents the authorities with special problems, it cannot accept that it is necessary to hold a suspect for fourteen days without judicial intervention. This period is exceptionally long, and left the applicant vulnerable not only to arbitrary interference with his right to liberty but also to torture’.

Finally, a state is required under Article 15 para.3 formally to notify derogation measures to the Council of Europe. The Court’s position is that a state cannot rely on derogation measures which have not been formally notified to the Council of Europe. This means that, on its own, a national announcement by a state of derogation measures does not satisfy the requirement of Article 15 para.3. (see the *Brannigan & McBride* case).

INTERPRETATIONS AND CONCLUSION

As the above-mentioned international human rights texts show, states are, under certain circumstances, allowed to take measures derogating from their obligations under those documents. For the administration of justice this means that in certain circumstances the application of some provisions can be suspended. States sometimes want to derogate from their obligations under human rights conventions, especially in the fight against terrorism and all the difficulties which flow from it. However, the conditions under which a state may derogate from its obligations are well defined: a public emergency must exist which threatens the life of a nation and this must be officially proclaimed. Only in circumstances which meet these requirements are states allowed taking derogating measures and even then only to the extent strictly required by the situation.

The international documents also show that it is absolutely prohibited to derogate from certain fundamental human rights. It is of utmost importance to mention here that, under no circumstances whatsoever, may a state derogate from those principles which relate to the right to life and the prohibition on torture and other cruel, inhuman or degrading treatment. As the jurisprudence of the European Court of Human Rights shows, even the permitted derogation from other human rights in a public emergency situation is limited.

Finally, there exists a requirement for states to inform other states, or the competent authority of the particular convention to which the derogation applies, about any derogation therefrom.

HUMAN RIGHTS AND THE FIGHT AGAINST TERRORISM

The considerations described in the preceding chapter on Administration of Criminal Justice under States of Emergency also apply to the role of the prosecutor in combating terrorism. In this chapter we also include some specific soft law.

SOFT INTERNATIONAL LAW

Europe

After the events of 11 September 2001, the Committee of Ministers of the Council of Europe adopted on 11 July 2002 *Guidelines on human rights and the fight against terrorism*. As the guidelines are to a great extent based on the European Convention on Human Rights and the case-law of the European Court of Human Rights, they are to be considered as ‘soft law’. The guidelines contain so much material which is of importance for national prosecutors dealing with the fight against terrorism, that the full text is quoted here.

As far as guideline X.2 is concerned, the introductory remarks in bold in the Chapter on ‘Human Rights and the right to life’ also apply here.

Preamble

The Committee of Ministers,

[a.] Considering that terrorism seriously jeopardises human rights, threatens democracy, and aims notably to destabilise legitimately constituted governments and to undermine pluralistic civil society;

[b.] Unequivocally condemning all acts, methods and practices of terrorism as criminal and unjustifiable, wherever and by whomever committed;

[c.] Recalling that a terrorist act can never be excused or justified by citing motives such as human rights and that the abuse of rights is never protected;

[d.] Recalling that it is not only possible, but also absolutely necessary, to fight terrorism while respecting human rights, the rule of law and, where applicable, international humanitarian law;

[e.] Recalling the need for States to do everything possible, and notably to co-operate, so that the suspected perpetrators, organisers and sponsors of terrorist acts are brought to justice to answer for all the consequences, in particular criminal and civil, of their acts;

[f.] Reaffirming the imperative duty of States to protect their populations against possible terrorist acts;

[g.] Recalling the necessity for states, notably for reasons of equity and social solidarity, to ensure that victims of terrorist acts can obtain compensation;

[h.] Keeping in mind that the fight against terrorism implies long-term measures with a view to preventing the causes of terrorism, by promoting, in particular, cohesion in our societies and a multicultural and inter-religious dialogue;

[i.] Reaffirming states' obligation to respect, in their fight against terrorism, the international instruments for the protection of human rights and, for the member states in particular, the Convention for the Protection of Human Rights and Fundamental Freedoms and the case-law of the European Court of Human Rights;

adopts the following guidelines and invites member States to ensure that they are widely disseminated among all authorities responsible for the fight against terrorism.

I

States' obligation to protect everyone against terrorism

States are under the obligation to take the measures needed to protect the fundamental rights of everyone within their jurisdiction against terrorist acts, especially the right to life. This positive obligation fully justifies States' fight against terrorism in accordance with the present guidelines.

II

Prohibition of arbitrariness

All measures taken by States to fight terrorism must respect human rights and the principle of the rule of law, while excluding any form of arbitrariness, as well as any discriminatory or racist treatment, and must be subject to appropriate supervision.

III

Lawfulness of anti-terrorist measures

1. All measures taken by States to combat terrorism must be lawful.
2. When a measure restricts human rights, restrictions must be defined as precisely as possible and be necessary and proportionate to the aim pursued.

IV

Absolute prohibition of torture

The use of torture or of inhuman or degrading treatment or punishment, is absolutely prohibited, in all circumstances, and in particular during the arrest, questioning and detention of a person suspected of or convicted of terrorist activities, irrespective of the nature of the acts that the person is suspected of or for which he/she was convicted.

V

Collection and processing of personal data by any competent authority in the field of State security

Within the context of the fight against terrorism, the collection and the processing of personal data by any competent authority in the field of State security may interfere with the respect for private life only if such collection and processing, in particular:

- (i) are governed by appropriate provisions of domestic law;
- (ii) are proportionate to the aim for which the collection and the processing were foreseen;
- (iii) may be subject to supervision by an external independent authority.

VI

Measures which interfere with privacy

1. Measures used in the fight against terrorism that interfere with privacy (in particular body searches, house searches, bugging, telephone tapping, surveillance of correspondence and use of undercover agents) must be provided for by law. It must be possible to challenge the lawfulness of these measures before a court.
2. Measures taken to fight terrorism must be planned and controlled by the authorities so as to minimise, to the greatest extent possible, recourse to

lethal force and, within this framework, the use of arms by the security forces must be strictly proportionate to the aim of protecting persons against unlawful violence or to the necessity of carrying out a lawful arrest.

VII

Arrest and police custody

1. A person suspected of terrorist activities may only be arrested if there are reasonable suspicions. He/she must be informed of the reasons for the arrest.
2. A person arrested or detained for terrorist activities shall be brought promptly before a judge. Police custody shall be of a reasonable period of time, the length of which must be provided for by law.
3. A person arrested or detained for terrorist activities must be able to challenge the lawfulness of his/her arrest and of his/her police custody before a court.

VIII

Regular supervision of pre-trial detention

A person suspected of terrorist activities and detained pending trial is entitled to regular supervision of the lawfulness of his or her detention by a court.

IX

Legal proceedings

1. A person accused of terrorist activities has the right to a fair hearing, within a reasonable time, by an independent, impartial tribunal established by law.
2. A person accused of terrorist activities benefits from the presumption of innocence.
3. The imperatives of the fight against terrorism may nevertheless justify certain restrictions to the right of defence, in particular with regard to:
 - (i) the arrangements for access to and contacts with counsel;
 - (ii) the arrangements for access to the case-file;
 - (iii) the use of anonymous testimony.
4. Such restrictions to the right of defence must be strictly proportionate to their purpose, and compensatory measures to protect the interests of the accused must be taken so as to maintain the fairness of the proceedings and to ensure that procedural rights are not drained of their substance.

X

Penalties incurred

1. The penalties incurred by a person accused of terrorist activities must be provided for by law for any action or omission which constituted a criminal offence at the time when it was committed; no heavier penalty may be imposed than the one that was applicable at the time when the criminal offence was committed.
2. Under no circumstances may a person convicted of terrorist activities be sentenced to the death penalty; in the event of such a sentence being imposed, it may not be carried out.

XI

Detention

1. A person deprived of his/her liberty for terrorist activities must in all circumstances be treated with due respect for human dignity.
2. The imperatives of the fight against terrorism may nevertheless require that a person deprived of his/her liberty for terrorist activities be submitted to more severe restrictions than those applied to other prisoners, in particular with regard to:
 - (i) the regulations concerning communications and surveillance of correspondence, including that between counsel and his/her client;
 - (ii) placing persons deprived of their liberty for terrorist activities in specially secured quarters;
 - (iii) the separation of such persons within a prison or among different prisons,on condition that the measure taken is proportionate to the aim to be achieved.

XII

Asylum, return ("refoulement") and expulsion

1. All requests for asylum must be dealt with on an individual basis. An effective remedy must lie against the decision taken. However, when the State has serious grounds to believe that the person who seeks to be granted asylum has participated in terrorist activities, refugee status must be refused to that person.
2. It is the duty of a State that has received a request for asylum to ensure that the possible return ("refoulement") of the applicant to his/her country of origin or to another country will not expose him/her to the death

penalty, to torture or to inhuman or degrading treatment or punishment. The same applies to expulsion.

3. Collective expulsion of aliens is prohibited.
4. In all cases, the enforcement of the expulsion or return ("refoulement") order must be carried out with respect for the physical integrity and for the dignity of the person concerned, avoiding any inhuman or degrading treatment.

XIII

Extradition

1. Extradition is an essential procedure for effective international co-operation in the fight against terrorism.
2. The extradition of a person to a country where he/she risks being sentenced to the death penalty may not be granted. A requested State may however grant an extradition if it has obtained adequate guarantees that:
 - (i) the person whose extradition has been requested will not be sentenced to death; or
 - (ii) in the event of such a sentence being imposed, it will not be carried out.
3. Extradition may not be granted when there is serious reason to believe that:
 - (i) the person whose extradition has been requested will be subjected to torture or to inhuman or degrading treatment or punishment;
 - (ii) the extradition request has been made for the purpose of prosecuting or punishing a person on account of his/her race, religion, nationality or political opinions, or that that person's position risks being prejudiced for any of these reasons.
4. When the person whose extradition has been requested makes out an arguable case that he/she has suffered or risks suffering a flagrant denial of justice in the requesting State, the requested State must consider the well-foundedness of that argument before deciding whether to grant extradition.

XIV

Right to property

The use of the property of persons or organisations suspected of terrorist activities may be suspended or limited, notably by such measures as freezing orders or seizures, by the relevant authorities. The owners of the

property have the possibility to challenge the lawfulness of such a decision before a court.

XV

Possible derogations

1. When the fight against terrorism takes place in a situation of war or public emergency which threatens the life of the nation, a State may adopt measures temporarily derogating from certain obligations ensuing from the international instruments of protection of human rights, to the extent strictly required by the exigencies of the situation, as well as within the limits and under the conditions fixed by international law. The State must notify the competent authorities of the adoption of such measures in accordance with the relevant international instruments.
2. States may never, however, and whatever the acts of the person suspected of terrorist activities, or convicted of such activities, derogate from the right to life as guaranteed by these international instruments, from the prohibition against torture or inhuman or degrading treatment or punishment, from the principle of legality of sentences and of measures, nor from the ban on the retrospective effect of criminal law.
3. The circumstances which led to the adoption of such derogations need to be reassessed on a regular basis with the purpose of lifting these derogations as soon as these circumstances no longer exist.

XVI

Respect for peremptory norms of international law and for international humanitarian law

In their fight against terrorism, States may never act in breach of peremptory norms of international law nor in breach of international humanitarian law, where applicable.

XVII

Compensation for victims of terrorist acts

When compensation is not fully available from other sources, in particular through the confiscation of the property of the perpetrators, organisers and sponsors of terrorist acts, the State must contribute to the compensation of the victims of attacks that took place on its territory, as far as their person or their health is concerned.

Other interesting material can be found in the Recommendation Rec(2005)10 of the Committee of Ministers of the Council of Europe to member states on “special investigation techniques” in relation to serious crimes including acts of terrorism (Adopted by the Committee of Ministers on 20 April 2005)

ICJ

The International Commission of Jurists, in its Berlin Declaration of 28 August 2004 (*The ICJ Declaration on Upholding Human Rights and the Rule of Law in Combatting Terrorism*) made the following comments as far as the duties of prosecutors in combating terrorism are concerned:

Prosecutors: In addition to working to bring to justice those responsible for terrorist acts, prosecutors should also uphold human rights and the rule of law in the performance of their professional duties, in accordance with the principles set out above. They should refuse to use evidence obtained by methods involving a serious violation of a suspect's human rights and should take all necessary steps to ensure that those responsible for using such methods are brought to justice. Prosecutors have a responsibility to tackle impunity by prosecuting persons responsible for serious human rights violations committed while countering terrorism and to seek remedy and reparation for victims of such violations.

EUROPEAN PRACTICE

In many judgments the European Court has emphasised that the provisions of the European Convention on Human Rights do also apply to persons who are suspected of the most serious crimes, like international organised crime and terrorism.

In paragraphs 124-136 of its judgment of 28 February 2008 in the case *Saadi v. Italy* the Court repeated that where substantial grounds have been shown for believing that a terrorist, if deported to his country of origin, faces a real risk of being subjected to treatment contrary to Article 3, this implies an obligation not to deport the person in question to that country. The same applies equally when the person faces a real risk of being subjected to a treatment contrary to Article 2 (right to life).

i. Responsibility of Contracting States in the event of expulsion

It is the Court's settled case-law that as a matter of well-established international law, and subject to their treaty obligations, including those arising from the Convention, Contracting States have the right to control the entry, residence and removal of aliens (see, among many other authorities, *Abdulaziz, Cabales and Balkandali v. the United Kingdom*, judgment of 28 May 1985, Series A no. 94, § 67, and *Boujlifa v. France*, judgment of 21 October 1997, *Reports of Judgments and Decisions* 1997-VI, § 42). In addition, neither the Convention nor its Protocols confer the right to political asylum (see *Vilvarajah and Others v. the United Kingdom*, judgment of 30 October 1991, Series A no. 215, § 102, and *Ahmed v. Austria*, judgment of 17 December 1996, *Reports* 1996-VI, § 38).

However, expulsion by a Contracting State may give rise to an issue under Article 3, and hence engage the responsibility of that State under the Convention, where substantial grounds have been shown for believing that the person concerned, if deported, faces a real risk of being subjected to treatment contrary to Article 3. In such a case Article 3 implies an obligation not to deport the person in question to that country (see *Soering v. the United Kingdom*, judgment of 7 July 1989, Series A no. 161, §§ 90-91; *Vilvarajah and Others*, cited above, § 103; *Ahmed*, cited above, § 39; *H.L.R. v. France*, judgment of 29 April 1997, *Reports* 1997-III, § 34; *Jabari v. Turkey*, no. 40035/98, § 38, ECHR 2000-VIII; and *Salah Sheekh v. the Netherlands*, no. 1948/04, § 135, 11 January 2007).

In this type of case the Court is therefore called upon to assess the situation in the receiving country in the light of the requirements of Article 3. Nonetheless, there is no question of adjudicating on or establishing the responsibility of the receiving country, whether under general international law, under the Convention or otherwise. In so far as any liability under the Convention is or may be incurred, it is liability incurred by the Contracting State, by reason of its having taken action which has as a direct consequence the exposure of an individual to the risk of proscribed ill-treatment (see *Mamatkulov and Askarov v. Turkey* [GC], nos. 46827/99 and 46951/99, § 67, ECHR 2005-I).

Article 3, which prohibits in absolute terms torture and inhuman or degrading treatment or punishment, enshrines one of the fundamental values of democratic societies. Unlike most of the substantive clauses of the Convention and of Protocols Nos. 1 and 4, Article 3 makes no provision for

exceptions and no derogation from it is permissible under Article 15, even in the event of a public emergency threatening the life of the nation (see *Ireland v. the United Kingdom*, judgment of 8 January 1978, Series A no. 25, § 163; *Chahal*, cited above, § 79; *Selmouni v. France* [GC], no. 25803/94, § 95, ECHR 1999-V; *Al-Adsani v. the United Kingdom* [GC], no. 35763/97, § 59, ECHR 2001-XI; and *Shamayev and Others v. Georgia and Russia*, no. 36378/02, § 335, ECHR 2005-III). As the prohibition of torture and of inhuman or degrading treatment or punishment is absolute, irrespective of the victim's conduct (see *Chahal*, cited above, § 79), the nature of the offence allegedly committed by the applicant is therefore irrelevant for the purposes of Article 3 (see *Indelicato v. Italy*, no. 31143/96, § 30, 18 October 2001, and *Ramirez Sanchez v. France* [GC], no. 59450/00, §§ 115-116, 4 July 2006).

ii. Material used to assess the risk of exposure to treatment contrary to Article 3 of the Convention

In determining whether substantial grounds have been shown for believing that there is a real risk of treatment incompatible with Article 3, the Court will take as its basis all the material placed before it or, if necessary, material obtained *proprio motu* (see *H.L.R. v. France*, cited above, § 37, and *Hilal v. the United Kingdom*, no. 45276/99, § 60, ECHR 2001-II). In cases such as the present the Court's examination of the existence of a real risk must necessarily be a rigorous one (see *Chahal*, cited above, § 96).

It is in principle for the applicant to adduce evidence capable of proving that there are substantial grounds for believing that, if the measure complained of were to be implemented, he would be exposed to a real risk of being subjected to treatment contrary to Article 3 (see *N. v. Finland*, no. 38885/02, § 167, 26 July 2005). Where such evidence is adduced, it is for the Government to dispel any doubts about it.

In order to determine whether there is a risk of ill-treatment, the Court must examine the foreseeable consequences of sending the applicant to the receiving country, bearing in mind the general situation there and his personal circumstances (see *Vilvarajah and Others*, cited above, § 108 *in fine*).

To that end, as regards the general situation in a particular country, the Court has often attached importance to the information contained in recent reports from independent international human-rights-protection associations such as Amnesty International, or governmental sources, including the US State Department (see, for example, *Chahal*, cited above, §§ 99-100; *Muslim v.*

Turkey, no.º53566/99, § 67, 26 April 2005; *Said v. the Netherlands*, no. 2345/02, § 54, 5 July 2005; and *Al-Moqayad v. Germany* (dec.), no.º35865/03, §§ 65-66, 20 February 2007). At the same time, it has held that the mere possibility of ill-treatment on account of an unsettled situation in the receiving country does not in itself give rise to a breach of Article 3 (see *Vilvarajah and Others*, cited above, § III, and *Fatgan Katani and Others v. Germany* (dec.), no. 67679/01, 31 May 2001) and that, where the sources available to it describe a general situation, an applicant's specific allegations in a particular case require corroboration by other evidence (see *Mamatkulov and Askarov*, cited above, § 73, and *Muslim*, cited above, § 68).

In cases where an applicant alleges that he or she is a member of a group systematically exposed to a practice of ill-treatment, the Court considers that the protection of Article 3 of the Convention enters into play when the applicant establishes, where necessary on the basis of the sources mentioned in the previous paragraph, that there are serious reasons to believe in the existence of the practice in question and his or her membership of the group concerned (see, *mutatis mutandis*, *Salah Sheekh*, cited above, §§ 138-149).

With regard to the material date, the existence of the risk must be assessed primarily with reference to those facts which were known or ought to have been known to the Contracting State at the time of expulsion. However, if the applicant has not yet been extradited or deported when the Court examines the case, the relevant time will be that of the proceedings before the Court (see *Chahal*, cited above, §§ 85 and 86, and *Venkadajalasarma v. the Netherlands*, no. 58510/00, § 63, 17 February 2004). This situation typically arises when, as in the present case, deportation or extradition is delayed as a result of an indication by the Court of an interim measure under Rule 39 of the Rules of Court (see *Mamatkulov and Askarov*, cited above, § 69). Accordingly, while it is true that historical facts are of interest in so far as they shed light on the current situation and the way it is likely to develop, the present circumstances are decisive.

iii. The concepts of “torture” and “inhuman or degrading treatment”

According to the Court's settled case-law, ill-treatment must attain a minimum level of severity if it is to fall within the scope of Article 3. The assessment of this minimum level of severity is relative; it depends on all the circumstances of the case, such as the duration of the treatment, its physical and mental effects and, in some cases, the sex, age and state of health of the victim (see, among other authorities, *Price v. the United Kingdom*, no. 33394/96,

§ 24, ECHR 2001-VII; *Mouisel v. France*, no. 67263/01, § 37, ECHR 2002-IX; and *Jalloh v. Germany* [GC], no. 54810/00, § 67, 11 July 2006).

In order for a punishment or treatment associated with it to be “inhuman” or “degrading”, the suffering or humiliation involved must in any event go beyond that inevitable element of suffering or humiliation connected with a given form of legitimate treatment or punishment (see *Labita v. Italy* [GC], no. 26772/95, § 120, ECHR 2000-IV).

In order to determine whether any particular form of ill-treatment should be qualified as torture, regard must be had to the distinction drawn in Article 3 between this notion and that of inhuman or degrading treatment. This distinction would appear to have been embodied in the Convention to allow the special stigma of “torture” to attach only to deliberate inhuman treatment causing very serious and cruel suffering (see *Aydin v. Turkey*, judgment of 25 September 1997, *Reports* 1997-VI, § 82, and *Selmouni*, cited above, § 96).

HUMAN RIGHTS AND JUVENILE JUSTICE

RELEVANT TEXTS AT THE U.N. LEVEL

The *Universal Declaration of Human Rights* states in article 25 para.2:

‘Motherhood and childhood are entitled to special care and assistance.(..)’

Subsequently several international documents have been adopted with the object of protecting the rights of the child.

First, the *International Covenant on Civil and Political Rights* contains several provisions that require that special care is taken of juveniles in criminal proceedings. Article 10 of the *Covenant* states in paras.2 (b) and 3 on the attitude towards juveniles deprived of their liberty:

- 2(b) ‘Accused juvenile persons shall be separated from adults and brought as speedily as possible for adjudication.
- 3. The penitentiary system shall comprise treatment of prisoners the essential aim of which shall be their reformation and social rehabilitation. Juvenile offenders shall be segregated from adults and be accorded treatment appropriate to their age and legal status’.

Paragraph 1 of article 14 of the *Covenant* requires special care when making public judgments on juveniles:

‘(..) 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(..).’

In relation to trial procedures involving juveniles the *Covenant* states in article 14 para.4:

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'.

Following the *Covenant* in 1959 the preamble to the *U.N. Declaration of the Rights of the Child* states:

'Whereas the child, by reason of his physical and mental immaturity, needs special safeguards and care, including appropriate legal protection, before as well as after birth, (..)'

Several provisions in this document support this view. Principle 2 is of most relevance for the public prosecutor:

'The child shall enjoy special protection, and shall be given opportunities and facilities, by law and by other means, to enable him to develop physically, mentally, morally, spiritually and socially in a healthy and normal manner and in conditions of freedom and dignity. In the enactment of laws for this purpose, the best interests of the child shall be the paramount consideration.'

These principles have been translated into rights in the 1989 U.N. *Convention on the Rights of the Child*. This document holds several provisions which are important for prosecutors in procedures relating to children. Article 37 reads:

'States Parties shall ensure that:

- a. No child shall be subjected to torture or other cruel, inhuman or degrading treatment or punishment. Neither capital punishment nor life imprisonment without possibility of release shall be imposed for offences committed by persons below eighteen years of age;
- b. No child shall be deprived of his or her liberty unlawfully or arbitrarily. The arrest, detention or imprisonment of a child shall be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time;
- c. Every child deprived of liberty shall be treated with humanity and respect for the inherent dignity of the human person, and in a manner which takes into account the needs of persons of his or her age. In particular, every child deprived of liberty shall be separated from adults

unless it is considered in the child's best interest not to do so and shall have the right to maintain contact with his or her family through correspondence and visits, save in exceptional circumstances;

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

RELEVANT TEXTS AT THE REGIONAL LEVEL

Europe

The *European Convention for the Protection of Human Rights and Fundamental Freedoms* requires states to take special care in making public judgments on juveniles. The relevant part of article 6 para.1 reads:

‘(..)Judgment shall be pronounced publicly but the press and public may be excluded from all part of the trial in the interest of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require(..).’

The *Charter of Fundamental Rights of the European Union* contains several provisions on the rights of the child which are also important for the prosecutor to take into account. Article 24 reads:

1. 'Children shall have the right to such protection and care as is necessary for their well-being. They may express their views freely. Such views shall be taken into consideration on matters which concern them in accordance with their age and maturity.
2. In all actions relating to children, whether taken by public authorities or private institutions, the child's best interests must be a primary consideration.(..).’

Africa

The 1990 *African Charter on the Rights and Welfare of the Child* first of all contains a more general provision on the best interests of the child in article 4:

1. 'In all actions concerning the child undertaken by any person or authority the best interests of the child shall be the primary consideration.
2. In all judicial or administrative proceedings affecting a child who is capable of communicating his/her own views, and opportunity shall be provided for the views of the child to be heard either directly or through an impartial representative as a party to the proceedings; and those views shall be taken into consideration by the relevant authority in accordance with the provisions of appropriate law'.

The document also contains an article specifically on the administration of juvenile justice. Article 17 reads:

1. 'Every child accused or found guilty of having infringed penal law shall have the right to special treatment in a manner consistent with the child's sense of dignity and worth and which reinforces the child's respect for human rights and fundamental freedoms of others.
2. States Parties to the present Charter shall in particular:
 - a) ensure that no child who is detained or imprisoned or otherwise deprived of his/her liberty is subjected to torture, inhuman or degrading treatment or punishment;
 - b) ensure that children are separated from adults in their place of detention or imprisonment;
 - c) ensure that every child accused in infringing the penal law:
 - i) shall be presumed innocent until duly recognized guilty;
 - ii) shall be informed promptly in a language that he understands and in detail of the charge against him, and shall be entitled to the assistance of an interpreter if he or she cannot understand the language used;
 - iii) shall be afforded legal and other appropriate assistance in the preparation and presentation of his defence;
 - iv) shall have the matter determined as speedily as possible by an impartial tribunal and if found guilty, be entitled to an appeal by a higher tribunal;
 - d) prohibit the press and the public from trial.
3. The essential aim of treatment of every child during the trial and also if found guilty of infringing the penal law shall be his or her reformation, re-integration into his or her family and social rehabilitation.

4. There shall be a minimum age below which children shall be presumed not to have the capacity to infringe the penal law’.

Arab world

The *Arab Charter on Human Rights* contains a more general provision on the requirement of special care towards juveniles. Article 38 under (b) reads:

‘The State undertakes to provide outstanding care and special protection for the family, mothers, children and the aged’.

The Americas

The *American Convention on Human Rights* also contains a more general provision on the rights of the child. Article 19 states:

‘Every minor child has the right to the measures of protection required by his condition as a minor on the part of his family, society, and the state’.

SOFT INTERNATIONAL LAW

U.N. level

Guideline 19 of the 1990 U.N. *Guidelines on the Role of Prosecutors* reads:

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

In addition to this document, which is specifically on the role of prosecutors, several international documents have been adopted specifically with regard to juveniles.

The 1985 U.N. *Standard Minimum Rules for the Administration of Juvenile Justice* (also known as the ‘Beijing Rules’) is a relevant document. Although it contains

very broad fundamental perspectives aiming at promoting juvenile welfare to the greatest possible extent, there we can also find some specific principles of relevance for the public prosecutor.

First of all there is rule 5, on the aim of juvenile justice:

‘The juvenile justice system shall emphasize the well-being of the juvenile and shall ensure that any reaction to juvenile offenders shall always be in proportion to the circumstances of both the offenders and the offence’.

In the same document this provision is commented upon as follows:

‘Rule 5 refers to two of the most important objectives of juvenile justice. The first objective is the promotion of the well-being of the juvenile. This is the main focus of those legal systems in which juvenile offenders are dealt with by family courts or administrative authorities, but the well-being of the juvenile should also be emphasized in legal systems that follow the criminal court model, thus contributing to the avoidance of merely punitive sanctions. (See also rule 14.)

The second objective is "the principle of proportionality". This principle is well-known as an instrument for curbing punitive sanctions, mostly expressed in terms of just deserts in relation to the gravity of the offence. The response to young offenders should be based on the consideration not only of the gravity of the offence but also of personal circumstances. The individual circumstances of the offender (for example social status, family situation, the harm caused by the offence or other factors affecting personal circumstances) should influence the proportionality of the reactions (for example by having regard to the offender's endeavour to indemnify the victim or to her or his willingness to turn to wholesome and useful life).

By the same token, reactions aiming to ensure the welfare of the young offender may go beyond necessity and therefore infringe upon the fundamental rights of the young individual, as has been observed in some juvenile justice systems. Here, too, the proportionality of the reaction to the circumstances of both the offender and the offence, including the victim, should be safeguarded.

In essence, rule 5 calls for no less and no more than a fair reaction in any given cases of juvenile delinquency and crime. The issues combined in the

rule may help to stimulate development in both regards: new and innovative types of reactions are as desirable as precautions against any undue widening of the net of formal social control over juveniles’.

Furthermore rule 7 is of the utmost importance on the rights of juveniles:

‘Basic procedural safeguards such as the presumption of innocence, the right to be notified of the charges, the right to remain silent, the right to counsel, the right to the presence of a parent or guardian, the right to confront and cross-examine witnesses and the right to appeal to a higher authority shall be guaranteed at all stages of proceedings.’

Part two of the document is entirely devoted to the investigation and prosecution of juveniles. Rule 10 states on initial contact:

- 10.1 ‘Upon the apprehension of a juvenile, her or his parents or guardian shall be immediately notified of such apprehension, and, where such immediate notification is not possible, the parents or guardian shall be notified within the shortest possible time thereafter.
- 10.2 A judge or other competent official or body shall, without delay, consider the issue of release.
- 10.3 Contacts between the law enforcement agencies and a juvenile offender shall be managed in such a way as to respect the legal status of the juvenile, promote the well-being of the juvenile and avoid harm to her or him, with due regard to the circumstances of the case’.

The commentary on this provision reads:

‘Rule 10.1 is in principle contained in rule 92 of the Standard Minimum Rules for the Treatment of Prisoners.

The question of release (rule 10.2) shall be considered without delay by a judge or other competent official. The latter refers to any person or institution in the broadest sense of the term, including community boards or police authorities having power to release an arrested person. (See also the International Covenant on Civil and Political Rights, article 9, paragraph 3.)

Rule 10.3 deals with some fundamental aspects of the procedures and behaviour on the part of the police and other law enforcement officials in cases of juvenile crime. To "avoid harm" admittedly is flexible wording and covers many features of possible interaction (for example the use of harsh language, physical violence or exposure to the environment). Involvement in juvenile justice processes in itself can be "harmful" to juveniles; the term "avoid harm" should be broadly interpreted, therefore, as doing the least harm possible to the juvenile in the first instance, as well as any additional or undue harm. This is especially important in the initial contact with law enforcement agencies, which might profoundly influence the juvenile's attitude towards the State and society. Moreover, the success of any further intervention is largely dependent on such initial contacts. Compassion and kind firmness are important in these situations'.

Rule 11 on diversion reads:

- 11.1 'Consideration shall be given, wherever appropriate, to dealing with juvenile offenders without resorting to formal trial by the competent authority, referred to in rule 14.1 below.
- 11.2 The police, the prosecution or other agencies dealing with juvenile cases shall be empowered to dispose of such cases, at their discretion, without recourse to formal hearings, in accordance with the criteria laid down for that purpose in the respective legal system and also in accordance with the principles contained in these Rules.
- 11.3 Any diversion involving referral to appropriate community or other services shall require the consent of the juvenile, or her or his parents or guardian, provided that such decision to refer a case shall be subject to review by a competent authority, upon application.
- 11.4 In order to facilitate the discretionary disposition of juvenile cases, efforts shall be made to provide for community programmes, such as temporary supervision and guidance, restitution, and compensation of victims'.

Its commentary reads:

'Diversion, involving removal from criminal justice processing and, frequently, redirection to community support services, is commonly practised on a formal and informal basis in many legal systems. This

practice serves to hinder the negative effects of subsequent proceedings in juvenile justice administration (for example the stigma of conviction and sentence). In many cases, non-intervention would be the best response. Thus, diversion at the outset and without referral to alternative (social) services may be the optimal response. This is especially the case where the offence is of a non-serious nature and where the family, the school or other informal social control institutions have already reacted, or are likely to react, in an appropriate and constructive manner.

As stated in rule 11.2, diversion may be used at any point of decision-making-by the police, the prosecution or other agencies such as the courts, tribunals, boards or councils. It may be exercised by one authority or several or all authorities, according to the rules and policies of the respective systems and in line with the present Rules. It need not necessarily be limited to petty cases, thus rendering diversion an important instrument.

Rule 11.3 stresses the important requirement of securing the consent of the young offender (or the parent or guardian) to the recommended diversionary measure(s). (Diversion to community service without such consent would contradict the Abolition of Forced Labour Convention.) However, this consent should not be left unchallengeable, since it might sometimes be given out of sheer desperation on the part of the juvenile. The rule underlines that care should be taken to minimize the potential for coercion and intimidation at all levels in the diversion process. Juveniles should not feel pressured (for example in order to avoid court appearance) or be pressured into consenting to diversion programmes. Thus, it is advocated that provision should be made for an objective appraisal of the appropriateness of dispositions involving young offenders by a "competent authority upon application". (The "competent authority," may be different from that referred to in rule 14.)

Rule 11.4 recommends the provision of viable alternatives to juvenile justice processing in the form of community-based diversion. Programmes that involve settlement by victim restitution and those that seek to avoid future conflict with the law through temporary supervision and guidance are especially commended. The merits of individual cases would make diversion appropriate, even when more serious offences have been committed (for example first offence, the act having been committed under peer pressure, etc.).

Rule 12 on specialization on juvenile justice within police authorities states:

‘In order to best fulfil their functions, police officers who frequently or exclusively deal with juveniles or who are primarily engaged in the prevention of juvenile crime shall be specially instructed and trained. In large cities, special police units should be established for that purpose’.

Its commentary reads:

‘Rule 12 draws attention to the need for specialized training for all law enforcement officials who are involved in the administration of juvenile justice. As police are the first point of contact with the juvenile justice system, it is most important that they act in an informed and appropriate manner.

While the relationship between urbanization and crime is clearly complex, an increase in juvenile crime has been associated with the growth of large cities, particularly with rapid and unplanned growth. Specialized police units would therefore be indispensable, not only in the interest of implementing specific principles contained in the present instrument (such as rule 1.6) but more generally for improving the prevention and control of juvenile crime and the handling of juvenile offenders’.

Finally rule 13 on the detention of juveniles pending trial states:

- 13.1 ‘Detention pending trial shall be used only as a measure of last resort and for the shortest possible period of time.
- 13.2 Whenever possible, detention pending trial shall be replaced by alternative measures, such as close supervision, intensive care or placement with a family or in an educational setting or home.
- 13.3 Juveniles under detention pending trial shall be entitled to all rights and guarantees of the Standard Minimum Rules for the Treatment of Prisoners adopted by the United Nations.
- 13.4 Juveniles under detention pending trial shall be kept separate from adults and shall be detained in a separate institution or in a separate part of an institution also holding adults.

- 13.5 While in custody, juveniles shall receive care, protection and all necessary individual assistance-social, educational, vocational, psychological, medical and physical-that they may require in view of their age, sex and personality’.

It is commented upon as follows:

‘The danger to juveniles of "criminal contamination" while in detention pending trial must not be underestimated. It is therefore important to stress the need for alternative measures. By doing so, rule 13.1 encourages the devising of new and innovative measures to avoid such detention in the interest of the well-being of the juvenile. Juveniles under detention pending trial are entitled to all the rights and guarantees of the Standard Minimum Rules for the Treatment of Prisoners as well as the International Covenant on Civil and Political Rights, especially article 9 and article 10, paragraphs 2 (b) and 3.

Rule 13.4 does not prevent States from taking other measures against the negative influences of adult offenders which are at least as effective as the measures mentioned in the rule.

Different forms of assistance that may become necessary have been enumerated to draw attention to the broad range of particular needs of young detainees to be addressed (for example females or males, drug addicts, alcoholics, mentally ill juveniles, young persons suffering from the trauma, for example, of arrest, etc.).

Varying physical and psychological characteristics of young detainees may warrant classification measures by which some are kept separate while in detention pending trial, thus contributing to the avoidance of victimization and rendering more appropriate assistance.

The Sixth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, in its resolution 4 on juvenile justice standards, specified that the Rules, inter alia, should reflect the basic principle that pre-trial detention should be used only as a last resort, that no minors should be held in a facility where they are vulnerable to the negative influences of adult detainees and that account should always be taken of the needs particular to their stage of development’.

Finally, we find the provision on research, being a basis for policy formulation towards juvenile justice, in part six of the *Standard Minimum Rules*. Rule 30 reads:

- 30.1 'Efforts shall be made to organize and promote necessary research as a basis for effective planning and policy formulation.
- 30.2 Efforts shall be made to review and appraise periodically the trends, problems and causes of juvenile delinquency and crime as well as the varying particular needs of juveniles in custody.
- 30.3 Efforts shall be made to establish a regular evaluative research mechanism built into the system of juvenile justice administration and to collect and analyse relevant data and information for appropriate assessment and future improvement and reform of the administration.
- 30.4 The delivery of services in juvenile justice administration shall be systematically planned and implemented as an integral part of national development efforts'.

This provision is commented on as follows:

'The utilization of research as a basis for an informed juvenile justice policy is widely acknowledged as an important mechanism for keeping practices abreast of advances in knowledge and the continuing development and improvement of the juvenile justice system. The mutual feedback between research and policy is especially important in juvenile justice. With rapid and often drastic changes in the life-styles of the young and in the forms and dimensions of juvenile crime, the societal and justice responses to juvenile crime and delinquency quickly become outmoded and inadequate.

Rule 30 thus establishes standards for integrating research into the process of policy formulation and application in juvenile justice administration. The rule draws particular attention to the need for regular review and evaluation of existing programmes and measures and for planning within the broader context of overall development objectives.

A constant appraisal of the needs of juveniles, as well as the trends and problems of delinquency, is a prerequisite for improving the methods of formulating appropriate policies and establishing adequate interventions, at both formal and informal levels. In this context, research by independent persons and bodies should be facilitated by responsible agencies, and it may be valuable to obtain and to take into account the

views of juveniles themselves, not only those who come into contact with the system.

The process of planning must particularly emphasize a more effective and equitable system for the delivery of necessary services. Towards that end, there should be a comprehensive and regular assessment of the wide-ranging, particular needs and problems of juveniles and an identification of clear-cut priorities. In that connection, there should also be a co-ordination in the use of existing resources, including alternatives and community support that would be suitable in setting up specific procedures designed to implement and monitor established programmes'.

The 1990 U.N. *Rules for the Protection of Juveniles Deprived of their Liberty* are also relevant. Chapter I of this document contains fundamental perspectives. Rule 1 of this chapter contains a more general provision:

'The juvenile justice system should uphold the rights and safety and promote the physical and mental well-being of juveniles. Imprisonment should be used as a last resort'.

Rule 2 then continues to restrict the deprivation of liberty of juveniles and makes a link to the above-mentioned *Standard Minimum Rules*:

'Juveniles should only be deprived of their liberty in accordance with the principles and procedures set forth in these Rules and in the United Nations Standard Minimum Rules for the Administration of Juvenile Justice (The Beijing Rules). Deprivation of the liberty of a juvenile should be a disposition of last resort and for the minimum necessary period and should be limited to exceptional cases. The length of the sanction should be determined by the judicial authority, without precluding the possibility of his or her early release'.

Chapter III is specifically addressed to the treatment of juveniles under arrest or awaiting trial. The relevant provisions in this chapter read:

17. 'Juveniles who are detained under arrest or awaiting trial ("untried") are presumed innocent and shall be treated as such. Detention before trial shall be avoided to the extent possible and limited to exceptional circumstances. Therefore, all efforts shall be made to apply alternative measures. When preventive detention is nevertheless used, juvenile courts and investigative bodies shall give the highest priority to the

most expeditious processing of such cases to ensure the shortest possible duration of detention. Untried detainees should be separated from convicted juveniles.

18. The conditions under which an untried juvenile is detained should be consistent with the rules set out below, with additional specific provisions as are necessary and appropriate, given the requirements of the presumption of innocence, the duration of the detention and the legal status and circumstances of the juvenile. These provisions would include, but not necessarily be restricted to, the following:
 - a) Juveniles should have the right of legal counsel and be enabled to apply for free legal aid, where such aid is available, and to communicate regularly with their legal advisers. Privacy and confidentiality shall be ensured for such communications;
 - b) Juveniles should be provided, where possible, with opportunities to pursue work, with remuneration, and continue education or training, but should not be required to do so. Work, education or training should not cause the continuation of the detention;
 - c) Juveniles should receive and retain materials for their leisure and recreation as are compatible with the interests of the administration of justice’.

The last rule, rule 87, is addressed to all personnel who come into contact with juveniles under detention and is therefore also of relevance to the public prosecutor:

‘In the performance of their duties, personnel of detention facilities should respect and protect the human dignity and fundamental human rights of all juveniles, in particular, as follows:

- a. No member of the detention facility or institutional personnel may inflict, instigate or tolerate any act of torture or any form of harsh, cruel, inhuman or degrading treatment, punishment, correction or discipline under any pretext or circumstance whatsoever;
- b. All personnel should rigorously oppose and combat any act of corruption, reporting it without delay to the competent authorities;
- c. All personnel should respect the present Rules. Personnel who have reason to believe that a serious violation of the present Rules has

- occurred or is about to occur should report the matter to their superior authorities or organs vested with reviewing or remedial power;
- d. All personnel should ensure the full protection of the physical and mental health of juveniles, including protection from physical, sexual and emotional abuse and exploitation, and should take immediate action to secure medical attention whenever required;
 - e. All personnel should respect the right of the juvenile to privacy, and, in particular, should safeguard all confidential matters concerning juveniles or their families learned as a result of their professional capacity;
 - f. All personnel should seek to minimize any differences between life inside and outside the detention facility which tend to lessen due respect for the dignity of juveniles as human beings’.

Finally, there are the 1990 U.N. *Guidelines for the Prevention of Juvenile Delinquency (also known as the ‘Riyadh Guidelines’)*. Although, as the title already states, this document is more aimed at the prevention of crimes committed by juveniles and, therefore, primarily addressed to the legislative authorities, the public prosecutor also plays a role herein and should take these guidelines into account.

Principle 1 states:

‘The prevention of juvenile delinquency is an essential part of crime prevention in society. By engaging in lawful, socially useful activities and adopting a humanistic orientation towards society and outlook on life, young persons can develop non-criminogenic attitudes’.

Principle 2 then proceeds:

‘The successful prevention of juvenile delinquency requires efforts on the part of the entire society to ensure the harmonious development of adolescents, with respect for and promotion of their personality from early childhood’.

Chapter III on general prevention requires states to take prevention plans at all levels of Government. Principle 9 states:

‘Comprehensive prevention plans should be instituted at every level of Government and include the following:

- a. In-depth analyses of the problem and inventories of programmes, services, facilities and resources available;
- b. Well-defined responsibilities for the qualified agencies, institutions and personnel involved in preventive efforts;
- c. Mechanisms for the appropriate co-ordination of prevention efforts between governmental and non-governmental agencies;
- d. Policies, programmes and strategies based on prognostic studies to be continuously monitored and carefully evaluated in the course of implementation;
- e. Methods for effectively reducing the opportunity to commit delinquent acts;
- f. Community involvement through a wide range of services and programmes;
- g. Close interdisciplinary co-operation between national, State, provincial and local governments, with the involvement of the private sector representative citizens of the community to be served, and labour, child-care, health education, social, law enforcement and judicial agencies in taking concerted action to prevent juvenile delinquency and youth crime;
- h. Youth participation in delinquency prevention policies and processes, including recourse to community resources, youth self-help, and victim compensation and assistance programmes;
- i. Specialized personnel at all levels’.

Finally, there is principle 58 on training for personnel in contact with juveniles:

‘Law enforcement and other relevant personnel, of both sexes, should be trained to respond to the special needs of young persons and should be familiar with and use, to the maximum extent possible, programmes and referral possibilities for the diversion of young persons from the justice system’.

The (revised) 2006 *European Prison Rules* state, as far as detained children are concerned:

11.1 Children under the age of 18 years should not be detained in a prison for adults, but in an establishment specially designed for the purpose.

11.2 If children are nevertheless exceptionally held in such a prison there shall be special regulations that take account of their status and needs (..)

35.1 Where exceptionally children under the age of 18 years are detained in a prison for adults the authorities shall ensure that, in addition to the services available to all prisoners, prisoners who are children have access to the social, psychological and educational services, religious care and recreational programmes or equivalents to them that are available to children in the community.

35.2 Every prisoner who is a child and is subject to compulsory education shall have access to such education.

35.3 Additional assistance shall be provided to children who are released from prison.

35.4 Where children are detained in a prison they shall be kept in a part of the prison that is separate from that used by adults unless it is considered that this is against the best interests of the child.

IAP

In the International Association of Prosecutors' 1999 *Standards of Professional Responsibility and Statement of the Essential Duties and Rights of Prosecutors* a provision requiring special care towards juvenile justice appears at principle 4.3 (h):

'Prosecutors shall (..) in accordance with local law and the requirements of a fair trial, give due consideration to waiving prosecution, discontinuing proceedings conditionally or unconditionally or diverting criminal cases, and particularly those involving young defendants, from the formal justice system, with full respect for the rights of suspects and victims, where such action is appropriate'.

INTERPRETATIONS AND CONCLUSION

Juveniles, because of their young age, receive special treatment in international human rights instruments. These standards require that juveniles be treated in a way that maximizes their opportunity to mature into responsible citizens, rather than to fall into a life of crime. All measures taken in respect of juveniles should be taken with this goal of rehabilitation in mind. Therefore, the detention of a child should only be used as a measure of last resort and other measures aimed at rehabilitation should prevail.

Some of the above-mentioned international human rights texts are more specifically aimed at the prevention of crimes committed by juveniles and therefore have a more social character. They may not, therefore, seem to be particularly relevant to the role of public prosecutors in relation to juveniles but they are. The public prosecutor should not limit his/her role simply to criminal proceedings, but should also play an active role in the prevention of crimes and in the process of rehabilitation after criminal proceedings have come to an end. It is, therefore, recommended that the international standards on this matter should also be taken into account.

DISCRIMINATION IN THE JUSTICE SYSTEM

RELEVANT TEXTS AT THE U.N. LEVEL

Article 1 of the *Universal Declaration on Human Rights* states very clearly on discrimination:

‘All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood’.

Article 2 then elaborates on this:

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

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

A similar provision to Article 2 of the *Universal Declaration* can be found in Article 2 para.1 of the *International Covenant on Civil and Political Rights*:

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

The 1969 *International Convention on the Elimination of All Forms of Racial Discrimination* contains relevant provisions when it comes to discrimination in the justice system and the elimination thereof. First, Article 2 requires states to take positive steps on the elimination of discrimination:

1. 'States Parties condemn racial discrimination and undertake to pursue by all appropriate means and without delay a policy of eliminating racial discrimination in all its forms and promoting understanding among all races, and, to this end:
 - a) Each State Party undertakes to engage in no act or practice of racial discrimination against persons, groups of persons or institutions and to ensure that all public authorities and public institutions, national and local, shall act in conformity with this obligation;
 - b) Each State Party undertakes not to sponsor, defend or support racial discrimination by any persons or organizations;
 - c) Each State Party shall take effective measures to review governmental, national and local policies, and to amend, rescind or nullify any laws and regulations which have the effect of creating or perpetuating racial discrimination wherever it exists;
 - d) Each State Party shall prohibit and bring to an end, by all appropriate means, including legislation as required by circumstances, racial discrimination by any persons, group or organization;
 - e) Each State Party undertakes to encourage, where appropriate, integrationist multiracial organizations and movements and other means of eliminating barriers between races, and to discourage anything which tends to strengthen racial division'.
2. States Parties shall, when the circumstances so warrant, take, in the social, economic, cultural and other fields, special and concrete measures to ensure the adequate development and protection of certain racial groups or individuals belonging to them, for the purpose of guaranteeing them the full and equal enjoyment of human rights and fundamental freedoms. These measures shall in no case entail as a consequence the maintenance of unequal or separate rights for different racial groups after the objectives for which they were taken have been achieved'.

The provisions laid down in Article 5 are more specifically aimed at discrimination in the administration of justice:

'In compliance with the fundamental obligations laid down in article 2 of this Convention, States Parties undertake to prohibit and to eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law, notably in the enjoyment of the following rights:

- a. 'The right to equal treatment before the tribunals and all other organs administering justice;
- b. The right to security of person and protection by the State against violence or bodily harm, whether inflicted by government officials or by any individual group or institution;(..)'

Finally, Article 6 of this *Convention* is mentioned here:

'States Parties shall assure to everyone within their jurisdiction effective protection and remedies, through the competent national tribunals and other State institutions, against any acts of racial discrimination which violate his human rights and fundamental freedoms contrary to this Convention, as well as the right to seek from such tribunals just and adequate reparation or satisfaction for any damage suffered as a result of such discrimination'.

RELEVANT TEXTS AT THE REGIONAL LEVEL

Europe

The *European Convention for the Protection of Human Rights and Fundamental Freedoms* states in Article 14 on the prohibition of discrimination:

'The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status'.

Although Article 14 of the *Convention* has no independent existence, it plays an important role in complementing the other normative provisions in the *Convention*. Article 14 safeguards individuals placed in similar situations from any discrimination in the enjoyment of the rights and freedoms set out in those other provisions. A measure which is of a discriminatory nature, although in itself in conformity with the requirements of an article of the *Convention* enshrining a given right or freedom, is incompatible with Article 14 and therefore violates those two articles taken in conjunction.

On 1 April 2005 the 12th Protocol to the Convention entered into force. This Protocol contains an independent provision containing a prohibition on discrimination. Article 1 of the Protocol reads:

1. 'The enjoyment of any right set forth by law shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.
2. No one shall be discriminated against by any public authority on any ground such as those mentioned in paragraph 1'.

Africa

Articles 2 and 3 of the *African Charter on Human and Peoples' Rights* state on the prohibition of discrimination:

'Article 2

Every individual shall be entitled to the enjoyment of the rights and freedoms recognized and guaranteed in the present Charter without distinction of any kind such as race, ethnic group, colour, sex, language, religion, political or any other opinion, national and social origin, fortune, birth or other status.

Article 3

1. Every individual shall be equal before the law.
2. Every individual shall be entitled to equal protection of the law'.

Arab world

Article 1 of the *Cairo Declaration on Human Rights in Islam* prohibits discrimination:

- a) 'All human beings form one family whose members are united by their subordination to Allah and descent from Adam. All men are equal in terms of basic human dignity and basic obligations and responsibilities, without any discrimination on the basis of race, colour, language, belief, sex, religion, political affiliation, social status or other

considerations. The true religion is the guarantee for enhancing such dignity along the path to human integrity.

- b) All human beings are Allah's subjects, and the most loved by Him are those who are most beneficial to His subjects, and no one has superiority over another except on the basis of piety and good deeds'.

Article 2 of the *Arab Charter for Human Rights* has a similar provision:

'Each State Party to the present Charter undertakes to ensure to all individuals within its territory and subject to its Jurisdiction the right to enjoy all the rights and freedoms recognized herein, without any distinction on grounds of race, colour, sex, language, religion, political opinion, national or social origin, property, birth or other status and without any discrimination between men and women'.

The Americas

In the *American Convention on Human Rights* the prohibition of discrimination can be found in Article 1:

1. 'The States Parties to this Convention undertake to respect the rights and freedoms recognized herein and to ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms, without any discrimination for reasons of race, color, sex, language, religion, political or other opinion, national or social origin, economic status, birth, or any other social condition.
2. For the purposes of this Convention, "person" means every human being'.

SOFT INTERNATIONAL LAW

U.N. Level

First, Guideline 13 (a) of the 1990 U.N. *Guidelines on the Role of Prosecutors* states very clearly:

'In the performance of their duties, prosecutors shall:

- a. Carry out their functions impartially and avoid all political, social, religious, racial, cultural, sexual or any other kind of discrimination’;

Following on from this there are several other soft law documents which set out relevant provisions prohibiting discrimination against minority groups in the community. Some of them have provisions specifically mentioning the prosecutor’s role in criminal proceedings.

The 1971 U.N. *Declaration on the Rights of Mentally Retarded Persons* contains some relevant provisions for public prosecutors. Article 1 states very clearly:

‘The mentally retarded person has, to the maximum degree of feasibility, the same rights as other human beings’.

Article 5 on the right of mentally retarded persons to a guardian is also important:

‘The mentally retarded person has a right to a qualified guardian when this is required to protect his personal well-being and interests’.

When it comes to prosecution of a mentally retarded person, the *Declaration* states in Article 6:

‘The mentally retarded person has a right to protection from exploitation, abuse and degrading treatment. If prosecuted for any offence, he shall have a right to due process of law with full recognition being given to his degree of mental responsibility’.

The 1975 U.N. *Declaration on the Rights of Disabled Persons* makes very clear statements on the rights of disabled persons. Article 3 reads:

‘Disabled persons have the inherent right to respect for their human dignity. Disabled persons, whatever the origin, nature and seriousness of their handicaps and disabilities, have the same fundamental rights as their fellow-citizens of the same age, which implies first and foremost the right to enjoy a decent life, as normal and full as possible’.

Article 4 continues:

‘Disabled persons have the same civil and political rights as other human beings(..)’.

Article 11 states specifically on judicial proceedings:

‘Disabled persons shall be able to avail themselves of qualified legal aid when such aid proves indispensable for the protection of their persons and property. If judicial proceedings are instituted against them, the legal procedure applied shall take their physical and mental condition fully into account’.

Furthermore, the 1991 U.N. *Principles for the Protection of Persons with Mental Illnesses and the Improvement of Mental Health Care* contain several provisions which are relevant for prosecutors in proceedings involving persons suffering from mental illnesses. Principle 1 paras.2 - 5 read:

2. ‘All persons with a mental illness, or who are being treated as such persons, shall be treated with humanity and respect for the inherent dignity of the human person.
3. All persons with a mental illness, or who are being treated as such persons, have the right to protection from economic, sexual and other forms of exploitation, physical or other abuse and degrading treatment.
4. There shall be no discrimination on the grounds of mental illness. "Discrimination" means any distinction, exclusion or preference that has the effect of nullifying or impairing equal enjoyment of rights. Special measures solely to protect the rights, or secure the advancement, of persons with mental illness shall not be deemed to be discriminatory. Discrimination does not include any distinction, exclusion or preference undertaken in accordance with the provisions of these Principles and necessary to protect the human rights of a person with a mental illness or of other individuals.
5. Every person with a mental illness shall have the right to exercise all civil, political, economic, social and cultural rights as recognized in the Universal Declaration of Human Rights, the International Covenant on Economic, Social and Cultural Rights, the International Covenant on Civil and Political Rights, and in other relevant instruments, such as the Declaration on the Rights of Disabled Persons and the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment’.

Principle 20 on offenders with mental illnesses is especially important:

1. 'This Principle applies to persons serving sentences of imprisonment for criminal offences, or who are otherwise detained in the course of criminal proceedings or investigations against them, and who are determined to have a mental illness or who it is believed may have such an illness.
2. All such persons should receive the best available mental health care as provided in Principle 1. These Principles shall apply to them to the fullest extent possible, with only such limited modifications and exceptions as are necessary in the circumstances. No such modifications and exceptions shall prejudice the persons' rights under the instruments noted in paragraph 5 of Principle 1.
3. Domestic law may authorize a court or other competent authority, acting on the basis of competent and independent medical advice, to order that such persons be admitted to a mental health facility.
4. Treatment of persons determined to have a mental illness shall in all circumstances be consistent with Principle 11'.

As was already mentioned in para.4 of Principle 20 (see above), Principle 11 is also mentioned here:

1. 'No treatment shall be given to a patient without his or her informed consent, except as provided for in paragraphs 6, 7, 8, 13 and 15 below.
2. Informed consent is consent obtained freely, without threats or improper inducements, after appropriate disclosure to the patient of adequate and understandable information in a form and language understood by the patient on:
 - a) The diagnostic assessment;
 - b) The purpose, method. Likely duration and expected benefit of the proposed treatment;
 - c) Alternative modes of treatment, including those less intrusive; and
 - d) Possible pain or discomfort. risks and side-effects of the proposed treatment.
3. A patient may request the presence of a person or persons of the patient's choosing during the procedure for granting consent.

4. A patient has the right to refuse or stop treatment, except as provided for in paragraphs 6, 7, 8, 13 and 15 below. The consequences of refusing or stopping treatment must be explained to the patient.
5. A patient shall never be invited or induced to waive the right to informed consent. If the patient should seek; to do so, it shall be explained to the patient that the treatment cannot be given without informed consent.
6. Except as provided in paragraphs 7, 8, 12, 13, 14 and 15 below, a proposed plan of treatment may be given to a patient without a patient's informed consent if the following conditions are satisfied:
 - a) The patient is, at the relevant time, held as an involuntary patient;
 - b) An independent authority, having in its possession all relevant information, including the information specified in paragraph 2 above, is satisfied that, at the relevant time, the patient lacks the capacity to give or withhold informed consent to the proposed plan of treatment or, if domestic legislation so provides, that, having regard to the patient's own safety or the safety of others, the patient unreasonably withholds such consent; and
 - c) The independent authority is satisfied that the proposed plan of treatment is in the best interest of the patient's health needs.
7. Paragraph 6 above does not apply to a patient with a personal representative empowered by law to consent to treatment for the patient; but, except as provided in paragraphs 12, 13, 14 and 15 below, treatment may be given to such a patient without his or her informed consent if the personal representative, having been given the information described in paragraph 2 above, consents on the patient's behalf.
8. Except as provided in paragraphs 12, 13, 14 and 15 below, treatment may also be given to any patient without the patient's informed consent if a qualified mental health practitioner authorized by law determines that it is urgently necessary in order to prevent immediate or imminent harm to the patient or to other persons. Such treatment shall not be prolonged beyond the period that is strictly necessary for this purpose.
9. Where any treatment is authorized without the patient's informed consent, every effort shall nevertheless be made to inform the patient about the nature of the treatment and any possible alternatives and to

involve the patient as far as practicable in the development of the treatment plan.

10. All treatment shall be immediately recorded in the patient's medical records, with an indication of whether involuntary or voluntary.
11. Physical restraint or involuntary seclusion of a patient shall not be employed except in accordance with the officially approved procedures of the mental health facility and only when it is the only means available to prevent immediate or imminent harm to the patient or others. It shall not be prolonged beyond the period which is strictly necessary for this purpose. All instances of physical restraint or involuntary seclusion, the reasons for them and their nature and extent shall be recorded in the patient's medical record. A patient who is restrained or secluded shall be kept under humane conditions and be under the care and close and regular supervision of qualified members of the staff. A personal representative, if any and if relevant, shall be given prompt notice of any physical restraint or involuntary seclusion of the patient.
12. Sterilization shall never be carried out as a treatment for mental illness.
13. A major medical or surgical procedure may be carried out on a person with mental illness only where it is permitted by domestic law, where it is considered that it would best serve the health needs of the patient and where the patient gives informed consent, except that, where the patient is unable to give informed consent, the procedure shall be authorized only after independent review.
14. Psychosurgery and other intrusive and irreversible treatments for mental illness shall never be carried out on a patient who is an involuntary patient in a mental health facility and, to the extent that domestic law permits them to be carried out, they may be carried out on any other patient only where the patient has given informed consent and an independent external body has satisfied itself that there is genuine informed consent and that the treatment best serves the health needs of the patient.
15. Clinical trials and experimental treatment shall never be carried out on any patient without informed consent, except that a patient who is unable to give informed consent may be admitted to a clinical trial or given experimental treatment, but only with the approval of a

competent, independent review body specifically constituted for this purpose.

16. In the cases specified in paragraphs 6, 7, 8, 13, 14 and 15 above, the patient or his or her personal representative, or any interested person, shall have the right to appeal to a judicial or other independent authority concerning any treatment given to him or her’.

Finally, Guideline 5 of the 1997 U.N. *International Guidelines on HIV/AIDS and Human Rights* reads:

‘States should enact or strengthen anti-discrimination and other protective laws that protect vulnerable groups, people living with HIV/AIDS and people with disabilities from discrimination in both the public and private sectors, ensure privacy and confidentiality and ethics in research involving human subjects, emphasize education and conciliation, and provide for speedy and effective administrative and civil remedies’.

IAP

The International Association of Prosecutors in its 1999 *Standards of Professional Responsibility and Statement of the Essential Duties and Rights of Prosecutors*, sets out a more general provision, a principle on the prohibition of discrimination in the justice system. Principle 1 (h) states:

‘Prosecutors shall respect, protect and uphold the universal concept of human dignity and human rights’.

This, of course, includes the prohibition on discrimination contained in all international human rights texts.

INTERPRETATIONS AND CONCLUSION

As the above-mentioned texts clearly show discrimination in general, as well as in the justice system, is prohibited and should be eliminated. Following the prohibition on any kind of distinction, most of the texts give examples of distinctions which are prohibited. For instance, no distinction may be made as to race, colour, national or ethnic origin, sex, political or religious opinion.

In addition to the more general prohibitions of discrimination there are several, mostly soft law, instruments which prohibit discrimination against minority groups in the community, for instance the documents which prohibit discrimination against mentally retarded or disabled persons. Some of these documents contain provisions which specifically relate to criminal proceedings against such persons.

Finally, those instruments especially aimed at the profession of public prosecutor state very clearly that discrimination is prohibited and should be eliminated.

EQUALITY FOR WOMEN IN THE ADMINISTRATION OF JUSTICE

RELEVANT TEXTS AT THE U.N. LEVEL

In the preamble of the *Universal Declaration of Human Rights* we read:

‘(..)Whereas the peoples of the United Nations have in the Charter reaffirmed their faith in fundamental human rights, in the dignity and worth of the human person and in the equal rights of men and women and have determined to promote social progress and better standards of life in larger freedom,(..)’

This proclamation has become a right in the *International Covenant on Civil and Political Rights*. Article 3 ICCPR states:

‘The States Parties to the present Covenant undertake to ensure the equal right of men and women to the enjoyment of all civil and political rights set forth in the present Covenant’.

The 1981 U.N. *Convention on the Elimination of All Forms of Discrimination against Women* contains provisions promoting equal rights for women through all facets of life. Articles 1 and 2 are relevant to equality for women in the administration of justice, although not specifically aimed at them. These articles require states to take positive steps to accomplish equality for women:

‘Article I

For the purposes of the present Convention, the term "discrimination against women" shall mean any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.

Article 2

States Parties condemn discrimination against women in all its forms, agree to pursue by all appropriate means and without delay a policy of eliminating discrimination against women and, to this end, undertake:

- a. To embody the principle of the equality of men and women in their national constitutions or other appropriate legislation if not yet incorporated therein and to ensure, through law and other appropriate means, the practical realization of this principle;
- b. To adopt appropriate legislative and other measures, including sanctions where appropriate, prohibiting all discrimination against women;
- c. To establish legal protection of the rights of women on an equal basis with men and to ensure through competent national tribunals and other public institutions the effective protection of women against any act of discrimination;
- d. To refrain from engaging in any act or practice of discrimination against women and to ensure that public authorities and institutions shall act in conformity with this obligation;
- e. To take all appropriate measures to eliminate discrimination against women by any person, organization or enterprise;
- f. To take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women;
- g. To repeal all national penal provisions which constitute discrimination against women’.

SOFT INTERNATIONAL LAW

U.N. Level

The 1993 U.N. *Declaration on the Elimination of Violence against Women* more or less repeats the right for women to enjoy equally all human rights. Article 3 reads:

‘Women are entitled to the equal enjoyment and protection of all human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field. These rights include, inter alia:

- a. The right to life;
- b. The right to equality;
- c. The right to liberty and security of person;
- d. The right to equal protection under the law;
- e. The right to be free from all forms of discrimination;
- f. The right to the highest standard attainable of physical and mental health;
- g. The right to just and favourable conditions of work;
- h. The right not to be subjected to torture, or other cruel, inhuman or degrading treatment or punishment.

INTERPRETATIONS AND CONCLUSION

As the international human rights texts show, women enjoy in full equality all human rights and fundamental freedoms. The public prosecutor should take this into account in the administration of justice.

APPENDICES

GUIDELINES ON THE ROLE OF PROSECUTORS¹

Whereas in the Charter of the United Nations the peoples of the world affirm, inter alia, their determination to establish conditions under which justice can be maintained, and proclaim as one of their purposes the achievement of international cooperation in promoting and encouraging respect for human rights and fundamental freedoms without distinction as to race, sex, language or religion,

Whereas the Universal Declaration of Human Rights enshrines the principles of equality before the law, the presumption of innocence and the right to a fair and public hearing by an independent and impartial tribunal,

Whereas frequently there still exists a gap between the vision underlying those principles and the actual situation,

Whereas the organization and administration of justice in every country should be inspired by those principles, and efforts undertaken to translate them fully into reality,

Whereas prosecutors play a crucial role in the administration of justice, and rules concerning the performance of their important responsibilities should promote their respect for and compliance with the above-mentioned principles, thus contributing to fair and equitable criminal justice and the effective protection of citizens against crime,

Whereas it is essential to ensure that prosecutors possess the professional qualifications required for the accomplishment of their functions, through improved methods of recruitment and legal and professional training, and through the provision of all necessary means for the proper performance of their role in combating criminality, particularly in its new forms and dimensions,

Whereas the General Assembly, by its resolution 34/169 of 17 December 1979, adopted the Code of Conduct for Law Enforcement Officials, on the recommendation of the Fifth United Nations Congress on the Prevention of Crime and the Treatment of Offenders,

¹ Guidelines on the Role of Prosecutors, Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, 27 August to 7 September 1990, U.N. Doc. A/CONF.144/28/Rev.1 at 189 (1990).

Whereas in resolution 16 of the Sixth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, the Committee on Crime Prevention and Control was called upon to include among its priorities the elaboration of guidelines relating to the independence of judges and the selection, professional training and status of judges and prosecutors,

Whereas the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders adopted the Basic Principles on the Independence of the Judiciary, subsequently endorsed by the General Assembly in its resolutions 40/32 of 29 November 1985 and 40/146 of 13 December 1985,

Whereas the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power recommends measures to be taken at the international and national levels to improve access to justice and fair treatment, restitution, compensation and assistance for victims of crime,

Whereas, in resolution 7 of the Seventh Congress, the Committee was called upon to consider the need for guidelines relating, inter alia, to the selection, professional training and status of prosecutors, their expected tasks and conduct, means to enhance their contribution to the smooth functioning of the criminal justice system and their cooperation with the police, the scope of their discretionary powers, and their role in criminal proceedings, and to report thereon to future United Nations congresses,

The Guidelines set forth below, which have been formulated to assist Member States in their tasks of securing and promoting the effectiveness, impartiality and fairness of prosecutors in criminal proceedings, should be respected and taken into account by Governments within the framework of their national legislation and practice, and should be brought to the attention of prosecutors, as well as other persons, such as judges, lawyers, members of the executive and the legislature and the public in general. The present Guidelines have been formulated principally with public prosecutors in mind, but they apply equally, as appropriate, to prosecutors appointed on an ad hoc basis.

Qualifications, selection and training

1. Persons selected as prosecutors shall be individuals of integrity and ability, with appropriate training and qualifications.
2. States shall ensure that:

- a) Selection criteria for prosecutors embody safeguards against appointments based on partiality or prejudice, excluding any discrimination against a person on the grounds of race, colour, sex, language, religion, political or other opinion, national, social or ethnic origin, property, birth, economic or other status, except that it shall not be considered discriminatory to require a candidate for prosecutorial office to be a national of the country concerned;
- b) Prosecutors have appropriate education and training and should be made aware of the ideals and ethical duties of their office, of the constitutional and statutory protections for the rights of the suspect and the victim, and of human rights and fundamental freedoms recognized by national and international law.

Status and conditions of service

- 3. Prosecutors, as essential agents of the administration of justice, shall at all times maintain the honour and dignity of their profession.
- 4. States shall ensure that prosecutors are able to perform their professional functions without intimidation, hindrance, harassment, improper interference or unjustified exposure to civil, penal or other liability.
- 5. Prosecutors and their families shall be physically protected by the authorities when their personal safety is threatened as a result of the discharge of prosecutorial functions.
- 6. Reasonable conditions of service of prosecutors, adequate remuneration and, where applicable, tenure, pension and age of retirement shall be set out by law or published rules or regulations.
- 7. Promotion of prosecutors, wherever such a system exists, shall be based on objective factors, in particular professional qualifications, ability, integrity and experience, and decided upon in accordance with fair and impartial procedures.

Freedom of expression and association

- 8. Prosecutors like other citizens are entitled to freedom of expression, belief, association and assembly. In particular, they shall have the right to take part in public discussion of matters concerning the law, the administration of justice and the promotion and protection of human rights and to join or form local,

national or international organizations and attend their meetings, without suffering professional disadvantage by reason of their lawful action or their membership in a lawful organization. In exercising these rights, prosecutors shall always conduct themselves in accordance with the law and the recognized standards and ethics of their profession.

9. Prosecutors shall be free to form and join professional associations or other organizations to represent their interests, to promote their professional training and to protect their status.

Role in criminal proceedings

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

11. Prosecutors shall perform an active role in criminal proceedings, including institution of prosecution and, where authorized by law or consistent with local practice, in the investigation of crime, supervision over the legality of these investigations, supervision of the execution of court decisions and the exercise of other functions as representatives of the public interest.

12. Prosecutors shall, in accordance with the law, perform their duties fairly, consistently and expeditiously, and respect and protect human dignity and uphold human rights, thus contributing to ensuring due process and the smooth functioning of the criminal justice system.

13. In the performance of their duties, prosecutors shall:

- a) Carry out their functions impartially and avoid all political, social, religious, racial, cultural, sexual or any other kind of discrimination;
- b) Protect the public interest, act with objectivity, take proper account of the position of the suspect and the victim, and pay attention to all relevant circumstances, irrespective of whether they are to the advantage or disadvantage of the suspect;
- c) Keep matters in their possession confidential, unless the performance of duty or the needs of justice require otherwise;
- d) Consider the views and concerns of victims when their personal interests are affected and ensure that victims are informed of their rights in accordance with the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power.

14. Prosecutors shall not initiate or continue prosecution, or shall make every effort to stay proceedings, when an impartial investigation shows the charge to be unfounded.

15. Prosecutors shall give due attention to the prosecution of crimes committed by public officials, particularly corruption, abuse of power, grave violations of human rights and other crimes recognized by international law and, where authorized by law or consistent with local practice, the investigation of such offences.

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

Discretionary functions

17. In countries where prosecutors are vested with discretionary functions, the law or published rules or regulations shall provide guidelines to enhance fairness and consistency of approach in taking decisions in the prosecution process, including institution or waiver of prosecution.

Alternatives to prosecution

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

19. In countries where prosecutors are vested with discretionary functions as to the decision whether or not to prosecute a juvenile, special considerations shall be given to the nature and gravity of the offence, protection of society and the personality and background of the juvenile. In making that decision,

prosecutors shall particularly consider available alternatives to prosecution under the relevant juvenile justice laws and procedures. Prosecutors shall use their best efforts to take prosecutory action against juveniles only to the extent strictly necessary.

Relations with other government agencies or institutions

20. In order to ensure the fairness and effectiveness of prosecution, prosecutors shall strive to cooperate with the police, the courts, the legal profession, public defenders and other government agencies or institutions.

Disciplinary proceedings

21. Disciplinary offences of prosecutors shall be based on law or lawful regulations. Complaints against prosecutors which allege that they acted in a manner clearly out of the range of professional standards shall be processed expeditiously and fairly under appropriate procedures. Prosecutors shall have the right to a fair hearing. The decision shall be subject to independent review.

22. Disciplinary proceedings against prosecutors shall guarantee an objective evaluation and decision. They shall be determined in accordance with the law, the code of professional conduct and other established standards and ethics and in the light of the present Guidelines.

Observance of the Guidelines

23. Prosecutors shall respect the present Guidelines. They shall also, to the best of their capability, prevent and actively oppose any violations thereof.

24. Prosecutors who have reason to believe that a violation of the present Guidelines has occurred or is about to occur shall report the matter to their superior authorities and, where necessary, to other appropriate authorities or organs vested with reviewing or remedial power.

RECOMMENDATION REC(2000) 19 OF THE COMMITTEE OF MINISTERS TO MEMBER STATES ON THE ROLE OF PUBLIC PROSECUTION IN THE CRIMINAL JUSTICE SYSTEM¹

COUNCIL OF EUROPE COMMITTEE OF MINISTERS

The Committee of Ministers, under the terms of article 15.b of the Statute of the Council of Europe,

Recalling that the aim of the Council of Europe is to achieve a greater unity between its members;

Bearing in mind that it is also the Council of Europe's purpose to promote the rule of law; which constitutes the basis of all genuine democracies;

Considering that the criminal justice system plays a key role in safeguarding the rule of law;

Aware of the common need of all member states to step up the fight against crime both at national and international level;

Considering that, to that end, the efficiency of not only national criminal justice systems but also international cooperation on criminal matters should be enhanced, whilst safeguarding the principles enshrined in the Convention for the Protection of Human Rights and Fundamental Freedoms;

Aware that the public prosecution also plays a key role in the criminal justice system as well as in international cooperation in criminal matters;

Convinced that, to that end, the definition of common principles for public prosecutors in member states should be encouraged;

Taking into account all the principles and rules laid down in texts on criminal matters adopted by the Committee of Ministers,

Recommends that governments of member states base their legislation and practices concerning the role of public prosecution in the criminal justice system on the following principles:

Functions of the public prosecutor

1. "Public prosecutors" are public authorities who, on behalf of society and in the public interest, ensure the application of the law where the breach of the

¹ Adopted by the Committee of Ministers on 6 October 2000 at the 724th meeting of the Ministers' Deputies.

law carries a criminal sanction, taking into account both the rights of the individual and the necessary effectiveness of the criminal justice system.

2. In all criminal justice systems, public prosecutors:
 - decide whether to initiate or continue prosecutions;
 - conduct prosecutions before the courts;
 - may appeal or conduct appeals concerning all or some court decisions.
3. In certain criminal justice systems, public prosecutors also:
 - implement national crime policy while adapting it, where appropriate, to regional and local circumstances;
 - conduct, direct or supervise investigations;
 - ensure that victims are effectively assisted;
 - decide on alternatives to prosecution;
 - supervise the execution of court decisions;
 - etc.

Safeguards provided to public prosecutors for carrying out their functions

4. States should take effective measures to guarantee that public prosecutors are able to fulfil their professional duties and responsibilities under adequate legal and organisational conditions as well as adequate conditions as to the means, in particular budgetary means, at their disposal. Such conditions should be established in close cooperation with the representatives of public prosecutors.
5. States should take measures to ensure that:
 - a) the recruitment, the promotion and the transfer of public prosecutors are carried out according to fair and impartial procedures embodying safeguards against any approach which favours the interests of specific groups, and excluding discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth, or other status;
 - b) the careers of public prosecutors, their promotions and their mobility are governed by known and objective criteria, such as competence and experience;
 - c) the mobility of public prosecutors is governed also by the needs of the service;

- d) public prosecutors have reasonable conditions of service such as remuneration, tenure and pension commensurate with their crucial role as well as an appropriate age of retirement and that these conditions are governed by law;
- e) disciplinary proceedings against public prosecutors are governed by law and should guarantee a fair and objective evaluation and decision which should be subject to independent and impartial review;
- f) public prosecutors have access to a satisfactory grievance procedure, including where appropriate access to a tribunal, if their legal status is affected;
- g) public prosecutors, together with their families, are physically protected by the authorities when their personal safety is threatened as a result of the proper discharge of their functions.

6. States should also take measures to ensure that public prosecutors have an effective right to freedom of expression, belief, association and assembly. In particular they should have the right to take part in public discussion of matters concerning the law, the administration of justice and the promotion and protection of human rights and to join or form local, national or international organisations and attend their meetings in a private capacity, without suffering professional disadvantage by reason of their lawful action or their membership in a lawful organisation. The rights mentioned above can only be limited in so far as this is prescribed by law and is necessary to preserve the constitutional² position of the public prosecutors. In cases where the rights mentioned above are violated, an effective remedy should be available.

7. Training is both a duty and a right for all public prosecutors, before their appointment as well as on a permanent basis. States should therefore take effective measures to ensure that public prosecutors have appropriate education and training, both before and after their appointment. In particular, public prosecutors should be made aware of:

- a) the principles and ethical duties of their office;
- b) the constitutional and legal protection of suspects, victims and witnesses;
- c) human rights and freedoms as laid down by the Convention for the Protection of Human Rights and Fundamental Freedoms, especially the rights as established by articles 5 and 6 of this Convention;
- d) principles and practices of organisation of work, management and human resources in a judicial context;
- e) mechanisms and materials which contribute to consistency in their activities.

Furthermore, states should take effective measures to provide for additional training on specific issues or in specific sectors, in the light of present-day conditions, taking into account in particular the types and the development of criminality, as well as international cooperation on criminal matters.

8. In order to respond better to developing forms of criminality, in particular organised crime, specialisation should be seen as a priority, in terms of the organisation of public prosecutors, as well as in terms of training and in terms of careers. Recourse to teams of specialists, including multi-disciplinary teams, designed to assist public prosecutors in carrying out their functions should also be developed.

9. With respect to the organisation and the internal operation of the Public Prosecution, in particular the assignment and re-assignment of cases, this should meet requirements of impartiality and independence and maximise the proper operation of the criminal justice system, in particular the level of legal qualification and specialisation devoted to each matter.

10. All public prosecutors enjoy the right to request that instructions addressed to him or her be put in writing. Where he or she believes that an instruction is either illegal or runs counter to his or her conscience, an adequate internal procedure should be available which may lead to his or her eventual replacement.

Relationship between public prosecutors and the executive and legislative powers

11. States should take appropriate measures to ensure that public prosecutors are able to perform their professional duties and responsibilities without unjustified interference or unjustified exposure to civil, penal or other liability. However, the public prosecution should account periodically and publicly for its activities as a whole and, in particular, the way in which its priorities were carried out.

12. Public prosecutors should not interfere with the competence of the legislative and the executive powers.

13. Where the public prosecution is part of or subordinate to the government, states should take effective measures to guarantee that:

- a) the nature and the scope of the powers of the government with respect to the public prosecution are established by law;

- b) government exercises its powers in a transparent way and in accordance with international treaties, national legislation and general principles of law;
- c) where government gives instructions of a general nature, such instructions must be in writing and published in an adequate way;
- d) where the government has the power to give instructions to prosecute a specific case, such instructions must carry with them adequate guarantees that transparency and equity are respected in accordance with national law, the government being under a duty, for example:
 - to seek prior written advice from either the competent public prosecutor or the body that is carrying out the public prosecution;
 - duly to explain its written instructions, especially when they deviate from the public prosecutor's advices and to transmit them through the hierarchical channels;
 - to see to it that, before the trial, the advice and the instructions become part of the file so that the other parties may take cognisance of it and make comments;
- e) public prosecutors remain free to submit to the court any legal arguments of their choice, even where they are under a duty to reflect in writing the instructions received;
- f) instructions not to prosecute in a specific case should, in principle, be prohibited. Should that not be the case, such instructions must remain exceptional and be subjected not only to the requirements indicated in paragraphs d. and e. above but also to an appropriate specific control with a view in particular to guaranteeing transparency.

14. In countries where the public prosecution is independent of the government, the state should take effective measures to guarantee that the nature and the scope of the independence of the public prosecution is established by law.

15. In order to promote the fairness and effectiveness of crime policy, public prosecutors should cooperate with government agencies and institutions in so far as this is in accordance with the law.

16. Public prosecutors should, in any case, be in a position to prosecute without obstruction public officials for offences committed by them, particularly corruption, unlawful use of power, grave violations of human rights and other crimes recognised by international law.

Relationship between public prosecutors and court judges

17. States should take appropriate measures to ensure that the legal status, the competencies and the procedural role of public prosecutors are established by law in a way that there can be no legitimate doubt about the independence and impartiality of the court judges. In particular states should guarantee that a person cannot at the same time perform duties as a public prosecutor and as a court judge.

18. However, if the legal system so permits, states should take measures in order to make it possible for the same person to perform successively the functions of public prosecutor and those of judge or vice versa. Such changes in functions are only possible at the explicit request of the person concerned and respecting the safeguards.

19. Public prosecutors must strictly respect the independence and the impartiality of judges; in particular they shall neither cast doubts on judicial decisions nor hinder their execution, save where exercising their rights of appeal or invoking some other declaratory procedure.

20. Public prosecutors must be objective and fair during court proceedings. In particular, they should ensure that the court is provided with all relevant facts and legal arguments necessary for the fair administration of justice.

Relationship between public prosecutors and the police

21. In general, public prosecutors should scrutinise the lawfulness of police investigations at the latest when deciding whether a prosecution should commence or continue. In this respect, public prosecutors will also monitor the observance of human rights by the police.

22. In countries where the police is placed under the authority of the public prosecution or where police investigations are either conducted or supervised by the public prosecutor, that state should take effective measures to guarantee that the public prosecutor may:

- a) give instructions as appropriate to the police with a view to an effective implementation of crime policy priorities, notably with respect to deciding which categories of cases should be dealt with first, the means used to search for evidence, the staff used, the duration of investigations, information to be given to the public prosecutor, etc.;

- b) where different police agencies are available, allocate individual cases to the agency that it deems best suited to deal with it;
- c) carry out evaluations and controls in so far as these are necessary in order to monitor compliance with its instructions and the law;
- d) sanction or promote sanctioning, if appropriate, of eventual violations.

23. States where the police is independent of the public prosecution should take effective measures to guarantee that there is appropriate and functional cooperation between the Public Prosecution and the police.

Duties of the public prosecutor towards individuals

24. In the performance of their duties, public prosecutors should in particular:

- a) carry out their functions fairly, impartially and objectively;
- b) respect and seek to protect human rights, as laid down in the Convention for the Protection of Human Rights and Fundamental Freedoms;
- c) seek to ensure that the criminal justice system operates as expeditiously as possible.

25. Public prosecutors should abstain from discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth, health, handicaps or other status.

26. Public prosecutors should ensure equality before the law, and make themselves aware of all relevant circumstances including those affecting the suspect, irrespective of whether they are to the latter's advantage or disadvantage.

27. Public prosecutors should not initiate or continue prosecution when an impartial investigation shows the charge to be unfounded.

28. Public prosecutors should not present evidence against suspects that they know or believe on reasonable grounds was obtained through recourse to methods which are contrary to the law. In cases of any doubt, public prosecutors should ask the court to rule on the admissibility of such evidence.

29. Public prosecutors should seek to safeguard the principle of equality of arms, in particular by disclosing to the other parties – save where otherwise provided in the law – any information which they possess which may affect the justice of the proceedings.

30. Public prosecutors should keep confidential information obtained from third parties, in particular where the presumption of innocence is at stake, unless disclosure is required in the interest of justice or by law.

31. Where public prosecutors are entitled to take measures which cause an interference in the fundamental rights and freedoms of the suspect, judicial control over such measures must be possible.

32. Public prosecutors should take proper account of the interests of the witnesses, especially take or promote measures to protect their life, safety and privacy, or see to it that such measures have been taken.

33. Public prosecutors should take proper account of the views and concerns of victims when their personal interests are affected and take or promote actions to ensure that victims are informed of both their rights and developments in the procedure.

34. Interested parties of recognised or identifiable status, in particular victims, should be able to challenge decisions of public prosecutors not to prosecute; such a challenge may be made, where appropriate after an hierarchical review, either by way of judicial review, or by authorising parties to engage private prosecution.

35. States should ensure that in carrying out their duties, public prosecutors are bound by “codes of conduct”. Breaches of such codes may lead to appropriate sanctions in accordance with paragraph 5 above. The performance of public prosecutors should be subject to regular internal review.

36. a) With a view to promoting fair, consistent and efficient activity of public prosecutors, states should seek to:

- give prime consideration to hierarchical methods of organisation, without however letting such organisational methods lead to ineffective or obstructive bureaucratic structures;
- define general guidelines for the implementation of criminal policy;
- define general principles and criteria to be used by way of references against which decisions in individual cases should be taken, in order to guard against arbitrary decision-making.

b) The above-mentioned methods of organisation, guidelines, principles and criteria should be decided by parliament or by government or, if national

law enshrines the independence of the public prosecutor, by representatives of the public prosecution.

- c) The public must be informed of the above-mentioned organisation, guidelines, principles and criteria; they shall be communicated to any person on request.

International cooperation

37. Despite the role that might belong to other organs in matters pertaining to international judicial cooperation, direct contacts between public prosecutors of different countries should be furthered, within the framework of international agreements where they exist or otherwise on the basis of practical arrangements.

38. Steps should be taken in a number of areas to further direct contacts between public prosecutors in the context of international judicial cooperation. Such steps should in particular consist in:

- a) disseminating documentation;
- b) compiling a list of contacts and addresses giving the names of the relevant contact persons in the different prosecuting authorities, as well as their specialist fields, their areas of responsibility, etc;
- c) establishing regular personal contacts between public prosecutors from different countries, in particular by organising regular meetings between Prosecutors General;
- d) organising training and awareness-enhancing sessions;
- e) introducing and developing the function of liaison law officers based in a foreign country;
- f) training in foreign languages;
- g) developing the use of electronic data transmission;
- h) organising working seminars with other states, on questions regarding mutual aid and shared crime issues.

39. In order to improve rationalisation and achieve co-ordination of mutual assistance procedures, efforts should be taken to promote:

- a) among public prosecutors in general, awareness of the need for active participation in international cooperation, and
- b) the specialisation of some public prosecutors in the field of international cooperation.

To this effect, states should take steps to ensure that the public prosecutor of the requesting state, where he or she is in charge of international cooperation,

may address requests for mutual assistance directly to the authority of the requested state that is competent to carry out the requested action, and that the latter authority may return directly to him or her the evidence obtained.

STANDARDS OF PROFESSIONAL RESPONSIBILITY AND STATEMENT OF THE ESSENTIAL DUTIES AND RIGHTS OF PROSECUTORS¹

WHEREAS the objects of the International Association of Prosecutors are set out in article 2.3 of its Constitution and include the promotion of fair, effective, impartial and efficient prosecution of criminal offences, and the promotion of high standards and principles in the administration of criminal justice;

WHEREAS the United Nations, at its Eighth Congress on the Prevention of Crime and the Treatment of Offenders in Havana, Cuba in 1990, adopted Guidelines on the Role of Prosecutors;

WHEREAS the community of nations has declared the rights and freedoms of all persons in the United Nations Universal Declaration of Human Rights and subsequent international covenants, conventions and other instruments;

WHEREAS the public need to have confidence in the integrity of the criminal justice system;

WHEREAS all prosecutors play a crucial role in the administration of criminal justice;

WHEREAS the degree of involvement, if any, of prosecutors at the investigative stage varies from one jurisdiction to another;

WHEREAS the exercise of prosecutorial discretion is a grave and serious responsibility;

AND WHEREAS such exercise should be as open as possible, consistent with personal rights, sensitive to the need not to re-victimise victims and should be conducted in an objective and impartial manner;

THEREFORE the International Association of Prosecutors adopts the following as a statement of standards of professional conduct for all prosecutors and of their essential duties and rights:

1. Professional Conduct

Prosecutors shall:

at all times maintain the honour and dignity of their profession;

¹ Adopted by the International Association of Prosecutors on the twenty-third day of April 1999.

always conduct themselves professionally, in accordance with the law and the rules and ethics of their profession;

at all times exercise the highest standards of integrity and care;

keep themselves well informed and abreast of relevant legal developments;

strive to be, and to be seen to be, consistent, independent and impartial;

always protect an accused person's right to a fair trial, and in particular ensure that evidence favourable to the accused is disclosed in accordance with the law or the requirements of a fair trial;

always serve and protect the public interest; respect, protect and uphold the universal concept of human dignity and human rights.

2. Independence

2.1 The use of prosecutorial discretion, when permitted in a particular jurisdiction, should be exercised independently and be free from political interference.

2.2 If non prosecutorial authorities have the right to give general or specific instructions to prosecutors, such instructions should be :

- transparent;
- consistent with lawful authority;
- subject to established guidelines to safeguard the actuality and the perception of prosecutorial independence.

2.3 Any right of non prosecutorial authorities to direct the institution of proceedings or to stop legally instituted proceedings should be exercised in similar fashion.

3. Impartiality

Prosecutors shall perform their duties without fear, favour or prejudice.

In particular they shall:

carry out their functions impartially;

remain unaffected by individual or sectional interests and public or media pressures and shall have regard only to the public interest; act with objectivity;

have regard to all relevant circumstances, irrespective of whether they are to the advantage or disadvantage of the suspect;

in accordance with local law or the requirements of a fair trial, seek to ensure that all necessary and reasonable enquiries are made and the result disclosed, whether that points towards the guilt or the innocence of the suspect;

always search for the truth and assist the court to arrive at the truth and to do justice between the community, the victim and the accused according to law and the dictates of fairness.

4. Role in criminal proceedings

4.1 Prosecutors shall perform their duties fairly, consistently and expeditiously.

4.2 Prosecutors shall perform an active role in criminal proceedings as follows: where authorised by law or practice to participate in the investigation of crime, or to exercise authority over the police or other investigators, they will do so objectively, impartially and professionally;

- a) when supervising the investigation of crime, they should ensure that the investigating services respect legal precepts and fundamental human rights; when giving advice, they will take care to remain impartial and objective;
- b) in the institution of criminal proceedings, they will proceed only when a case is well founded upon evidence reasonably believed to be reliable and admissible, and will not continue with a prosecution in the absence of such evidence; throughout the course of the proceedings, the case will be firmly but fairly prosecuted; and not beyond what is indicated by the evidence;

when, under local law and practice, they exercise a supervisory function in relation to the implementation of court decisions or perform other non prosecutorial functions, they will always act in the public interest.

4.3 Prosecutors shall, furthermore; preserve professional confidentiality; in accordance with local law and the requirements of a fair trial, consider the

views, legitimate interests and possible concerns of victims and witnesses, when their personal interests are, or might be, affected, and seek to ensure that victims and witnesses are informed of their rights;

and similarly seek to ensure that any aggrieved party is informed of the right of recourse to some higher authority/court, where that is possible;

safeguard the rights of the accused in co operation with the court and other relevant agencies;

disclose to the accused relevant prejudicial and beneficial information as soon as reasonably possible, in accordance with the law or the requirements of a fair trial;

examine proposed evidence to ascertain if it has been lawfully or constitutionally obtained;

refuse to use evidence reasonably believed to have been obtained through recourse to unlawful methods which constitute a grave violation of the suspect's human rights and particularly methods which constitute torture or cruel treatment;

seek to ensure that appropriate action is taken against those responsible for using such methods;

in accordance with local law and the requirements of a fair trial, give due consideration to waiving prosecution, discontinuing proceedings conditionally or unconditionally or diverting criminal cases, and particularly those involving young defendants, from the formal justice system, with full respect for the rights of suspects and victims, where such action is appropriate.

5. Co operation

In order to ensure the fairness and effectiveness of prosecutions, prosecutors shall:

co operate with the police, the courts, the legal profession, defence counsel, public defenders and other government agencies, whether nationally or internationally;

and render assistance to the prosecution services and colleagues of other jurisdictions, in accordance with the law and in a spirit of mutual co operation.

6. Empowerment

In order to ensure that prosecutors are able to carry out their professional responsibilities independently and in accordance with these standards, prosecutors should be protected against arbitrary action by governments. In general they should be entitled:

to perform their professional functions without intimidation, hindrance, harassment, improper interference or unjustified exposure to civil, penal or other liability;

together with their families, to be physically protected by the authorities when their personal safety is threatened as a result of the proper discharge of their prosecutorial functions;

to reasonable conditions of service and adequate remuneration, commensurate with the crucial role performed by them and not to have their salaries or other benefits arbitrarily diminished; to reasonable and regulated tenure, pension and age of retirement subject to conditions of employment or election in particular cases;

to recruitment and promotion based on objective factors, and in particular professional qualifications, ability, integrity, performance and experience, and decided upon in accordance with fair and impartial procedures;

to expeditious and fair hearings, based on law or legal regulations, where disciplinary steps are necessitated by complaints alleging action outside the range of proper professional standards;

to objective evaluation and decisions in disciplinary hearings;

to form and join professional associations or other organisations to represent their interests, to promote their professional training and to protect their status; and to relief from compliance with an unlawful order or an order which is contrary to professional standards or ethics.

USEFUL INTERNET ADDRESSES

United Nations

UN High Commissioner for Human Rights
United Nations Office at Geneva
1211 Geneva
Switzerland
www.unhchr.ch
www.un.org/rights

Council of Europe

Directorate General of Human Rights
F-67075 Strasbourg Cedex
www.coe.int
www.echr.coe.int
www.cpt.coe.int

International Association of Prosecutors

International Association of Prosecutors
Hartogstraat 13
2514 EP The Hague
The Netherlands
www.iap.nl.com

Useful sources

- Human Rights Web
www.hrweb.org
- University of Minnesota Human Rights Library
www.umn.edu/humanrts
- Derechos Human Rights
www.derechos.link