

OROMIA JUSTICE SECTOR PROFESSIONALS TRAINING AND LEGAL RESEARCH INSTITUTE



International Human Rights Law and Fair Criminal Trial

By:

Mr. Andrew Haas,
Public Deffender,
Alaska State, U.S.A

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OJSPILRI
Adama

Fair Trial Manual
For
International Human Rights

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CHAPTER I

Introduction

Right to Fair Trial

The right to a fair trial is a very important part of the system of human rights. Its application tests how the government judges its citizens. While the fair trial right applies to both civil and criminal cases, this manual will focus on criminal cases. Many of the rights found in this manual (such as the right to equality) may be extended to civil cases. This manual also addresses issues unique to criminal cases, such as how the government should review the defendant's incarceration.

These rights protect from the beginning of an investigation through sentencing and appeal all persons, including those persons with special needs such as children and the mentally ill. The judge must often provide extra protection to ensure that these rights apply to persons with special needs in a meaningful way. *Equality* includes *equality of arms* between the prosecution and the defense. In essence, this means that the defendant must be granted such rights as to offset the structural disadvantages he has in comparison with the prosecutor.

These rights are supported at many levels of Ethiopian law. They are written into the Ethiopian Criminal Procedure Code, the Ethiopian Constitution, and the treaties that it has ratified.

Interpretation of Ethiopian Laws with International Human Rights Laws

There is an international presumption that the legislature did not write any law that violated international law. Throughout the world, courts have used international law as a guide to help interpret ambiguous domestic law to bring it into compliance with international law.¹

In Ethiopia, the reference to interpreting rights in compliance with International Human Rights Documents is much stronger: it is a constitutional duty found in Article 13. First, the duty to interpret laws is vested in the courts by Constitutional Article 79:

¹ In England, for example, this was discussed in the case of *Garland v. British Rail Engineering Ltd.* [1983] 2 AC 751. In the USA, it is referred to as *The Charming Betsy* principle and has been discussed in *Cook v. U.S.*, 288 US 102 (1933) and *Weinberger v. Rossi*, 456 U.S. 25, 32 (1982). In Germany it was stated in BverfGE 74, 358 (370). In South Africa, it was described in Devenish, *Interpretation of Statutes* pp. 212-215 (1992). In Zimbabwe, it was apparently relied upon in the case of *S v. Ncube*, [1988] 2 SA 702 (ZS).

Judicial Powers

1. Judicial powers, both at Federal and State levels, are vested in the courts.

Second, courts *at all levels* must respect and enforce Chapter III of the Constitution:

Article 13. Scope of Application and Interpretation

1. All Federal and State legislative, executive and judicial organs at all levels shall have a responsibility and duty to respect and enforce the provisions of this Chapter.

This is a two-part requirement. The Courts must *respect* the Constitution by not violating its provisions.² They cannot apply unconstitutional laws; to do so would be violating Article 9 of the Constitution, which is forbidden. But also, they must *enforce* the Constitution by actively interpreting the constitution to ensure that the laws are constitutional.³

Constitutional Article 13(2) provides the standard by which section III of the Constitution must be measured when interpreting its provisions:

Article 13. Scope of Application and Interpretation

2. The fundamental rights and liberties contained in this Chapter shall be interpreted in a manner conforming to the Universal Declaration of Human Rights, International Covenants on Human Rights and international instruments adopted by Ethiopia.

Therefore an interpretation of the criminal procedure code must be in compliance with section III of the Constitution, which must be interpreted in accordance with the International Human Rights Documents adopted by Ethiopia. In order for the treaties to be adopted by Ethiopia, they need not be published in the *Negarit Gazette*. A treaty is *adopted* under international law when a representative of the Executive votes to accept it.⁴ As the Vienna Convention on the Law of Treaties described:

² Under international law, the *duty to respect* is the duty of a country to avoid action that would violate the right. It is a negative duty, requiring that a person not act in a prohibited manner. See for example ICESCR General Comment 13 (21st session, 1999) Para. 47; ICESCR General Comment 14 (22nd session, 2000) Paras. 33-34 and 50; and ICESCR General Comment 12 (20th session, 1999) Para. 15.

³ Under international law, the *duty to enforce* requires that the country take active steps to ensure that individuals comply with the requirement. See for example *The Case concerning United States Diplomatic and Consular Staff In Teheran*, Judgment of 24 May 1980, ICJ (International Court of Justice) Reports 1980, Para. 69.

⁴ *Vienna Convention on the Law of Treaties*, United Nations, Treaty Series, vol. 1155, p. 331. Art. 9. Available at <http://www1.umn.edu/humanrts/instree/viennaconvention.html>. Ethiopia has ratified the Vienna Convention on the Law of Treaties.

Adoption of the text

1. The adoption of the text of a treaty takes place by the consent of all the States participating in its drawing up except as provided in paragraph 2.
2. The adoption of the text of a treaty at an international conference takes place by the vote of two-thirds of the States present and voting, unless by the same majority they shall decide to apply a different rule.

This interpretive requirement found in Article 13(2) of the Ethiopian Constitution reflects Article 18 of the Vienna Convention on the Law of Treaties. Under Article 18, once a country adopts and signs the treaty, it “is obliged to refrain from acts which would defeat the object and purpose of a treaty.” By interpreting its Bill of Rights in a manner consistent with the adopted treaty, Ethiopia is refraining from taking action that would defeat the object and purpose of the Human Right Treaty.

Once the executive adopts the treaty, it may of course be ratified. Once ratified, as stated in Article 9 of the Constitution:

4. All international agreements ratified by Ethiopia are an integral part of the law of the land.

Under the constitution, no additional steps are required of the legislature before the treaty is part of Ethiopian law.

Afterwards, the President is under an obligation to publish adopted laws in the *Negarit Gazette*. This is just the distribution or promulgation of the law. However, if the president fails to do so, the laws are still adopted, signed, and ratified. Accordingly, they are still the guidelines for interpretation of Section III and are still an integral part of the law of the land.

Use of International Human Rights Laws

Furthermore, in addition to being interpretive aids, the international human rights treaties are directly part of Ethiopian law. Each of the treaties studied here has been adopted, signed, and ratified. Whether each treaty needs additional legislation depends upon the relationship between the executive and legislative branch. If under domestic law the ratification of the treaty excludes the legislative branch, it would ordinarily require additional legislation in order to obtain their consent. But in Ethiopia, the human rights treaties have been signed by the Executive and ratified by the Legislature. Because the Legislature has provided its input, they are not disadvantaged by the lack of any additional involvement. Instead, publication in the Gazette, the only missing action, relates only to an executive action.

Under international law, a country cannot evade its treaty obligations by failing to enact domestic legislation. This has been a long-standing rule of international law. For instance, in 1872 during its Civil War, the United States complained when England allowed a US Confederate ship to sail from its port to attack American shipping. The international arbitration tribunal ruled that the absence of a British law was no defense and England had to pay America for the damages.⁵

In the *Polish Nationals in Danzig*⁶ case (dealing with the rights of Polish minorities in 1932), the Permanent Court of International Justice ruled that a State cannot rely upon its own constitution to evade its international treaty obligations. This provision of international law has been codified in Article 27 of the *Vienna Convention on the Law of Treaties*, stating a “party may not invoke the provisions of its internal law as a justification for its failure to perform a treaty.” Because Ethiopia ratified the *Vienna Convention on the Law of Treaties*, this obligation directly applies to it.

In the *Lockerbie*⁷ case, where Libya was sued for its involvement in destroying an airplane over Scotland, the International Court of Justice reconfirmed the law that inability to act under domestic law was no defense to liability under international law.

Once a treaty is ratified, its terms become Ethiopian law. If Ethiopian legislation conflicts with the treaty, Ethiopian law determines the conflict. Under Ethiopian law, the more recent, more specific law controls. However, in terms of trial rights, such a conflict should rarely happen. That is because any court should under Article 13(2) of the Constitution interpret legislation in conformity with the international treaty. Given such a required interpretation, a conflict will really very rarely happen.

International Human Rights Treaties to be Discussed

Regarding this study of international law, special attention is given to the *African Charter (AC)*⁸ the *International Covenant on Civil and Political Rights (ICCPR)*⁹, the *Convention on the Elimination of Discrimination Against Women (CEDAW)*,¹⁰ the *International Convention on the Elimination of All Forms of Racial Discrimination (CERD)*,¹¹ and the *Convention Against Torture (CAT)*.¹²

⁵ *Alabama Claims* (1872).

⁶ PCIJ, Series A/B, No. 44, pp. 21, 64.

⁷ ICJ Reports, 1992; 94 ILR pp. 478, 515.

⁸ Available at http://www.oauoua.org/oau_info/rights.htm. Ethiopia ratified the African Charter in 1998.

⁹ Available at http://www.unhchr.ch/html/menu3/b/a_ccpr.htm. Ethiopia ratified the ICCPR in 1993.

¹⁰ Available at <http://www1.umn.edu/humanrts/instree/e1cedaw.htm>. Ethiopia ratified CEDAW in 1981.

¹¹ Available at <http://www1.umn.edu/humanrts/instree/d1cerd.htm>. Ethiopia ratified CERD in 1976.

¹² Available at http://www.unhchr.ch/html/menu3/b/h_cat39.htm. Ethiopia ratified CAT in 1994.

Equality before the Law and Equal Treatment by the Law

Fact pattern

- a) Two defendants appear before the judge on the issue of pre-trial detention. Both are charged with assaulting a taxi driver. There had been a fight and they both threw rocks at the driver. The taxi driver was not badly injured, but only suffered a few bruises. Ashenafi (A) is a beggar who does not own any property. Biniam (B) owns his home and a car. How should the judge set pre-trial release conditions? Should it be the same for both defendants?
- b) Both Ashenafi and Biniam are convicted at trial. If Biniam goes to jail for any amount of time, he will lose his job. If Ashenafi goes to jail, he will at least receive food and a place to sleep. Should they receive the same jail time? Should they receive the same fine?

Relevant Provisions

The law on equality falls into two parts: the protection against discrimination on specific grounds and the requirement that everyone should be treated equally.

Non-Discrimination

International Covenant on Civil and Political Rights

Article 2

1. 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.

African Charter

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, color, sex, language, religion, political or any other opinion, national and social origin, fortune, birth or other status.

Equality

Ethiopia Constitution, Article 25

Right to Equality

All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall guarantee to all

persons equal and effective protection without discrimination on grounds of race, nation, nationality, or other social origin, colour, sex, language, religion, political or other opinion, property, birth or other status.

International Covenant on Civil and Political Rights

Article 14

1. All persons shall be equal before the courts and tribunals.

International Covenant on Civil and Political Rights

Article 26

All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

The Convention on the Elimination of Discrimination Against Women (CEDAW)

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.

African Charter

Article 3

1. Every individual shall be equal before the law.
2. Every individual shall be entitled to equal protection of the law.

Dakar Declaration¹³

Article 9

Women and Fair Trial: Judicial processes and institutions reflect societal discrimination against women. Gender discrimination affects women in accessing justice and as prospective litigants, accused in criminal trials, victims of crime, witnesses and as legal representatives before judicial institutions. Women are not adequately represented in judicial positions and legal procedures are not sufficiently sensitive to issues that affect them.

Dakar Declaration

Article 10

Children and Fair Trial: Children are entitled to all the fair trial guarantees and rights applicable to adults and to some additional protection. The African Charter on the Rights and Welfare of the Child requires that: “Every child accused of 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 of human rights and fundamental freedoms.”

Comment

The right to equality before the law and equal treatment by the law means that generally:

- Defendants should be treated equally and
- The defendant and the prosecutor should be treated equally.

Additionally, discrimination on specific grounds irrelevant to justice is prohibited. For instance men and women should have the same rights. This does not necessarily require identical treatment. Prohibited are only those distinctions that are not based on reasonable and objective criteria.

Both the ICCPR and the African Charter require equality and prohibit discrimination. The African Charter’s section on non-discrimination in Article 2 follows that of the ICCPR word for word, except that it adds “ethnic group” as an additional ground on which discrimination is prohibited—an additional ground that is found in Ethiopia’s Constitution.

¹³ The Dakar Declaration and Recommendations were a result of the Seminar on the Right to a Fair Trial in Africa held in collaboration with the African Society of International and Comparative Law and Interights, in Dakar, Senegal, from 9-11 September 1999. The African Commission on Human Rights has adopted the findings of the Dakar Declaration and Recommendations.

While the ICCPR does not define discrimination, its Human Rights Committee has adopted¹⁴ the definitions of CEDAW and CERD:

6. The Committee notes that the Covenant neither defines the term "discrimination" nor indicates what constitutes discrimination. However, article 1 of the International Convention on the Elimination of All Forms of Racial Discrimination provides that the term "racial discrimination" shall mean any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life. Similarly, article 1 of the Convention on the Elimination of All Forms of Discrimination against Women provides that "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.

Part of equality is the idea of "equality of arms." The equality of arms principle holds that the parties to any proceeding must be on equal footing. As the Human Rights Committee stated:¹⁵

The right to equality before courts and tribunals also ensures equality of arms. This means that the same procedural rights are to be provided to all the parties unless distinctions are based on law and can be justified on objective and reasonable grounds, not entailing actual disadvantage or other unfairness to the defendant.

It is important to repeat that equal treatment does not always mean identical treatment. Unless prohibited by the anti-discrimination provision, the court may consider differences if they objectively and reasonably relate to justice. As the African Commission¹⁶ has stated, the response of the judges should be similar "when objective facts are alike."¹⁷

¹⁴ Human Rights Committee, General Comment 18, Non-discrimination (Thirty-seventh session, 1989), Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, U.N. Doc. HRI/GEN/1/Rev.1 at 26 (1994) Para. 6.

¹⁵ Human Rights Committee, General Comment No. 32, Article 14: Right to equality before courts and tribunals and to a fair trial, U.N. Doc. CCPR/C/GC/32 (2007) Section II; Communication No. 1347/2005, *Dudko v. Australia*, Para. 7.4.

¹⁶ Decisions of the African Commission in available on the Internet at <http://www1.umn.edu/humanrts/africa/comcases/allcases.html>.

¹⁷ *Avocats Sans Frontières (on behalf of Gaëtan Bwampamye) v. Burundi*, Communication No. 231/99, Paras. 26-27.

Comment on the fact pattern

The right to equality requires that all persons receive equal opportunity and equal access to the court.

Additionally, they should not be discriminated against for such reasons as “race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.” These grounds have nothing to do with the application of the law.

However, there are other grounds that justify a different treatment of persons. Obviously at sentencing a judge will increase a sentence depending upon whether a person has been convicted before and depending upon the severity of the crime.

In determining pre-trial detention for A and B, the court should consider whether the defendants will appear in court. One factor is the defendant’s connection to the community. Because B is more likely to appear, he may be treated differently.

Likewise, the parties may be treated differently at sentencing. A valid sentencing goal is to deter the defendant from committing another crime. A 500 Birr fine would not have the same impact for B as it would have for A.

Discussion points

- Do the prosecutor and defendant have equal access to witnesses and evidence?
- If some people are at a disadvantage in the judge’s courtroom due to historical reasons, should the judge take extra steps to try to make them equal? Is that discrimination by the judge? Name two examples of someone belonging to a historically disadvantaged minority and what sort of steps may be permissible by the judge.
- Part of equality is treating similar cases in similar ways. Let’s say that two defendants commit the same crime and are about to be sentenced. Name 5 sentencing criteria that might make their sentences different.

Presumption of Innocence

Fact pattern

- a) Judge Daniel (D) has a rule in his courtroom that everyone charged with a serious crime who is in custody will wear handcuffs in his courtroom. Does the violate the presumption of innocence?
- b) Judge Solomon (S) has too many trials. In many cases when a defendant appears in his court, Judge S tells the defendant that if he were to confess and plead guilty the judge would be very lenient. Has the judge violated either the presumption of innocence or the right to remain silent?

Relevant Provisions

Ethiopia Constitution, Article 20

Rights of Persons Accused

- 3. During proceedings accused persons have the right to be presumed innocent until proved guilty according to law and not to be compelled to testify against themselves.

African Charter

- Article 7 (1)(b) Every individual shall have the right to have his cause heard. This comprises...the right to be presumed innocent until proved guilty by a competent court or tribunal;

ICCPR

Article 14

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

Comment

Although the African Charter specifically includes neither a right to remain silent nor a right to a public hearing, the African Commission on Human Rights has considered this to be an inherent part of the right to be presumed innocent. For example, Sudan violated this article when public officials announced that a defendant who was facing trial was guilty.¹⁸

¹⁸ *Gwebu and another v. Rex, African Human Rights Law Reports* (2002) 229.

Under the ICCPR, a presumption of innocence also requires that the defendant shall not be found guilty unless and until the case against him is proved *beyond a reasonable doubt*. As the Human Rights Committee stated:¹⁹

The presumption of innocence, which is fundamental to the protection of human rights, imposes on the prosecution the burden of proving the charge, guarantees that no guilt can be presumed until the charge has been proved beyond reasonable doubt, ensures that the accused has the benefit of doubt, and requires that persons accused of a criminal act must be treated in accordance with this principle.

The presumption of innocence applies to all government officials, not only a judge. Police and prosecutors for example cannot publicly announce the defendant's guilt.²⁰ As the HRC stated²¹ in General Comment 13:

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.

Comment on the fact pattern

- a) The presumption of innocence means that no member of the government can presume any guilt until it is proven in court. Therefore, Judge D should not handcuff everyone merely because they are charged with a serious crime. Rather, he should individually look at each defendant and handcuff him or her only if there is a danger from that individual defendant.
- b) On the one hand, the statement by Judge S may be seen as letting the defendant know that if he were to plead guilty he would receive a standard sentence. In this sense, Judge S would be honestly communicating information to a defendant rather than impacting a right. However, there is inherent coercion present in the judge's statement that affects the innocent as well as the guilty. Even more of a problem is the judge's insistence that a confession accompany a guilty plea. This more directly impacts the defendant's right to remain silent.

Discussion proposal:

- What information would the participants give to the press in high profile cases?
- How does public pressure influence the criminal proceedings?

¹⁹ Human Rights Committee, General Comment No. 32, Article 14: Right to equality before courts and tribunals and to a fair trial, U.N. Doc. CCPR/C/GC/32 (2007) Section IV.

²⁰ *Gridin v Russian Federation* (2000) UN Doc. CCPR/C/69/D/770/1997 Para. 8.3.

²¹ Human Rights Committee, General Comment 13, Article 14 (Twenty-first session, 1984), Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, U.N. Doc. HRI/GEN/1/Rev.1 at 14 (1994) Para. 7.

- What is the role of the judge in relation to the accused, that is does he have a duty concerning the rights of the accused?
- Can the participants imagine motives of the suspect/accused for a false confession?

Prohibited Forms of Examination

Fact pattern

a) Solomon (S) is arrested. The police know that he is claustrophobic (he is very afraid of small rooms). In order to obtain a confession, the police put him in a small, dark cell. There is no bed and hardly enough room to sleep on the floor. They tell him that he can go home if he confesses, which he does. Is this illegal? When the judge learns of this during trial, what should the judge do?

b) Betty is an attractive 20-year-old woman arrested for theft in small village. There is only one jail cell in this small prison, and it contains three men. The police tell her that if she confesses their investigation will be complete and she will be released. Otherwise, she will spend a few nights in the jail cell with the men. She confesses and is released. Should the judge accept her confession as evidence against her?

c) During trial, Daniel (D) asked the judge if he could file a complaint with the police for having his rib broken by the police. The judge says that D should talk to the head of police about that. Neither the judge nor the prosecutor takes any steps to inquire about the mistreatment. D's written confession is received as evidence. Did the judge act properly? Did the prosecutor act properly?

Relevant Provisions

Ethiopia Constitution, Article 18

Prohibition against Inhuman Treatment

Everyone has the right to protection against cruel, inhuman or degrading treatment or punishment.

Ethiopia Constitution, Article 19

Rights of Persons Arrested

5. Persons arrested shall not be compelled to make confessions or admissions that could be used in evidence against them. Any evidence obtained under such coercion shall not be admissible.

Ethiopia Constitution, Article 21

The Rights of Persons Held in Custody and Convicted Prisoners

1. All persons held in custody and persons imprisoned upon conviction and sentencing have the right to treatments respecting their human dignity.
2. All persons shall have the opportunity to communicate with, and to be visited by, their spouses or partners, close relatives, friends, religious counselors, medical doctors and their legal counsel.

International Covenant on Civil and Political Rights

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.

International Covenant on Civil and Political Rights

Article 10

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

International Covenant on Civil and Political Rights

Article 14

3. In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality:
(g) Not to be compelled to testify against himself or to confess guilt.

African Charter

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.

Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT)

Article 1

1. 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.

CAT

Article 13

Each State Party shall ensure that any individual who alleges he has been subjected to torture in any territory under its jurisdiction has the right to complain to, and to have his case promptly and impartially examined by, its competent authorities. Steps shall be taken to ensure that the complainant and witnesses are protected against all ill-treatment or intimidation as a consequence of his complaint or any evidence given.

CAT

Article 14

1. Each State Party shall ensure in its legal system that the victim of an act of torture obtains redress and has an enforceable right to fair and adequate compensation, including the means for as full rehabilitation as possible. In the event of the death of the victim as a result of an act of torture, his dependants shall be entitled to compensation.
2. Nothing in this article shall affect any right of the victim or other persons to compensation which may exist under national law.

CAT

Article 15

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.

Comment

One of the most basic rights is to be free from torture and mistreatment. It applies to all stages of a criminal proceeding; it is absolute; and it is a right that cannot be derogated (suspended) in times of war or emergency. An official cannot justify torture by claiming that he was following the orders of a superior

According to Article 1 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment,²² “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.” This broad definition is also reflected in the ICCPR.²³

Acts of torture, as defined by international law, include the disproportionate use of force by police, such as:

- prolonged solitary confinement;
- physical pressure during interrogation, such as hooding, prolonged playing of music;

²² Available at <http://www1.umn.edu/humanrts/instreet/h2catoc.htm>. Ratified by Ethiopia in 1994.

²³ Human Rights Committee, General Comment 20, Article 7 (1992), Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, U.N. Doc. HRI/GEN/1/Rev.1 at 7 (1994).

- shaking, deprivation of sleep, threats of death etc. and medical experimentation.

Police should only occasionally use force to the minimum extent required by the circumstances. The Human Rights Committee²⁴ has found the following extreme instances to violate Article 7:

- “10 months incommunicado including solitary confinement chained to a bed spring for three and a half months with minimal clothing and severe food rations, followed by a further month’s detention incommunicado in a tiny cell, followed by detention with another in a three by three meter cell without external access for eighteen months.”²⁵
- Salt water was rubbed into the victim’s nasal passages after which he was left for a night handcuffed to a chair without food or water.²⁶
- Victim was subjected to electric shocks and being hung with his arms tied behind him. He was also taken to the beach, where he was subjected to mock drowning.²⁷
- Use of interrogation techniques such as prolonged stress positions and isolation, sensory deprivation, hooding, exposure to cold or heat, sleep and dietary adjustments, 20 hour interrogations, removal of clothing and of all comfort items including religious items, forced grooming, and exploitation of a detainee’s personal phobias.²⁸
- Victim was severely beaten on his head by prison officers (requiring several stitches).²⁹
- Beatings were so severe as to cause the victim to be hospitalized.³⁰
- Withholding of food and water for five consecutive days.³¹
- Soldiers blindfolded and dunked the prisoner in a canal.³²
- Severe beatings by prison guards, along with the burning of the prisoner’s personal belongings, including legal documents. The treatment was inflicted to

²⁴ Decisions of the Human Rights Committee are available on the Internet at <http://humanrights.law.monash.edu.au/undocs/allundocs.html>.

²⁵ *White v. Madagascar* (115/82), Paras. 15.2, 17.

²⁶ *Cañon García v. Ecuador* (319/1988), Para. 5.2.

²⁷ *Vargas Más v. Peru* (1058/02).

²⁸ Concluding Observations on the U.S. (2006) CCPR/C/USA/CO/3, Para. 13.

²⁹ *Henry v. Trinidad and Tobago* (752/97), Para. 2.1.

³⁰ *Sirageva v. Uzbekistan* (907/00).

³¹ *Bee and Obiang v. Equatorial Guinea* (1152 and 1190/03), Para. 6.1.

³² *Vicente et al v. Colombia* (612/95), Para. 8.5.

punish all persons, including the complainant, who had been involved in an escape attempt. His beatings were so bad that he “could hardly walk.”³³

Additionally, sometimes prison conditions are so bad as to be a violation of ICCPR Article 7. The Human Rights Committee has concluded that the following conditions violate Article 7:

- Over a two-year period, the prisoner was variously subjected to incommunicado detention, threats of torture and death, intimidation, food deprivation, being locked in a cell for days without any possibility of recreation.³⁴
- Deprivation of food and drink for several days.³⁵
- Prisoners were subjected to electric shocks, hanging by his hands, immersion of his head in dirty water near to the point of asphyxia.³⁶
- Detention in a cell for fifty hours “measuring 20 by 5 meters, where approximately 125 persons accused of common crimes were being held, and where, owing to lack of space, some detainees had to sit on excrement. He received no food or water until the following day.”³⁷
- Being locked up in a cell for 23 hours a day, with no mattress or other bedding, no adequate sanitation, ventilation or electric lighting, exercise, medical treatment, adequate nutrition or clean drinking water. Furthermore, the prisoner’s belongings (including medication) were destroyed by the jail guards, and he had been denied prompt assistance in the case of an asthma-attack.³⁸
- In General Comment 20, the HRC stated that “prolonged solitary confinement may amount to acts prohibited by Article 7.” The HRC has found that solitary confinement for over three years violated Article 7.³⁹

Duty to Investigate

One of the basic international documents outlawing the use of torture is the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT). Pursuant to the Convention against Torture (CAT), each state party shall ensure that any individual who claims that he has been subjected to torture has the

³³ *Howell v. Jamaica* (798/98), Para. 2.5.

³⁴ *Mikong v. Cameroon* (458/91), Para. 9.4.

³⁵ *Tshiesekedi v. Zaire* (242/1987), Para. 13b, and *Miha v. Equatorial Guinea* (414/1990), Para. 6.4.

³⁶ *Weismann v. Uruguay* (8/77), Para. 9.

³⁷ *Portorreal v. Dominican Republic* (188/84), Para. 9.2.

³⁸ *Brown v. Jamaica* (775/97), Para. 6.13.

³⁹ *Polay Campos v. Peru* (577/94), Para. 8.7. See also *Marais v. Madagascar* (49/79) and *El-Megreisi v. Libyan Arab Jamahiriya* (440/90).

right to complain to the competent reviewing authority and to have his case promptly and impartially examined by it. The state is obliged to take steps to ensure that the complainant and witnesses are protected against all ill treatment or intimidation as a consequence of his complaint or any evidence given.⁴⁰

All allegations that evidence was obtained under torture or other cruel, inhuman or degrading treatment must be promptly and impartially examined.⁴¹ If the prosecutor is the first to learn of it, he must investigate.

The court is obliged to investigate forced confessions even in the absence of an express complaint or allegation, if the defendant shows visible signs of physical or mental abuse.⁴² These standards of course apply when any person (including the defendant or any witness) complains of mistreatment.⁴³

The failure to promptly and impartially investigate is a violation of the ICCPR as well as the CAT. The Human Rights Committee described⁴⁴ the failure of the prosecutor and prison doctor to investigate as a violation as follows:

The States failure in this regard is evident in a number of ways. First, the Chief Prosecutor failed to respond promptly to either of the submitted complaints. In both cases, no official reply was received by the author for approximately eight months. No justification has ever been given for the delay in interviewing the author; he was not interviewed until 14 months after the submission of his second complaint. Delays in an investigation also breached CAT in *Halimi-Nedzibi v. Austria* (CAT 8/91). Secondly, the investigation of those complaints by the Chief Prosecutor was plainly inadequate, in that he did not interview a number of relevant witnesses, as outlined in paragraph 25 above. The interview with the author was also unsatisfactory. For example, the author did not get a chance to respond to the contention that the ill-treatment could have been caused by other prisoners. The investigation was plainly not impartial as the Chief Investigator only personally interviewed witnesses who would favour the State. The failings of the Chief Prosecutor in the investigations resemble those that were found to breach the Articles 12 and 13 of the CAT in *Baraket v. Tunisia* (CAT 60/96) and *Blanco Abad v. Spain* (CAT 59/96). The Human Rights Committee also found a breach of Article 7 due to a State's failure to undertake a prompt and adequate investigation of torture allegations in *Herrera Rubio v. Colombia* (161/83). Thirdly, the Court of Appeal compounded the poor investigation, by failing to reinstate the investigation, and giving no reasons for its decision. Fourthly, the complaint about prison conditions to the prison authorities was not taken

⁴⁰ CAT Art. 13.

⁴¹ CAT Art. 16.

⁴² Art. 14(3) g) of the ICCPR; as well as *Kelly v. Jamaica*, CCPR/C/41/D/253/1987, 10 April 1991, Para. 5.5.

⁴³ CAT Articles 13 and 16. For future use, the attached Appendix A is an internationally accepted form and guideline for the taking of evidence in torture cases. The form and guideline was developed by the United Nations.

⁴⁴ *Concluding Observations on Brazil*, (1996) UN doc. CCPR/C/79/Add. 66, Para. 12.

seriously. Indeed, it only resulted in reprisals against the author. The Human Rights Committee has condemned Brazil in Concluding Observations for failing to provide witnesses with protection against reprisals in respect of complaints of torture. Finally, the failure of the City Prison doctor to undertake a proper medical examination of the author (see above, paragraph 8) breaches Article 7. Any standard medical examination involves the removal of some clothing, and the doctor was plainly not interested in listening or responding to the author's allegations. The superficial and selective nature of the medical examination rendered it clearly inadequate. Its inadequacy was compounded by the refusal of the prison authorities to permit an independent medical examination.

Exclusion of evidence elicited as a result of torture or other duress

The Convention against Torture requires Ethiopian courts to ensure that any statement that is established to have been made as a result of torture shall not be used as evidence in any proceedings except against a person accused of torture.⁴⁵

Comment on the fact pattern

a) Torture is defined to include 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 a confession.

Jail conditions can violate the prohibition as well, regardless of the defendant's claustrophobia. Factors include whether the jail is overcrowded; the unsanitary conditions of the jail cell and the length of incarceration. The purpose of the imprisonment (whether meant to mistreat the prisoner) is a relevant factor.

Under ICCPR case law, it is uncertain whether this act torture. In the case of *Concluding Observations on the U.S. (2006)*, the HRC has found that a detainee's special fears are relevant in determining mistreatment (in that case, fear of dogs). However, the HRC relied upon additional criteria including sleep deprivation and 20-hour interrogations.

b) Torture against women frequently takes the form of rape and sexual mistreatment. Generally, women in custody should be held separately from men and supervised only by female staff members. Women and men should either be held in separate persons or kept apart within one jail. This is certainly torture as it is intended to cause severe pain or suffering. Its resulting confession cannot be used in court.

c) The Judge and the Prosecutor are both required to promptly start an investigation. They must investigate any claim of torture, during which they should order a medical examination, and take all necessary steps to ensure that the allegation is fully, promptly,

⁴⁵ CAT Art. 15.

and impartially investigated. During the investigation, they are also required to ensure the safety of the defendant.

Discussion

- How would the participants define torture? In their understanding, does it include psychological pressure? What behavior is allowed? Must it result in injury?
- What is the truth content of confessions made under pressure?
- When, if at any time, is mistreatment justified? Is it justified to save a life?
- What difficulties have the judges had in the past investigating mistreatment of prisoners?

Freedom from Arbitrary Detention

Introduction

Experts have concluded⁴⁶ that the right to be free from arbitrary detention under Article 9 of the ICCPR include the following:

- The right to be informed of a criminal charge (article 9(2));
- The rights of persons detained on criminal charges (article 9(3));
- The right of habeas corpus (article 9(4)); and
- The right to compensation for unlawful arrest or detention (article 9(5)).

Fact pattern

- a) Mohammed (M) is an 70-year-old illiterate beggar. He was arrested 6 months ago on suspicion of theft. But he was never charged with any crime. Mohammed remains in jail, His sister writes the judge a letter, asking for M to be released from jail. What should the judge do?
- b) Samuel (S) and Elias (E) become involved in a fight. It is really uncertain who started it. However, Samuel is the police officer's best friend, and the police officer arrests Elias for the assault. Because the police officer is going to a wedding, Elias is not taken to court for 4 days. What should the judge do and why?

Relevant Provisions

Ethiopia Constitution, Article 17

Right to Liberty

1. No one shall be deprived of his or her liberty except on such grounds and in accordance with such procedures as are established by law.
2. No person may be subjected to arbitrary arrest, and no person may be detained without a charge or conviction against him.

Ethiopia Constitution, Article 19

Rights of Persons Arrested

1. Persons arrested have the right to be brought before a court within 48 hours of their arrest. Such time shall not include the time reasonably required for the journey from the place of arrest to the court. On appearing before a court, they have the right to be given prompt and specific explanation of the reasons for their arrest due to the alleged crime committed.
4. All persons have an inalienable right to petition the court to order their physical release where the arresting police officer or the law enforcer fails to

⁴⁶ Joseph, Schultz and Castan, *The International Covenant on Civil and Political Rights – Cases, Materials and Commentary* (2nd Ed, 2004) 304; and *C v Australia*, Communication No 900/00, Un Doc CCPR/C/76/D/900/1999 (2002) Para. 1.

bring them before a court within the prescribed time and to provide reasons for their arrest. Where the interest of justice requires, the court may order the arrested person to remain in custody or, when requested, remand him for a time strictly required to carry out the necessary investigation. In determining the additional time necessary for investigation, the court shall ensure that the responsible law enforcement authorities carry out the investigation respecting the arrested person's right to a speedy trial.

Ethiopia Constitution, Article 21

The Rights of Persons Held in Custody and Convicted Prisoners

1. All persons held in custody and persons imprisoned upon conviction and sentencing have the right to treatments respecting their human dignity.
2. All persons shall have the opportunity to communicate with, and to be visited by, their spouses or partners, close relatives, friends, religious counselors, medical doctors and their legal counsel.

African Charter

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.

African Charter

Article 7

1. Every individual shall have the right to have his cause heard. This comprises:
(a) the right to an appeal to competent national organs against acts of violating his fundamental rights as recognized and guaranteed by conventions, laws, regulations and customs in force;

International Covenant on Civil and Political Rights

Article 9

1. 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.
2. 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.
3. Anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release. It shall not be the general rule that persons awaiting trial shall be detained in custody, but release

may be subject to guarantees to appear for trial, at any other stage of the judicial proceedings, and, should occasion arise, for execution of the judgment.

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

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

International Covenant on Civil and Political Rights Article 14

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.

Comment

The freedom from arbitrary detention means that an arrest is not disproportional, unjust unpredictable, or discriminatory. There must be legal grounds for the arrest, and the arrest must be executed in a lawful manner. An important safeguard for this right is the duty to promptly bring the suspect before a judge who has the power to release the detainee if the arrest is unlawful. This ensures an effective control by an independent authority and therefore reduces the risk of arbitrary detention. In order for the right to have any meaning, the judge must actively review the arrest, detention, and the time in which the defendant is brought before the court. The judge must be prepared to order the release of the arrested person if the judge finds that the arrest has been arbitrary.

The Human Rights Committee determined that the right *to be brought promptly before a judge* means within a few days. In *Freemantle v Jamaica*,⁴⁷ the HRC concluded that *incommunicado detention* of four days without access to a court or an attorney was a violation of Article 9. *Incommunicado detention* is the secret detention of a person, where his incarceration is not made known to the public. It raises serious problems and leads to significant abuses.

When a prisoner is in jail without charges, the state cannot claim as a defense that the prisoner could have brought a habeas corpus proceeding.⁴⁸

The freedom from arbitrary detention also means that the purpose for the arrest cannot be for discriminatory reasons. For this reason, the African Commission concluded that

⁴⁷ Communication No 625/95.

⁴⁸ *Berry v. Jamaica*, Communication No. 330/1988, Para. 11.1

arrests and detentions carried out by the Rwandan Government “on grounds of ethnic origin alone, ... constitute arbitrary deprivation of the liberty of an individual” and were thus “clear evidence of a violation of” Article 6 of the African Charter.⁴⁹

In addition to the binding articles of the ICCPR and African Charter, there are standards that have been adopted by the United Nations that are not legally binding on countries. However, their existence is important to understand. They are like signs that describe the direction international courts are taking when they interpret the ICCPR and the African Charter. Some of the standards restate what is law; other standards describe the formation of law. *The Body of Principles for the Protection of All Persons Under Any Form of Detention or Imprisonment*⁵⁰ is one standard that discusses *incommunicado detention*. It requires that any person arrested or detained have access to the outside world, including his family, friends and to medical treatment.⁵¹ The HRC relies upon these standards when they determine whether there is a violation of Article 9.

The HRC has recently stated⁵² that regarding the length of time to initially bring a suspect to court:

The State Party should take action to ensure that detention in police custody never lasts longer than 48 hours and that detainees have access to lawyers from the moment of their detention.

In order for the arrest to be lawful under the African Charter, it must comply with Ethiopian law. Additionally for the arrest to be valid, Ethiopian law must comply with international standards by being the kind of “powers normally granted to the security force in a democratic society.”⁵³ Creating that test in a case against Sudan, the HRC reviewed a Sudanese law that had allowed arrests for vague reasons that the HRC felt were “not in conformity with the spirit of the African Charter” and violated its Article 6.

For the purposes of an example, the African Commission on Human Rights has found the following to be a violation of Article 6:

- A prisoner to be held beyond the completion of his sentence.⁵⁴
- A detainee to be held indefinitely.⁵⁵
- A Nigerian law that allowed journalists to be held up to three months without charges.⁵⁶

⁴⁹ *Organisation Contre la Torture and Others v. Rwanda*, Communications Nos. 27/89, 46/91, 49/91, and 99/93, Para. 28.

⁵⁰ *Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment*, UN General Assembly resolution 43/173, December 9, 1988. Available at http://www.unhchr.ch/html/menu3/b/h_comp36.htm.

⁵¹ Two other relevant standards are *The Standard Minimum Rules for the Treatment of Prisoners* and *The Basic Principles for the Treatment of Prisoners*.

⁵² HRC, Concluding Observations on Gabon, UN Doc CCPR/CO/70/GAB (2000).

⁵³ *Amnesty International v. Sudan*, Communication 48/90, 50/91, 52/91, and 89/93, Para. 59.

⁵⁴ *Annette Pagnoulle (on behalf of Abdoulaye) v. Cameroon*, Communication 39/90.

⁵⁵ Communications 25/89, 47/90, 56/91, and 100/93.

Habeas Corpus

Article 9(4) of the ICCPR and Article 7(1)(a) of the African Charter require the right to challenge an unlawful challenge in court. The English reference to this is the *Right of Habeas Corpus*.⁵⁷

The habeas corpus procedures should be speedy, simple, and free if the detainee cannot afford to pay.⁵⁸ The detainee also has the right to continuing review of the lawfulness of detention at reasonable intervals.⁵⁹ For example, if the prosecutor responds to a petition for habeas corpus by filing charges that he afterwards dismisses (while keeping the defendant in custody), the detainee can file another petition for habeas corpus that the court should review.

In *Hammel v Madagascar*,⁶⁰ incommunicado detention for three days, during which it was impossible for the detainee to access a court to challenge his detention with a petition for habeas corpus, was held to breach article of Article 9(4).

Furthermore, the HRC has concluded⁶¹ that the right to habeas corpus should not be limited (derogated) in times of emergency.

ICCPR Article 9(5) states that a defendant may receive compensation for a violation of his rights. You may recall that this was also stated in the Convention Against Torture Article 14. That means that if a defendant's rights are violated, he must be able to receive compensation. The HRC found that when a person had been arbitrarily arrested and detained, the Country had to remedy the violation, pay him compensation, and ensure that the violation would not occur again.⁶²

Comment on the fact pattern

a) The ICCPR requires that there must be a habeas corpus procedure that will allow someone to challenge his imprisonment.

Ethiopia Constitution, Article 19(4) states:

⁵⁶ Communications 137/94, 139/94, 154/95, and 161/97.

⁵⁷ The Spanish reference is *The Right of Amparo*.

⁵⁸ Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, UN General Assembly resolution 43/173, December 9, 1988, Principle 32(2).

⁵⁹ Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, Principle 11(3).

⁶⁰ (155/83)

⁶¹ Human Rights Committee, General Comment 29, States of Emergency (article 4), U.N. Doc. CCPR/C/21/Rev.1/Add.11 (2001) Para. 9.

⁶² Communication No. 132/1982, *Monja Jaona v. Madagascar*.

All persons have an inalienable right to petition the court to order their physical release where the arresting police officer or the law enforcer fails to bring them before a court within the prescribed time and to provide reasons for their arrest.

Under the ICCPR, the habeas corpus procedures must be simple, speedy, and free of charge if the detainee cannot afford to pay. This implies that the judge should take active steps to ensure that M be brought to court to review his detention. M is isolated, old, and illiterate. The judge should accept the letter from M's sister as the necessary petition to begin a habeas corpus proceeding.

b) The Court must review the delay in bringing Elias to court. If the judge finds that it is unreasonable (as it clearly is) he should order Elias' release. Besides monetary compensation, that is the only possible relief.

Discussion proposal:

- Are the time limits contained in the Ethiopian Criminal Code realistic? Why or why not? What responsibility does a judge have if they are violated? What remedies can the judge realistically order for a violation of the time limits?
- What issues have to be considered when making a decision about pre-trial detention?

Right of a defendant to have adequate time and facilities to prepare a case

Fact pattern

a) David (D) is charged with murder. He is held in custody because of the existing danger of flight. D is represented by defense counsel of his choice. The prison regulations limit the possibility of communication with defense counsel. Visits are allowed only for two hours each day and in the presence of a prison officer. Furthermore the prison officers read all written communication. Does that affect the right to an adequate defense?

b) During the trial, the prosecution finds new evidence when he talks to a witness Biniam (B) outside of the courtroom. The new evidence provides an alibi for the defendant and tends to prove the defendant's innocence. The prosecutor does not call B to testify as a witness. Instead, the prosecutor sends B home.

However, witness Lucy (L) overheard the conversation between B and the prosecutor. She testifies in court that the defendant could not have committed the crime because of the conversation she heard between B and the prosecutor.

The defendant asks the court for an interruption of the trial and for adequate time to prepare the defense according to the changed situation. The judge is in doubt whether an interruption of the trial is necessary or if this would violate the right to trial without undue delay. What should the court decide? Did the Prosecutor respect the legal provisions relevant for an adequate defense?

Relevant Provisions

Ethiopia Constitution, Article 19

Rights of Persons Arrested

1. Persons arrested have the right to be informed promptly, in a language they understand, of the reasons for their arrest and of any charge against them.

Ethiopia Constitution, Article 20

Rights of Persons Accused

2. Accused persons have the right to be informed with sufficient particulars of the charge brought against them and to be given the charge in writing.
4. Accused persons have the right to full access to any evidence presented against them, to examine witnesses testifying against them, to adduce or to have evidence produced in their own defense, and to obtain the attendance of and examination of witnesses on their behalf before the court.

African Charter
Article 7

1. Every individual shall have the right to have his cause heard. This comprises:
(a) the right to an appeal to competent national organs against acts of violating his fundamental rights as recognized and guaranteed by conventions, laws, regulations and customs in force;

ICCPR
Article 14

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 defense and to communicate with counsel of his own choosing;

Standard Minimum Rules for the Treatment of Prisoners⁶³
Paragraph 93

For the purposes of his defense, an untried prisoner shall be allowed to apply for free legal aid where such aid is available, and to receive visits from his legal adviser with a view to his defense and to prepare and hand to him confidential instructions. For these purposes, he shall if he so desires be supplied with writing material. Interviews between the prisoner and his legal adviser may be within sight but not within the hearing of a police or institution official.

Comment

The right to an adequate defense includes the right either to be fully assisted by a lawyer or to defend oneself; the right to view the evidence; and the right to question the witnesses.

This right to defense is drawn from the principle of the *equality of arms*. This means that, in relation to the prosecution, the defense must have an equal opportunity to prepare and present a case--that the prosecution and the defense must have an equal position throughout the proceedings. The rights of the accused begin at the moment of the arrest or investigation, whichever is earlier, and include the right to hire a lawyer with whom the defendant can have free and confidential communication. The judge must inform the defendant of the charges, his rights, and of the relevant actions taken by the court in a language that the defendant understands. Without this information, the preparation of the defense is impossible.

⁶³ Standard Minimum Rules for the Treatment of Prisoners, approved by the Economic and Social Council by its resolution 663 C (XXIV) of 31 July 1957 and 2076 (LXII) of 13 May 1977.

The Human Rights Committee has defined “adequate time” and “adequate facilities” as follows:⁶⁴

What counts as “adequate time” depends on the circumstances of each case. If counsel reasonably feel that the time for the preparation of the defence is insufficient, it is incumbent on them to request the adjournment of the trial. A State party is not to be held responsible for the conduct of a defence lawyer, unless it was, or should have been, manifest to the judge that the lawyer’s behaviour was incompatible with the interests of justice. There is an obligation to grant reasonable requests for adjournment, in particular, when the accused is charged with a serious criminal offence and additional time for preparation of the defence is needed.

“Adequate facilities” must include access to documents and other evidence; this access must include all materials that the prosecution plans to offer in court against the accused or that are exculpatory. Exculpatory material should be understood as including not only material establishing innocence but also other evidence that could assist the defence (e.g. indications that a confession was not voluntary). In cases of a claim that evidence was obtained in violation of article 7 of the Covenant, information about the circumstances in which such evidence was obtained must be made available to allow an assessment of such a claim.

The following decisions by the Human Right Committee are helpful. In them, it may be seen that errors can be cured if the judge continues the case once he learns of the inadequacies. Of course, the continuance must be balanced against the right to a trial within a reasonable amount of time. In this balance lies the difficulty.

- A public defender was not present at all preliminary hearings and met the criminal defendant ten minutes before the start of the trial. Although the trial judge and the investigating magistrate were not expressly told, they must have been aware of that fact and did not correct it. Thus, the Committee found a violation of Article 14 (3) (b) ICCPR.⁶⁵
- The defendants claimed a violation of their right to adequate time and facilities for the preparation of the defense, because the lawyer only visited them for twenty minutes two days before the trial. However, the Committee did not agree with the defendants’ claim because the hearing was adjourned by the judge in order to allow the public defender to prepare the case.⁶⁶
- The Committee found a violation of Article 14 (3) (b) of the Covenant, because the appellate court failed to inform the defendant with sufficient advance notice of the date of the hearing of his appeal. This delay deprived him of the opportunity to prepare his appeal and to consult with the court-appointed lawyer.⁶⁷

⁶⁴ Human Rights Committee, General Comment No. 32, Article 14: Right to equality before courts and tribunals and to a fair trial, U.N. Doc. CCPR/C/GC/32 (2007) Section. V

⁶⁵ *George Winston Reid v. Jamaica*, CCPR/C/51/D/355/1989 (1994)

⁶⁶ *Michael and Brian Hill v. Spain*, CCPR/C/59/D/526/1993 (1997)

⁶⁷ *Leroy Simmonds v. Jamaica*, CCPR/C/46/D/338/1988 (1992)

- The defendant claimed a violation of the right to adequate time and facilities for the preparation of the defense, because he was not given a chance to communicate with his attorney before the preliminary hearing, and the public defender visited him in prison only three days before the start of the trial. The determination of what constitutes “adequate time” requires an assessment of the individual circumstances of the case. In the present case, the material did not reveal that either defendants or his counsel complained to the trial judge that the time or facilities for the preparation of the defense were inadequate. Thus, no violation of Article 14 (3) (b) was found.⁶⁸

Comment on the fact pattern

a) The right to an adequate defense derives from the principle of equality of arms. The defendant and his lawyer must be granted an equal opportunity to prepare and present his case. Compared to the prosecutor, the defendant is in a weaker position. The defense would be deprived of any opportunity of an adequate defense if the possibility of free and confidential communication between the suspect/accused and the defense counsel were not respected. In its *Resolution on the Right to Recourse and Fair Trial*, the African Commission on Human and Peoples’ Rights reinforced the right to legal representation guaranteed by article 7(1)(c) of the African Charter. It held that “in the determination of charges against them, individuals shall in particular be entitled to communicate in confidence with counsel of their choice” and on the basis of this, it found a violation of this right in the case of *Media Rights Agenda (acting on behalf of Mr. Niran Malaolu) v. Nigeria*.⁶⁹

b) The defendant is entitled to an adequate defense. He should not be disadvantaged vis a vis the prosecutor merely because he is charged with a crime. Under the ICCPR, the right to adequate facilities for a defense include an obligation on the prosecutor to provide information to the defendant that the prosecutor knows will either tend to prove the defendant’s innocence or tend to reduce the defendant’s sentence. This also extends to material that may reduce the credibility of a prosecution witness.

This is especially true when the defendant cannot be expected to have access to such information because he is in jail without an attorney.

Discussion proposal:

- What is the consequence for the proceedings if the defendant and his lawyer are not allowed access to the investigative files?
- What are the advantages for the whole judicial system if the defendant is ensured the right to an adequate defense?
- What problems occur if a defendant is not allowed to consult his lawyer in private?

⁶⁸ *Glenford Campbell v. Jamaica*, CCPR/C/44/D/248/1987 (1992)

⁶⁹ *ACHPR, Media Rights Agenda (on behalf of Niran Malaolu) v. Nigeria*, Communication No. 224/98, Para 52.

- Are there many defense lawyers in Ethiopia– if not, why not?

The Right to Remain Silent

Fact pattern

- a) Ashenafi (A) is accused of theft. He remains silent during the trial. The judge sentences him to a long prison term reasoning that if he were not guilty he would have spoken in his own defense. Was the judge allowed to base his judgment on this circumstance?
- b) Abraham (A) is arrested for murder. When questioned by the police, he says nothing. The police told him he should make a written statement or else he will be punished even more severely. He still refused to talk. The police obtained a warrant to allow them to secretly place a tape recorder in his jail cell. The police also placed in his prison cell another prisoner who had agreed in past cases to testify against fellow inmates in order to get his case dismissed. Does this violate A's right to remain silent?
- c) Hassan (H) is charged with assault. When investigated, he refused to make any statements to the police. At trial, he effectively raises a claim of self-defense. During his testimony, the prosecutor asks him why he didn't tell the police that he had acted in self-defense. Does this violate his right to remain silent? What if the judge had asked him instead?

Relevant Provisions

Ethiopia Constitution, Article 19

Rights of Persons Arrested

3. Persons arrested have the right to remain silent. Upon arrest, they have the right to be informed promptly, in a language they understand, that any statement they make may be used as evidence against them in court.
4. Persons arrested shall not be compelled to make confessions or admissions that could be used in evidence against them. Any evidence obtained under such coercion shall not be admissible.

Ethiopia Constitution, Article 20

Rights of Persons Accused

3. During proceedings accused persons have the right to be presumed innocent until proved guilty according to law and not to be compelled to testify against themselves.

ICCPR

Article 14

3. In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality:
 - g) Not to be compelled to testify against himself or to confess guilt.

African Charter

Article 7:

Every individual shall have the right to have his cause heard. This comprises...
(b) the right to be presumed innocent until proved guilty by a competent court or tribunal

Comment

The right to silence has two parts. First, the suspect cannot be forced to incriminate himself. Therefore, any force with the aim of compelling the suspect to make a statement or confess guilt is prohibited during all stages of the proceedings.

Second, the judge cannot draw adverse conclusions from the defendant's silence. The burden of proof always rests on the prosecution, so that a conviction based in anyway on the defendant's silence violates the presumption of innocence. Under no circumstances may the silence of the accused be considered as proof of guilt. Of course an accused staying silent can be convicted, but the reason for the conviction must entirely be based on other facts. Therefore, a verdict mentioning the defendant's silence as a reason for conviction violates the right to silence.

Article 14(3) (g) of the ICCPR guarantees the right of the accused not to be compelled to testify against himself or to confess guilt. The African Charter contains no similar provisions. However, the African Commission on Human Rights has found that the right to remain silent is an inherent part of the right to be presumed innocent, which is expressly provided in African Charter Article 7.

The Human Rights Committee made the following observation on the right to remain silent:⁷⁰

Finally, article 14, paragraph 3 (g), guarantees the right not to be compelled to testify against oneself or to confess guilt. This safeguard must be understood in terms of the absence of any direct or indirect physical or undue psychological pressure from the investigating authorities on the accused, with a view to obtaining a confession of guilt. A fortiori, it is unacceptable to treat an accused person in a manner contrary to article 7 of the Covenant in order to extract a confession. Domestic law must ensure that statements or confessions obtained in violation of article 7 of the Covenant are excluded from the evidence, except if such material is used as evidence that torture or other treatment prohibited by this provision occurred, and that in such cases the burden is on the State to prove that statements made by the accused have been given of their own free will.

⁷⁰ Human Rights Committee, General Comment No. 32, Article 14: Right to equality before courts and tribunals and to a fair trial, U.N. Doc. CCPR/C/GC/32 (2007) Section V.

Comment on the fact pattern

- a) Obviously the judge may not base his findings on A's silence. The defendant's decision to remain silent cannot be punished in any way. However, this fact pattern is a natural response that should be discussed and always considered.
- b) First of all, the right to remain silent applies to those arrested who have not yet been charged with a crime. The freedom to choose whether to talk or to remain silent is effectively destroyed where the police use tricks to get from the suspect (having chosen to remain silent during questioning) incriminating statements that they were unable to obtain during questioning. In this case, after the defendant refused to talk with them, the police secretly placed microphones in his jail cell pursuant to a search warrant. They also placed in his jail cell another prisoner who has repeatedly made deals in the past to inform against inmates in exchange for a dismissal. This violates the defendant's right to remain silent.
- c) The right to remain silent is violated if the judge infers guilt from the prosecutor's question. It is also violated if the judge asks the question.

Discussion proposal:

- Does the silence of a defendant influence the decision of the court?
- What can be the reasons for the silence of the accused?
- What are the most important forms of evidence?

Right to Assistance of counsel

Fact pattern

- a) Ashenafi (A) is suspected of having committed several crimes and has been arrested. During his questioning by the police he asks for his lawyer. However, he is told that 1) lawyers are very expensive, 2) getting a lawyer will delay the investigation until the next day during which time he will stay in jail and 3) a lawyer would tell him to be honest anyway. All of this is true. Are there any legal violations?
- b) Betty (B) is charged with the murder of her husband. She claims self-defense. Her lawyer wants to take a camera to the jail to take photographs of the injuries caused by the beatings from her husband. The jail will not let the defense lawyer take a camera to the jail. The defense lawyers asks for a court order to allow him to take a camera to the jail. What should the judge do?
- c) Lucy (L) has hired a lawyer to represent her. Her lawyer has missed a few hearings. The judge continued the hearings to allow her lawyer to be present. At trial, the judge suspects that the lawyer is falling asleep during a witness' testimony. Should the judge do anything? Would it be any different if the attorney was a court-appointed public defender?

Relevant Provisions

Ethiopia Constitution, Article 20

Rights of Persons Accused

5. Accused persons have the right to be represented by legal counsel of their choice, and, if they do not have sufficient means to pay for it and miscarriage of justice would result, to be provided with legal representation at state expense.

African Charter

Article 7

Every individual shall have the right to have his cause heard. This comprises...
(c) the right to defence, including the right to be defended by counsel of his choice;

Dakar Declaration

Article 8.

Legal Aid: Access to justice is a paramount element of the right to a fair trial. Most accused and aggrieved persons are unable to afford legal services due to the high cost of court and professional fees. It is the duty of governments to provide legal assistance to indigent persons in order to make the right to a fair trial more effective. The contribution of the judiciary, human rights NGOs and professional associations should be encouraged.

ICCPR

Article 14

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

(b) To have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing; ...

(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;

Comment

The right to counsel in Africa has focused, in a few high profile cases, on the right to have full access to a privately hired defense attorney of one's own choosing.⁷¹ Neither the African Commission on Human Rights nor the HRC has had a chance to determine when and under what circumstances the court should appoint a free attorney. Basically the same vagueness ("in the interests of justice") that is found in the Ethiopian Constitution is also found in the international treaties.

On the other hand, the HRC has concluded⁷² that once an attorney is appointed to represent a defendant, "measures must be taken to ensure that counsel, once assigned, provides effective representation in the interest of justice." Once the defendant is appointed an attorney, he can no longer represent himself and must rely upon the effectiveness of his attorney.

This means that if the court-appointed attorney does not provide the standard of a reasonably effective attorney, the defendant is denied his right to counsel.

When is a judge responsible for the ineffectiveness of a defense lawyer? Only if it was either obvious or brought to his attention. The judge "cannot be held accountable for alleged errors made by [the lawyer] unless it was or should have been manifest to the judge that the lawyer's behaviour was incompatible with the interests of justice."⁷³

Comment on the fact pattern

⁷¹ For instance communications 87/93, *Constitutional Rights Project (In respect of Zamani Lakwot and six others) v. Nigeria*, 137/94, 139/94, 154/96, and 161/97.

⁷² *T. Collins v. Jamaica*, Communication No. 356/1989, Para. 8.2; and *N. Lewis v. Jamaica*, Communication No. 708/1996, Para. 8.4.

⁷³ *Henry v. Jamaica*, Communication No. 610/1995, Para. 7.4.

a) First, the defendant's right to have unrestricted access to the attorney of his choice exists at such early stages as arrest and pretrial investigation. Once he requests an attorney, the police cannot interfere with that request.

b) The right to counsel, in connection with the right to have adequate facilities to prepare a defense, requires the attorney to be able to photograph Betty. The rights require that the attorney have unrestricted and confidential access to both the defendant and any evidence.

c) You may recall that under the right to adequate facilities to prepare a defense, the HRC stated that if it was obvious to the judge that the lawyer's behavior was incompatible with the interests of justice the judge should grant a continuance. The right to an attorney is not merely theoretical or hypothetical. The judge should take a recess, wake the attorney and grant a continuance if necessary.

The state, however, cannot be held responsible for every shortcoming of the lawyer. The court must in its supervisory role make sure that the defendant is truly enjoying his right to counsel. If the court is not made aware of the faults of defense counsel, it cannot be held responsible for them unless they are obvious. The court can only be held responsible if it is brought to their attention (for instance by the defendant) or if it is obvious.

Discussion proposal:

- Every accused has the right to counsel, but when should defense counsel be appointed by the state? What issues should be taken into consideration?
- What is the function of defense counsel within the course of the proceedings and within the judicial system as a whole?
- Do the participants have experience with defense counsel?
- Should there be more court-appointed lawyers for criminal cases? Should there be a public defender agency? Why or why not?

Pre-trial Release

Fact pattern

- a) Samuel (S), who is a poor beggar without friends, is charged with theft of 1000 Birr. In determining pretrial release, Judge Ephrem (E) always sets bail for theft in the amount that was stolen. As result, he sets bail for S at 1000 Birr and schedules trial. S remains in jail. Because of a busy schedule for the judge and prosecutor, trial has been continued 5 times, and is about to be continued again. S has now been in jail for 4 months. If S is convicted, Judge E would only give him a sentence of one month in jail. S asks to be released from jail if the trial is continued again. What should Judge E do and why?

Relevant Provisions

Ethiopia Constitution, Article 19

Rights of Persons Arrested

- 4 All persons have an inalienable right to petition the court to order their physical release where the arresting police officer or the law enforcer fails to bring them before a court within the prescribed time and to provide reasons for their arrest. Where the interest of justice requires, the court may order the arrested person to remain in custody or, when requested, remand him for a time strictly required to carry out the necessary investigation. In determining the additional time necessary for investigation, the court shall ensure that the responsible law enforcement authorities carry out the investigation respecting the arrested person's right to a speedy trial.
6. Persons arrested have the right to be released on bail. In exceptional circumstances prescribed by law, the court may deny bail or demand adequate guarantee or the conditional release of the arrested person.

Article 9. International Covenant on Civil and Political Rights

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

Comment

ICCPR article 9(3) makes it clear that pre-trial detention “shall not be the general rule” and provides a detainee with a legitimate claim to release in exchange for bail or some other guarantee of appearance at the trial. Furthermore, Article 9(3) states that if a trial

does not occur within a reasonable period of time, the accused must be released from pre-trial detention pending trial. The period of time that is considered to be “reasonable” depends on the circumstances of the case. The relevant factors include the risk of flight, the complexity of the case, the nature of the offence.

General Comment No. 8 of the Human Rights Committee has stated that the reasons supporting a decision to keep a suspect in pretrial detention must be detailed, reasoned, and announced.⁷⁴

There are four presumptions forbidden in international law. First, the strength of the evidence alone cannot be enough to detain the defendant.

Second, the severity of the sentence cannot alone be enough to detain the defendant. Nor can the court base detention on the loss alleged--but must consider the defendant and his characteristics. The goal is not to guarantee the payment of the loss, but the presence of the defendant at trial.

3rd, the possibility of an escape from the region without evidence as it relates to the defendant is insufficient.

Lastly, the mere existence of the defendant’s criminal record is insufficient in itself to deny release.

There are three criteria to evaluate pretrial detention, all three of which appear in the Ethiopian Criminal Code. They are as follows.

1) Risk of suspect’s non-appearance

The Court must examine the defendant’s characteristics and what personal guarantees he may offer in order to determine whether there is a risk that he will not appear in court. The danger of flight cannot be based only on the severity of the charges. Instead, the Court must also consider the following regarding the defendant:

- Character,
- Morals,
- Assets, and
- Links to the area in which he is being prosecuted.

It should also be noted that the flight risk necessarily decreases as the time spent in detention increases since the reduced remaining jail time would make the conviction seem less threatening to him and reduce his temptation to flee.

⁷⁴ Human Rights Committee, General Comment 8, Article 9 (Sixteenth session, 1982), Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, U.N. Doc. HRI/GEN/1/Rev.1 at 8 (1994).

2) The risk of the suspect's interference with the course of justice

This concern is most important during the investigative stage. Its importance will fade after the investigation is completed. Two principles should be noted. First, this factor does not require a person charged with a criminal offence to actively co-operate with the judicial authorities. He need not produce evidence of his guilt. Rather, it prohibits his active interference.

Second, where the defendant had been previously released without interfering with the investigation, it will be very difficult to justify pre-trial detention on the basis of interference with the course of justice.

3) The risk of the suspect committing further crimes

The danger of re-offending as it applies to the defendant must be plausible. Even for the most serious crimes such as murder, before detention may be ordered based on danger of re-offending, the defendant's background and personal circumstances must be considered. The defendant's criminal history is relevant to whether he will re-offend while on release.

However, in order to believe that the defendant will re-offend, there must be more than just prior convictions. The Ethiopian Court must consider whether the defendant's record justifies detention.

Comment on the fact pattern

- a) The judge began with a mistake of always setting bail in a particular manner without respect to the individual. All decisions regarding pre-trial release must be individualized, considering the particular facts of the defendant and his case.

Second, when the defendant has served a sentence equivalent to the amount of time that he would serve if convicted, the risk of his non-appearance decreases. There is less for him to fear in the event of a conviction. Finally, the risk that he would interfere with the investigation and prosecution has diminished with the trial's progression.

Discussion proposal:

- What can a judge do to minimize the danger of a defendant's flight risk.
- Can defendants ask the court to review the pre-trial detention order? If so, under what circumstances should the judge change his order of pre-trial detention?
- Under what circumstances should the judge respond to a request from a prosecutor to change his order of pre-trial detention?

Questions to sum up the general principles:

- Is every kind of different treatment before the law prohibited? Can you think of reasonable distinctions?
- What are the consequences of the presumption of innocence in relation to pre-trial detention?
- What is the consequence of the presumption of innocence with regard to the burden of proof?
- Can you name three actions falling under the prohibition of torture?
- Is it permitted to use force against suspects? In which cases can the use of force be justified, and which restrictions are there? What about merely the threat of force—a threat that does not cause injury?
- Name the essential procedural safeguards in regard to the freedom from arbitrary detention.
- The right to freedom from arbitrary detention has to be understood in a substantive as well as in a procedural way. Explain those aspects. (Arrest must be for the violation of a law and must procedurally be conducted in a legal manner).
- Name reasons that can justify pre-trial detention.
- Are the judicial authorities allowed to draw consequences from the silence of the defendant in relation to his guilt?
- Are judges obliged to inform the defendant of his right to silence? Are there extra obligations if the defendant is either a child or someone mentally ill?
- Name advantages of the presence of defense counsel for the defendant as well as for the court.
- In which cases is it especially important for the defendant to be represented by defense counsel?

CHAPTER II

Introduction

Everyone is entitled under international law⁷⁵ to a fair and public hearing by a competent, impartial, and independent judiciary within a reasonable amount of time.

The right to a fair trial has many different aspects. “But as a general principle it has always to be borne in mind that the accused person must at all times be given a genuine possibility of answering charges, challenging evidence, cross-examining witnesses, and doing so in a dignified atmosphere.”⁷⁶

The right to a *fair hearing* in criminal trials can be broken down into a number of specific rights:

- The right to be presumed innocent;
- The right to be tried without undue delay;
- The right to prepare a defense;
- The right to defend oneself in person or through counsel;
- The right to call and examine witnesses; and
- The right to protection from retroactive criminal laws.

A fair hearing requires that the court safeguard all of these rights, even in the most unpopular cases. For instance, the right to a fair trial in article 14(1) of the ICCPR was violated in a case⁷⁷ where the trial court failed “to control the hostile atmosphere and pressure created by the public in the court room, which made it impossible for defence counsel to properly cross-examine the witnesses and present” the defence.

Competent means that the court is established by an act of the legislature rather than the whim of the executive.

Independent means that the tribunal is independent from the executive, legislature and the parties.

⁷⁵ Described in Art. 10 of the Universal Declaration of Human Rights (UDHR); ICCPR Art. 14; and African Charter Art. 7. The right to a fair trial under the African Charter follows the ICCPR, but leaves out a few rights in its language: the right to a public trial, the right to an interpreter and the protections against self-incrimination and double jeopardy. However, the African Commission on Human Rights has followed the ICCPR decisions and has treated cases as if those rights were present in the right to a fair trial. Resolution of the Right to Recourse and a Fair Trial, ACPH/Res. 4(XI)92, and communications 218/98, 251/2002.

⁷⁶ *Human Rights In The Administration Of Justice: A Manual on Human Rights for Judges, Prosecutors and Lawyers* Para. 7.3.2 (United Nations 2003), available at <http://www.unhchr.ch/html/menu6/2/training.htm>.

⁷⁷ *Gridin v Russian Federation* (2000) UN Doc. CCPR/C/69/D/770/1997 Para. 3.5.

Impartial refers to the fairness of the judge: that he is ethical and unbiased toward the parties.

A reasonable amount of time depends upon factors including the complexity of the case.

This chapter will look at the aspects of these rights.

Independent and Impartial Tribunal

Fact pattern

- a) Abel (A) was recently a well-respected judge in Adama. He retired last year and is now a defense lawyer appearing before the same judges with whom he used to work. Partly because of his friendship with the judges and partly because of his intelligence, he usually wins his trials. The prosecutor feels that this is not fair. Is it?
- b) Michael (M) is charged with theft and will have a trial before the judge in two weeks. This weekend, the judge's mother is having a birthday party for her 70th birthday. She invited both the prosecutor and M (her long time friends) to attend the party. They are both likely to take gifts for her. What should the judge do?
- c) A defense lawyer tells his client that if client paid 1000 Birr to the Court, his case would be dismissed. Regardless of whether this is true, the judge hears about this statement and does nothing to correct it. Is there a problem? What should the judge do?
- d) In a small courtroom, the prosecutor sits at the same table as the court clerk. How does that affect the judge's appearance of impartiality?
- e) Trial Judge Daniel (D) is unhappy. There are really two things in court that make him angry. The first is a defendant who is poor, but spends all of his family's money on alcohol. The second is a specific prosecutor Abraham (A) whom he really dislikes. If either of these persons appear in his court, he will be angry at them. He yells at Abraham, who sometimes deserves it. At sentencing, he angrily lectures drunks without money who commit crimes. Is the judge impartial? Are there any reasons why his conduct would be improper?

Relevant Provisions

International Covenant on Civil and Political Rights

Article 14

1. All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. The Press and the public may be excluded from all or part of a trial for reasons of morals, public order (ordre public) or national security in a democratic society, or when the interest of the private lives of the parties so requires, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice; but any judgment rendered in a criminal case or in a suit at law shall be made public except where the interest of juvenile persons otherwise requires or the proceedings concern matrimonial disputes or the guardianship of children.

African Charter

Article 7

1 Every individual shall have the right to have his cause heard. This comprises... (d) the right to be tried within a reasonable time by an impartial court or tribunal.

Principles And Guidelines On The Right To A Fair Trial And Legal Assistance In Africa (The African Commission on Human Rights on Human and Peoples' Rights) Article 4 Independent tribunal

- (a) The independence of judicial bodies and judicial officers shall be guaranteed by the constitution and laws of the country and respected by the government, its agencies and authorities;
- (b) Judicial bodies shall be established by law to have adjudicative functions to determine matters within their competence on the basis of the rule of law and in accordance with proceedings conducted in the prescribed manner;
- (c) The judiciary shall have jurisdiction over all issues of a judicial nature and shall have exclusive authority to decide whether an issue submitted for decision is within the competence of a judicial body as defined by law;
- (d) A judicial body's jurisdiction may be determined, *inter alia*, by considering where the events involved in the dispute or offence took place, where the property in dispute is located, the place of residence or domicile of the parties and the consent of the parties;
- (e) Military or other special tribunals that do not use the duly established procedure of the legal process shall not be created to displace the jurisdiction belonging to the ordinary judicial bodies;
- (f) There shall not be any inappropriate or unwarranted interference with the judicial process nor shall decisions by judicial bodies be subject to revision except through judicial review, or the mitigation or commutation of sentence by competent authorities, in accordance with the law;
- (g) All judicial bodies shall be independent from the executive branch.
- (h) The process for appointments to judicial bodies shall be transparent and accountable and the establishment of an independent body for this purpose is encouraged. Any method of judicial selection shall safeguard the independence and impartiality of the judiciary.
- (i) The sole criteria for appointment to judicial office shall be the suitability of a candidate for such office by reason of integrity, appropriate training or learning and ability.
- (j) Any person who meets the criteria shall be entitled to be considered for judicial office without discrimination on any grounds such as race, colour, ethnic origin, language, sex, gender, political or other opinion, religion, creed, disability, national or social origin, birth, economic or other status. However, it shall not be discriminatory for states to:

1. prescribe a minimum age or experience for candidates for judicial office;
 2. prescribe a maximum or retirement age or duration of service for judicial officers;
 3. prescribe that such maximum or retirement age or duration of service may vary with different level of judges, magistrates or other officers in the judiciary;
 4. require that only nationals of the state concerned shall be eligible for appointment to judicial office.
- (k) No person shall be appointed to judicial office unless they have the appropriate training or learning that enables them to adequately fulfill their functions.
- (l) Judges or members of judicial bodies shall have security of tenure until a mandatory retirement age or the expiry of their term of office.
- (m) The tenure, adequate remuneration, pension, housing, transport, conditions of physical and social security, age of retirement, disciplinary and recourse mechanisms and other conditions of service of judicial officers shall be prescribed and guaranteed by law.
- (n) Judicial officers shall not be:
1. liable in civil or criminal proceedings for improper acts or omissions in the exercise of their judicial functions;
 2. removed from office or subject to other disciplinary or administrative procedures by reason only that their decision has been overturned on appeal or review by a higher judicial body;
 3. appointed under a contract for a fixed term.
- (o) Promotion of judicial officials shall be based on objective factors, in particular ability, integrity and experience.
- (p) Judicial officials may only be removed or suspended from office for gross misconduct incompatible with judicial office, or for physical or mental incapacity that prevents them from undertaking their judicial duties.
- (q) Judicial officials facing disciplinary, suspension or removal proceedings shall be entitled to guarantees of a fair hearing including the right to be represented by a legal representative of their choice and to an independent review of decisions of disciplinary, suspension or removal proceedings.
- (r) The procedures for complaints against and discipline of judicial officials shall be prescribed by law. Complaints against judicial officers shall be processed promptly, expeditiously and fairly.
- (s) Judicial officers are entitled to freedom of expression, belief, association and assembly. In exercising these rights, they shall always conduct themselves in accordance with the law and the recognized standards and ethics of their profession.
- (t) Judicial officers 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.
- (u) States may establish independent or administrative mechanisms for monitoring the performance of judicial officers and public reaction to the justice delivery

- processes of judicial bodies. Such mechanisms, which shall be constituted in equal part of members
- (v) The judiciary and representatives of the Ministry responsible for judicial affairs, may include processes for judicial bodies receiving and processing complaints against its officers.
 - (w) States shall endow judicial bodies with adequate resources for the performance of its their functions. The judiciary shall be consulted regarding the preparation of budget and its implementation.

Principles And Guidelines On The Right To A Fair Trial And Legal Assistance In Africa
(The African Commission on Human Rights on Human and Peoples' Rights) Article 5
Impartial Tribunal

- (a) A judicial body shall base its decision only on objective evidence, arguments and facts presented before it. Judicial officers shall decide matters before them without any restrictions, improper influence, inducements, pressure, threats or interference, direct or indirect, from any quarter or for any reason.
- (b) Any party to proceedings before a judicial body shall be entitled to challenge its impartiality on the basis of ascertainable facts that the fairness of the judge or judicial body appears to be in doubt.
- (c) The impartiality of a judicial body could be determined on the basis of three relevant facts:
 1. That the position of the judicial officer allows him or her to play a crucial role in the proceedings;
 2. The judicial officer may have expressed an opinion which would influence the decision-making;
 3. The judicial official would have to rule on an action taken in a prior capacity.
- (d) The impartiality of a judicial body would be undermined when:
 1. A former public prosecutor or legal representative sits as a judicial officer in a case in which he or she prosecuted or represented a party;
 2. A judicial official secretly participated in the investigation of a case;
 3. A judicial official has some connection with the case or a party to the case;
 4. A judicial official sits as member of an appeal tribunal in a case which he or she decided or participated in a lower judicial body.

In any of these circumstances, a judicial official would be under an obligation to step down.

- (e) A judicial official may not consult a higher official authority before rendering a decision in order to ensure that his or her decision will be upheld.

Independence and Impartiality of the Judiciary: While there are constitutional and legal provisions which provide for the independence of the judiciary in most African countries, the existence of these provisions alone do not ensure the independence and impartiality of the judiciary. Issues and practices which undermine the independence and impartiality of the judiciary include the lack of transparent and impartial procedures for the appointment of judges, interference and control of the judiciary by the executive, lack of security of tenure and remuneration and inadequate resources for the judicial system.

Comment

The independence of the judiciary means that the court may make decisions independent of any other branch of the government. Its decisions may be reviewed only by appellate courts that are themselves independent from the other branches.

Under the ICCPR, a court that is not independent may never convict a criminal defendant. As its Human Rights Committee has stated:⁷⁸

The notion of a “tribunal” in article 14, paragraph 1 designates a body, regardless of its denomination, that is established by law, is independent of the executive and legislative branches of government or enjoys in specific cases judicial independence in deciding legal matters in proceedings that are judicial in nature. Article 14, paragraph 1, second sentence, guarantees access to such tribunals to all who have criminal charges brought against them. This right cannot be limited, and any criminal conviction by a body not constituting a tribunal is incompatible with this provision.

The African Commission on Human Rights has adopted the standards for independence stated 1) in the United Nations Basic Principles on the Judiciary and 2) the International Bar Association’s Minimum Standards for Judicial Independence.⁷⁹

These contain helpful standards. For instance, both the UN Basic Principles⁸⁰ and the IBA Minimum Standards⁸¹ require that the judges be given adequate money to perform its job. In turn, judges are expected to act independently, impartially, and courteously

The impartiality of a court reflects its fairness to both parties, treating both courteously without preference for one side.

⁷⁸ Human Rights Committee, General Comment No. 32, Article 14: Right to equality before courts and tribunals and to a fair trial, U.N. Doc. CCPR/C/GC/32 (2007) Section III.

⁷⁹ Communication 251/02, Para. 55. The U.N. Basic Principles on the Judiciary is available at http://www.unhchr.ch/html/menu3/b/h_comp50.htm. The IBA Minimum Standard for Judicial Independence is available at <http://www.ibanet.org/Document/Default.aspx?DocumentUid=BB019013-52B1-427C-AD25-A6409B49FE29>.

⁸⁰ Principle 7.

⁸¹ Standard 13.

The African Commission on Human Rights has reviewed cases involving the impartiality of tribunals. Its rulings have focused on two circumstances. First, military courts should very rarely (and under exceptional circumstances) try civilians. Second, special tribunals should not try cases that fall under the ordinary jurisdiction of other courts.⁸²

Comment on the fact pattern

a) Obviously, the judges should not let their comradeship with Abel affect their decisions. But more than that: judges must not only be impartial, but must avoid the appearance of partiality. It is difficult for all of the judges to excuse themselves from his cases. Rather, they must present the appearance that his familiarity does not affect their decisions.

b) First, bribes can improperly be received by someone other than the judge, including his family.⁸³ If a bribe is given to the judge's mother, it is still improper. This is a difficult situation. On the one hand, both M and the prosecutor will be present at the party. On the other hand, how will it appear if one gift is inevitably worth more than the other? The first course of action is to ask mother to refuse gifts from the prosecutor and from M, stating that it would affect her son's role as judge. The second choice is for the judge to excuse himself from the case. The 3rd choice is for the judge to remain on the case if both the gifts were purely nominal (of the smallest value). Small, token gifts that might not reasonably be perceived as intended to influence the judge in the performance of his duties can be received, as described in the Bangalore Principles

c) The behavior of the defense lawyer is not very helpful. But once the judge learns about it, he again must display the appearance of impartiality. He may only do this by correcting the statement.

d) Again, the judge must avoid the appearance of impartiality. This applies not only to him, but also to all members of his court. As the Bangalore Principles state:

A judge shall not knowingly permit court staff or others subject to the judge's influence, direction or control to differentiate between persons concerned, in a matter before the judge, on any irrelevant ground.

e) The judge must appear impartially being courteous to both parties. Courteousness is certainly the appearance of impartiality. When the judge cannot be polite he is at the very least showing the appearance of bias. When the rude behavior either reflects an actual bias or when it interferes with the presentation of evidence, it is much worse. Of course

⁸² Communication 224/98, Para. 62.

⁸³ The Bangalore Code of Judicial Conduct 2001, adopted by the Judicial Group on Strengthening Judicial Integrity, as revised at the Round Table Meeting of Chief Justices held at the Peace Palace, The Hague, November 25-26, 2002.

the judge at sentencing may show valid condemnation of a defendant who violates society's values. But it should be done courteously and firmly.

Discussion proposal:

- What are the limits to professional objectivity? When would the judges choose not to deal with a case?
- What is the main obstacle for the independence and impartiality of the judiciary?
- How should a judge respond to a complaint about impartiality from the public press? What if it is anonymous complaint?

Trial without Undue Delay

Fact pattern

a) In Eastern Hararge High Zone, Abdurrahman is accused of killing two persons (a father and son) in a car accident. He has not yet been arrested. The public prosecutor has charged him with negligent homicide. The court ordered the police to bring the accused before the court. However, they did not bring him into court for more than seven adjournments. As justification, the police claim that AB has changed his address, hindering the implementation of the arrest warrant.

At the 8th such hearing, relatives of the deceased claim to the court that the accused is normally living in his house and that he has been arrested but released by the zonal police. The judge issues another order to the police to find the accused and bring him before the court.

How do you see this case in light of fair trial standards? How do the rights of a fair trial apply to victims?

What should the judge do to assure the appearance of the accused?

What is the role of the police and prosecutor in assuring a fair trial?

b) In Western Wollega, Gimbi District Court, eight people have been accused and charged with assault resulting in normal bodily injury. On the first day hearing, defendant number one was absent; and defendant number two raised a defense that he is too young to be tried with the other defendants.

As a result, the judge issued two orders for the police to perform before the next hearing. The first order was to locate the missing defendant #1 and to bring him to the next court hearing. The second order was to bring to the next court hearing medical evidence of the defendant #2's age.

Surprisingly, the police have failed to comply with either order for 8 consecutive hearings. At each hearing, all defendants except for #1 appear, the judge re-issues his orders, and the case is continued. The judge has never gone further than reading the charges to the seven defendants. Then, on the seventh hearing, the defendants complained by saying "we are coming to court for the eighth time without any solution".

How does the right to a speedy trial apply to this case?

What should the police do to overcome these obstacles?

What should the judge do to obtain compliance with his order?

c) In 2007, Tasfaye (a boy aged 16) and Hayilu (aged 65) have been suspected of committing homicide at a district of Mojo. Based on Article 60 of the criminal procedure code, the judge ordered pre-trial detention of both defendants. For 18 months they have been detained in the East Shoa Prison House. No charges have been opened, no preliminary investigation has been conducted, and no steps have been taken to get the defendants into the trial process.

The only thing that has occurred is that the defendants spoke to the district police officers when they were arrested.

Have similar cases occurred in your working areas?

What kinds of violations do you observe, if any?

What fair trial standards apply to this case? And how should such standards be resolved?

In this kind of case, what do you think is expected of public prosecutors, police officers, and judges? Please discuss in detail.

Relevant Provisions

Ethiopia Constitution, Article 20

Rights of Persons Accused

1. Accused persons have the right to a public trial by an ordinary court of law within a reasonable time after having been charged. The court may hear cases in a closed session only with a view to protecting the right to privacy of the parties concerned, public morals and national security.

African Charter

Article 7(1)(d)

- Every individual shall have the right to have his cause heard. This comprises...(d) the right to be tried within a reasonable time by an impartial court or tribunal.

International Covenant on Civil and Political Rights

Article 9

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

International Covenant on Civil and Political Rights

Article 14

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

c. To be tried without undue delay.

Comment

The requirement of a prompt trial in criminal cases requires the court to ensure that all proceedings, from pre-trial stages to final appeal, are completed and judgments issued within a reasonable time. This must be balanced with the right of the accused to adequate time and facilities to prepare his defense.

There are two sets of standards: the first one is applicable to suspects in jail while awaiting trial. The second standard relates to everyone charged with a criminal offence, regardless of whether the defendant is incarcerated.

1) Defendant in Custody

Concerning the first set of standards, the accused upon arrest shall be brought promptly before a judge and shall be entitled to trial within a reasonable time or to release.⁸⁴ This right is based upon the presumption of innocence, the right to personal liberty and the protection against arbitrary detention.⁸⁵ In criminal cases where the accused is held in pre-trial detention, the obligation of the State to accelerate trials is even more pressing, and delay is considered less reasonable (and even less in cases of children in custody).⁸⁶

If a person in detention is not brought to trial within a reasonable time, he has the right to be released from jail pending trial.

2) Regardless of whether the defendant is in custody

The second concern applies to everyone charged with a criminal offence, whether or not detained. The ICCPR provides for those facing criminal charges “[t]o be tried without undue delay.”⁸⁷ This requires that all criminal trials be held without unnecessary delay in order to ensure that people awaiting trial on criminal charges do not suffer prolonged uncertainty. It also aims to prevent the loss of evidence or it being undermined due to lengthy proceedings. For example, witnesses’ memories may fade or become distorted, or the witnesses themselves may become unavailable.

⁸⁴ Art. 9 (3) ICCPR

⁸⁵ *Tomasi v. France*, 27 August 1992, 241-A Ser. A, Para. 84.

⁸⁶ *Haase v. Federal Republic of Germany*, (7412/76), 12 July 1977, 11 DR 78.

⁸⁷ Article 14(3)(c), ICCPR.

The period to be taken into consideration begins on the day a person is either charged, arrested, or committed for trial (whichever is earlier). As the Human Rights Committee noted:⁸⁸

What is reasonable has to be assessed in the circumstances of each case, taking into account mainly the complexity of the case, the conduct of the accused, and the manner in which the matter was dealt with by the administrative and judicial authorities. In cases where the accused are denied bail by the court, they must be tried as expeditiously as possible. This guarantee relates not only to the time between the formal charging of the accused and the time by which a trial should commence, but also the time until the final judgement on appeal. All stages, whether in first instance or on appeal must take place “without undue delay.”

The right to a trial without undue delay has been analyzed by other African Courts. For instance, the Constitutional Court of South Africa has recognized three relevant goals. First, the minimizing the anxiety and stigma protects the right to security of the person. Second, minimizing the constraint on the suspect protects the right to liberty. Third, attempting to ensure that proceedings take place while evidence is available and fresh protects the right to a fair trial.

The court violates the right to a speedy trial if, for example, they allow the investigation and proceedings to stagnate, or if they take an unreasonable time to complete specific measures. The proceedings are also carried out with undue delay if the system of criminal procedure itself inhibits a speedy conclusion of trials; the State has to organize the judiciary in such a way that the courts can meet the requirement of reasonableness.⁸⁹ For example, the difficult economic situation of the court system is not an excuse for a prolonged delay.

The lack of the defendant’s co-operation does not justify delays: the accused is neither obliged to co-operate in criminal proceedings actively with the judicial authorities, nor to renounce any procedural rights. The Court cannot delay a case for instance because the defendant refuses to confess. The case might be different if the accused has displayed a determination to be obstructive: for example 1) not appearing in court or 2) threatening witnesses.

Discussion proposal:

- What problems arise if there is a long delay between the arrest and the start of the trial?
- What effect could a prolonged pre-trial procedure have on the accused and his family?

⁸⁸ Human Rights Committee, General Comment No. 32, Article 14: Right to equality before courts and tribunals and to a fair trial, U.N. Doc. CCPR/C/GC/32 (2007) Section V.

⁸⁹ See e.g. Concluding observations, Democratic Republic of Congo, CCPR/C/COD/CO/3 (2006), Para. 21, Central African Republic, CCPR/C/CAF/CO/2 (2006), para. 16.

- What effect could long delays before the trial have on the administration of justice in general?

Public Hearing

Fact pattern

- a) A law student Elias (E) is researching the way that judges treat Muslim women in court. He wants to observe each criminal trial in the region in which a Muslim woman is charged with a crime. Judge Henok (H) refuses to allow Elias to be an observer in his courtroom. His reason is that it would embarrass Muslim women to have their cases described in a research paper. Did Judge Henok violate the right to a public trial?
- b) In a small courthouse, there are two trials proceeding at the same time. However, there is only one courtroom. As a result, the judge holds one trial in his private office. Does this violate a right to a public trial?
- c) Because many appeal judges have been sick, there is a pile of undecided appeals that need to be reviewed. Many of the cases have been waiting at least a year for a decision. Two judges decide that these cases need to be decided. Appeal Judge Abel (A) took half of the cases. He writes one-page decisions that essentially state the result of the appeal without any reasoning. Appeals Judge Samson (S) takes a different approach. He goes into the courtroom without anyone present except for his court clerk and without notice to any of the parties. The clerk turns on a tape recorder, and Judge S talks about his decision for each case. His oral description of each case is in detail. He then issues a one-page written decision that refers to the tape recording. Talk about whether each judge has issued a public judgment.

Relevant Provisions

Ethiopia Constitution, Article 20

Rights of Persons Accused

1. Accused persons have the right to a public trial by an ordinary court of law within a reasonable time after having been charged. The court may hear cases in a closed session only with a view to protecting the right to privacy of the parties concerned, public morals and national security.

International Covenant on Civil and Political Rights

Article 14

1. All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. The Press and the public may be excluded from all or part of a trial for reasons of morals, public order (ordre public) or national security in a democratic society, or when the interest of the private lives of the parties so requires, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice; but any judgment rendered in a criminal case or in a suit at law shall be made public except where the interest of juvenile persons otherwise

requires or the proceedings concern matrimonial disputes or the guardianship of children.

African Charter

Article 7 (1)(b)

Every individual shall have the right to have his cause heard. This comprises...the right to be presumed innocent until proved guilty by a competent court or tribunal;

Principles And Guidelines On The Right To A Fair Trial And Legal Assistance In Africa (The African Commission on Human Rights on Human and Peoples' Rights) Article 3
Public hearing: All the necessary information about the sittings of judicial bodies shall be made available to the public by the judicial body;

- a) A permanent venue for proceedings by judicial bodies shall be established by the State and widely publicised. In the case of ad-hoc judicial bodies, the venue designated for the duration of their proceedings should be made public.
- b) Adequate facilities shall be provided for attendance by interested members of the public;
- c) No limitations shall be placed by the judicial body on the category of people allowed to attend its hearings where the merits of a case are being examined;
- d) Representatives of the media shall be entitled to be present at and report on judicial proceedings except that a judge may restrict or limit the use of cameras during the hearings;
- e) The public and the media may not be excluded from hearings before judicial bodies except if it is determined to be in the interest of justice for the protection of children, witnesses or the identity of victims of sexual violence
- f) For reasons of public order or national security in an open and democratic society that respects human rights and the rule of law.
- g) Judicial bodies may take steps or order measures to be taken to protect the identity and dignity of victims of sexual violence, and the identity of witnesses and complainants who may be put at risk by reason of their participation in judicial proceedings.
- h) Judicial bodies may take steps to protect the identity of accused persons, witnesses or complainants where it is in the best interest of a child.
- i) Nothing in these Guidelines shall permit the use of anonymous witnesses, where the judge and the defense is unaware of the witness' identity at trial.
- a) Any judgment rendered in legal proceedings, whether civil or criminal, shall be pronounced in public.

Comment

The requirement of a public access has two components. As the Human Rights Committee observed:⁹⁰

The publicity of hearings ensures the transparency of proceedings and thus provides an important safeguard for the interest of the individual and of society at large. Courts must make information regarding the time and venue of the oral hearings available to the public and provide for adequate facilities for the attendance of interested members of the public, within reasonable limits, taking into account, inter alia, the potential interest in the case and the duration of the oral hearing.

This principle not only guarantees that the public is informed about cases, but it also helps the parties because the public can review the legality of the proceedings. Furthermore, by public openness the court can affirm its independence, impartiality and fairness and increase general trust in the courts. The principle of public attendance includes the right of the press to report on the hearings, as long as the requirements of the presumption of innocence, “non-prejudgment,”⁹¹ secrecy and morality are preserved.

A public hearing also requires the meaningful opportunity for the public to attend. Information about the time and location must be made available to the public by the courts. In addition, the courts must provide adequate facilities, within reasonable time limits, for the attendance of interested members of the public.⁹² Also prohibited is an indirect restriction of public attendance, for example by allowing police in civilian clothes to fill the courtroom before the beginning of the hearing so that there is no more space for press and interested members of the public.⁹³

However, there are several permissible exceptions to a public hearing, by which the press and the public may be excluded from all or parts of the hearing. In some cases, the exclusion is even necessary to ensure the defendant’s rights, for example in juvenile cases. Exceptions⁹⁴ have to be construed narrowly and to be handled in a restrictive way. There is the “public order” exception (referring primarily to the order within the courtroom), “national security” interests (relating primarily to the secrecy of important military facts vital to protect a country’s existence or its territorial integrity), “morality,” (including hearings involving sexual offences, especially when minors are concerned), juvenile cases (in which a child is charged with a crime) and matrimonial cases (relating to marriage and divorce).

⁹⁰ Human Rights Committee, General Comment No. 32, Article 14: Right to equality before courts and tribunals and to a fair trial, U.N. Doc. CCPR/C/GC/32 (2007) Section III.

⁹¹ Non-prejudgment means that the public does not presume that the defendant is guilty before his trial. Its consequences involve humiliation and loss of prestige in the community.

⁹² G.A. van Meurs v. The Netherlands, Communication No. 215/1986, OR of the Human Rights Committee 1989/90, Vol. II, p. 400 (p. 402, Para. 6.1).

⁹³ This happened during a trial in 1992, where a trade unionist and political leader (N. Amaoui) were accused of defamation against the government of Morocco.

⁹⁴ Article 14 (1) of the ICCPR.

According to both the HRC⁹⁵ and the African Commission,⁹⁶ the exceptions listed in ICCPR Article 14 are exhaustive: there may be no further exceptions other than those that are listed.

While the number of instances that could allow the closing of a trial are fairly broad, this is not the case when the pronouncement of a judgement is involved. Under Article 14(1) judgements “shall be made public” except where the interest of juvenile persons otherwise requires or where the proceedings concern matrimonial disputes or the guardianship of children.⁹⁷ A judgment is considered to have been made public either when it was orally pronounced in court at a scheduled hearing or when it was published. In any event, its accessibility to the public is the determining factor.

Also, the judgment must be so detailed as to permit the defendant to file an appeal, and must be delivered within a reasonable time of the hearing. In the case of *Kelly v. Jamaica*,⁹⁸ the Human Rights Committee found that given the “lack of a reasoned judgement from the Court of Appeal,” defense counsel “was entitled to assume that any petition for special leave to appeal would inevitably fail.”

Comment on the fact pattern

- a) The right to a public trial has limited exceptions. The privacy of an adult defendant in a criminal trial is not one of them. However, this does possibly describe the tension between the right to a public trial and the right to honor and privacy.
- b) Yes, if the public does not have access to the private office. Such restricted access for example may occur by a locked door or a sign restricting the public.
- c) A detailed judgment must either be read aloud to the public at a scheduled hearing or be made automatically available to the public. The decision must be in such sufficient detail that a party might further appeal its contents. The detailed decision must be available to both the parties and to the general public.

Discussion proposal:

- What are the advantages of having a public trial?
- What are the disadvantages of having a public trial?
- What could be reasons for attending trial proceedings?
- In what circumstances could a closed trial be necessary?

⁹⁵ Human Rights Committee, General Comment 13, Article 14 (Twenty-first session, 1984), Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, U.N. Doc. HRI/GEN/1/Rev.1 at 14 (1994) Para. 6.

⁹⁶ *Media Rights Agenda (on behalf of Niran Malaolu) v. Nigeria*, Communication No. 224/98, Para. 51

⁹⁷ Human Rights Committee, General Comment No. 32, Article 14: Right to equality before courts and tribunals and to a fair trial, U.N. Doc. CCPR/C/GC/32 (2007) Section III.

⁹⁸ *Kelly v. Jamaica*, CCPR/C/41/D/253/1987, 10 April 1991, Para. 5.1.

Non-retroactivity of Law

Fact Pattern

- a) Lucy (L) killed her husband in 2007. She was arrested and charged with murder. She claimed self-defense. Her trial is scheduled to start in 2009. In 2008, the legislature passed a law that changed the way judges treat claims of self-defense. Under the new law, judges 1) presume that there is no self-defense and 2) that the defendant must convince the judge otherwise beyond a reasonable doubt. Lucy's lawyer claims that this violates the rule against retroactive laws. What should the judge decide and why?
- b) Biniam (B) is arrested in 2007 for the sale of drugs. Pursuant to a search warrant, the police seized one kilogram of cocaine and 50,000 Birr. His trial is scheduled to start in 2009. In 2008, two new laws were passed. The first new law says that anyone convicted for the sale of drugs automatically forfeits all the drugs and money that were seized by the police. The second law changes the way that a search warrant is issued. Can either of these laws apply to B's case?
- c) What if the new search warrant law in B's case was expressed by the Court of Cassation in a decision rather than in the form of a new law?

Relevant Provisions

Ethiopia Constitution, Article 22

Non-retroactivity of Criminal Law

1. No one shall be held guilty of any criminal offence on account of any act or omission that did not constitute a criminal offence at the time when it was committed. Nor shall a heavier penalty be imposed on any person than the one that was applicable at the time when the criminal offence was committed.
2. Notwithstanding the provisions of sub-Article 1 of this Article, a law promulgated subsequent to the commission of the offence shall apply if it is advantageous to the accused or convicted person.

International Covenant on Civil and Political Rights

Article 15

1. No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time when the criminal offence was committed. If, subsequent to the commission of the offence, provision is made by law for the imposition of a lighter penalty, the offender shall benefit thereby.
2. Nothing in this article shall prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal

according to the general principles of law recognized by the community of nations.⁹⁹

African Charter

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.

African Charter

Article 7

2. No one may be condemned for an act or omission which did not constitute a legally punishable offence at the time it was committed. No penalty may be inflicted for an offence for which no provision was made at the time it was committed. Punishment is personal and can be imposed only on the offender.

Comment

This is an obvious standard. It becomes problematic when the legislature passes a new law that has an indirect effect of making a conviction easier.

Comment on the fact pattern

- a) The change in the treatment of self-defense is an invalid retroactive law because it makes the conviction for a crime more likely than it would have been in 2007.
- b) Both laws violate the principle of non-retroactivity. The mandatory forfeiture increases the penalty for B. However, a law that does not add a penalty, it increases an administrative provision may not be a problem. For example, a new law that says someone convicted must lose his or her driver's license for a specific time period may not be designed as punishment. The new law on a search warrant also may not be applied if it were to make B's conviction easier. However, it may apply if it were to benefit B.
- c) I don't think that there is an international law standard as to the retroactive application of case law. In America, a new rule described by case law may not be applied retroactively to the defendant's disadvantage.

⁹⁹ ICCPR Art. 15(2) is why people have been prosecuted for violations of customary international law such as war crimes, piracy, and genocide, even though they were not expressly prohibited in a country's legislation.

Discussion proposal:

- When can a retroactive law be effective?
- What about a law that denies certain benefits to those who have in the past been convicted of a crime? For example, a law might be passed that prohibits anyone convicted of rape from teaching. Is this a valid law?

Right of a defendant to be present in court

Trial in Absentia

Fact pattern

a) Henok (H) is notified of the prosecution against him and has received the notice indicating the start of the trial and the charges against him. Nevertheless he does not appear before the court on the day of the hearing. The court appoints a public defender and starts the trial a week later without the presence of H, but with the presence of his defense counsel. Is this proceeding lawful? What if the judge had not appointed an attorney, but had continued it 3 times to allow Henok to appear, each time giving notice to Henok?

Relevant Provisions

Ethiopia Constitution, Article 20

Rights of Persons Accused

1. Accused persons have the right to be represented by legal counsel of their choice, and, if they do not have sufficient means to pay for it and miscarriage of justice would result, to be provided with legal representation at state expense.

International Covenant on Civil and Political Rights

Article 14

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

Comment

According to the Human Rights Committee (HRC), trials *in absentia* are permissible in certain circumstances:¹⁰⁰

¹⁰⁰ Human Rights Committee, General Comment No. 32, Article 14: Right to equality before courts and tribunals and to a fair trial, U.N. Doc. CCPR/C/GC/32 (2007) Section. V

Article 14, paragraph 3 (d) contains three distinct guarantees. First, the provision requires that accused persons are entitled to be present during their trial. Proceedings in the absence of the accused may in some circumstances be permissible in the interest of the proper administration of justice, i.e. when accused persons, although informed of the proceedings sufficiently in advance, decline to exercise their right to be present. Consequently, such trials are only compatible with article 14, paragraph 3 (d) if the necessary steps are taken to summon accused persons in a timely manner and to inform them beforehand about the date and place of their trial and to request their attendance.

Under international standards, the defendant must generally be present in court in order to exercise his or her right to defend himself in person.¹⁰¹ This applies to an appeal before an appellate court if the appellate court were to accept new facts on appeal.

The right to be present at trial obliges the authorities to inform the defendant and his lawyer in a timely manner of the date and location of the hearing, to request the defendant's presence in court, and not to exclude him from the hearing without good reason.¹⁰² The defendant's right to be present at trial may be temporarily limited if the defendant breaches the rules of court to such an extent that the court decides it inappropriate to continue in his presence. If that occurs, the Court must appoint an attorney to represent the defendant in his absence.

The UN Human Rights Committee's General Comment 13 noted that the right to be present in court in person may be waived, but said that, "When exceptionally for justified reasons trials in absentia are held, strict observance of the rights of the defense is all the more necessary."¹⁰³

The right to be present at trial is not explicitly recognized by all human rights instruments. However, international decisions have recognized the right to be tried in one's presence as implicit in the right to a proper defense.

Comment on the fact pattern

a) First, the court must provide such adequate notice to the defendant of the court date that he can appear in court. Without sufficient notice, the court cannot proceed with the hearing in his absence. A trial in the defendant's absence really can very rarely happen.

A criminal trial in the absence of the defendant may be allowed in certain exceptional circumstances, if the court has acted diligently in notifying the defendant of the hearing and if the interests of justice require that the trial start. Although the representation of the defendant by a lawyer who is present at the hearing is not absolutely necessary, it is a very important factor to validate a trial *in absentia*.

¹⁰¹ ICCPR, Article 14, Para. 3d.

¹⁰² See: Resolution of the UN Committee, *Mbenge v. Zaire*, 25 March, 1983.

¹⁰³ See: Notes to the Basic Principles, 13 (21) UN Human Rights Committee, point 11.

Discussion proposal:

- Why is the accused's presence during the trial so important? (establishment of the factual circumstances, correct assessment of the accused's personality, the interest of the accused to influence the outcome of the proceedings)
- What circumstances may justify a trial in absentia?
- Can there be a trial in absentia when the accused is detained in jail?

Questions to sum up the principles applicable at trial:

- To meet the requirement of the principle of legality of courts four prerequisites must be given. What are they?
- Under which conditions can trials be conducted by special tribunals?
- What rights are guaranteed through the principle of access to courts?
- The principle of access to courts is linked to other principles. What are they?
- Which factors may influence the judge to favor one or the other party?
- How can interventions of the executive in the decision-making of the judiciary be prevented?
- What personal qualifications are judges to have according to the law?
- Why are the time limits for all proceedings shorter when the defendant is in custody?
- Can a delayed trial be justified if an accused is not willing to co-operate with the judicial authorities?
- What are the permissible exceptions to public hearing foreseen by law?
- Can the announcement of the court decision also be made in closed session?
- When is the hearing of a case in closed session deemed necessary?
- What are the prerequisites for the possibility of an adequate defense? What rights are comprised?
- What is meant by the principle of “equality of arms”?
- When can records of the testimonies of witnesses as well as of experts’ examination collected during the investigative phase have the value of evidence?
- Why is the presence of the suspect/accused during the interrogation of the witnesses and experts of importance for his right to a fair trial?
- What are the general rules of notification of the accused?
- Two different categories of absent accused can be distinguished. What categories exist and what are the consequences for the trial in absentia?

Assignment: write down the article number for the ICCPR and the African Charter for each right

A. Pre-trial rights

ICCPR

AC

The right to liberty, prohibition of arbitrary arrest and detention
and reasonable suspicion of an offence justifying arrest

The right to know the reasons for arrest

The presumption of release pending trial

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

The prohibition of torture and the right to humane conditions
during detention

B. The Trial

Equal access to and equality before the courts	_____	_____
Right to a fair hearing	_____	_____
Right to a public hearing	_____	_____
Trials shall be conducted by a competent, independent and impartial tribunal.	_____	_____
Trials shall be conducted only by tribunals established by law	_____	_____
Right to be presumed innocent until proven guilty according to law	_____	_____
Right to be informed promptly and in detail of the nature and cause of any charges in a language which he or she understands	_____	_____
Right to adequate time and facilities for the preparation of a Defense	_____	_____
Right to communicate directly and in private with counsel of his or her own choosing	_____	_____
Right to defend yourself in person or through legal assistance of your own choosing	_____	_____
Right to examine the witnesses against you, and to examine the witnesses on your behalf under the same conditions as the prosecutor	_____	_____
Right not to be compelled to testify against yourself or to confess guilt	_____	_____
Right to be tried without undue delay	_____	_____
A penalty heavier than the one that was applicable at the time when the criminal offence was committed shall not be imposed	_____	_____

Checklist: The Elements of a Fair Trial

1. All persons shall be equal before the courts.¹⁰⁴
2. In the determination of any criminal charge, or rights and obligations in a suit at law, everyone shall be entitled to a fair hearing.¹⁰⁵
3. Trials shall be public.¹⁰⁶
4. Trials shall be conducted by an independent and impartial tribunal.¹⁰⁷
5. Trials shall be conducted only by competent tribunals established by law.¹⁰⁸
6. Everyone charged with a criminal offence shall have the right to be presumed innocent until proven guilty beyond a reasonable doubt according to law.¹⁰⁹
7. In the determination of any criminal charges against him or her, everyone shall be entitled to the following minimum guarantees, in full equality:¹¹⁰
 - (a) To be informed promptly and in detail of the nature and cause of any charges in a language which he understands;¹¹¹
 - (b) To have adequate time and facilities for the preparation of a defence;¹¹²
 - (c) To communicate directly with an attorney of his own choosing;¹¹³
 - (d) To be tried without undue delay;¹¹⁴
 - (e) To be tried in his or her own presence, and to defend himself in person or through legal assistance of his own choosing;¹¹⁵

¹⁰⁴ ICCPR, Art. 14(1); and African Charter Art. 2.

¹⁰⁵ ICCPR, Art. 14(1); and African Charter Art. 7.

¹⁰⁶ The press and public may be excluded from part or all of the trial only for reasons of morals, public order 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 required in the opinion of the court in special circumstances where publicity would prejudice the interests of justice. The judgment, however, shall always be made public, except where the interests of juvenile persons otherwise requires or where the proceedings concern matrimonial disputes or the guardianship of children. ICCPR, Art. 14(1)); and African Charter Art. 7. (Interpreted to include this right through the Resolution of the Right to Recourse and a Fair Trial, ACPH/Res. 4(XI)92, and communications 218/98, 251/2002).

¹⁰⁷ ICCPR, Art. 14(1); and African Charter Art. 7.

¹⁰⁸ ICCPR, Art. 14(1); and African Charter Art. 7(1)(b).

¹⁰⁹ ICCPR, Art. 14(2); and African Charter Art. 7.

¹¹⁰ ICCPR, Art. 14(3).

¹¹¹ ICCPR, Art. 14(3)(a); and African Charter Art. 7 (Interpreted to include this right through the Resolution of the Right to Recourse and a Fair Trial, ACPH/Res. 4(XI)92, and communications 218/98, 251/2002).

¹¹² ICCPR, Art. 14(3)(b); and African Charter Art. 7.

¹¹³ ICCPR, Art. 14(3)(b); and African Charter Art. 7.

¹¹⁴ ICCPR, Art. 14(3)(c); and African Charter Art. 7.

- (f) To be informed, if he does not have legal assistance, of the right to legal assistance;¹¹⁶
 - (g) To have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him if he does not have sufficient money to pay;¹¹⁷
 - (h) To examine the witnesses against him, and to examine the witnesses on his behalf under the same conditions;¹¹⁸
 - (i) To have the free assistance of an interpreter if he cannot understand or speak the language used in court;¹¹⁹ and
 - (j) Not to be compelled to testify against himself or to confess guilt.¹²⁰
8. Everyone convicted of a crime shall have the right to have the conviction and sentence reviewed by a higher tribunal according to law.¹²¹
9. If someone is convicted by a final decision, but the conviction is subsequently reversed, or a pardon granted on the ground that a new or newly discovered fact shows conclusively that there has been a miscarriage of justice, the defendant is to be compensated according to law, unless it is proved that the non-disclosure of the unknown fact in time is wholly or partially attributable to the defendant.¹²²
10. No one shall be liable to be tried or punished again for an offence for which he has already been convicted or acquitted in accordance with the law of the country.¹²³
11. No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time it was committed.¹²⁴

¹¹⁵ ICCPR, Art. 14(3)(d).

¹¹⁶ ICCPR, Art. 14(3)(d).

¹¹⁷ ICCPR, Art. 14(3)(d).

¹¹⁸ ICCPR, Art. 14(3)(e); and African Charter Art. 7.

¹¹⁹ ICCPR, Art. 14(5); and African Charter Art. 7 (Interpreted to include this right through the Resolution of the Right to Recourse and a Fair Trial, ACPH/Res. 4(XI)92, and communications 218/98, 251/2002).

¹²⁰ ICCPR, Art. 14(3)(g) and African Charter Art. 7 (Interpreted to include this right through the Resolution of the Right to Recourse and a Fair Trial, ACPH/Res. 4(XI)92, and communications 218/98, 251/2002).

¹²¹ ICCPR, Art. 14(5); and African Charter Art. 7.

¹²² ICCPR, Art. 14(6).

¹²³ ICCPR, Art. 14(7) and African Charter Art. 7 (Interpreted to include this right through the Resolution of the Right to Recourse and a Fair Trial, ACPH/Res. 4(XI)92, and communications 218/98, 251/2002). This is known as the principle of *ne bis in idem*, or “double jeopardy.”

¹²⁴ ICCPR, Art. 15(1); and African Charter Art 7.

12. A penalty heavier than the one that was applicable at the time when the criminal offence was committed shall not be imposed.¹²⁵

13. If, after the commission of the crime, the law provides for the imposition of a lighter penalty, the offender shall benefit by the new law.¹²⁶

¹²⁵ ICCPR, Art. 15(1); and African Charter Art. 7.

¹²⁶ ICCPR, Art. 15(1); and African Charter Art. 7.

Appendix A: Worksheet for the examination of Torture Claims

The following guidelines¹²⁷ are based on the *Istanbul Protocol: Manual on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*. The African Commission, the U.N. Committee Against Torture, and the U.N. Commission on Human Rights have adopted them.

I. Case information

Date of exam: _____
Exam requested by (name/position): _____
Case or report No: _____
Duration of evaluation: _____ hours, _____ minutes
Subject's given name: _____
Birth date: _____
Birth place: _____
Subject's family name: _____ Gender: male/female
Reason for exam: _____
Clinician's name: _____
Interpreter (yes/no), name: _____
Subject accompanied by (name/position): _____
Persons present during exam (name/position): _____

Subject restrained during exam: yes/no; If "yes", how/why? _____

Medical report transferred (given) to whom (name/position): _____

Transfer date: _____ Transfer time: _____

Medical evaluation/investigation conducted without restriction (for subjects in custody):
yes/no; Provide details of any restrictions: _____

II. Examining Clinician's qualifications

Medical education and clinical training _____

Psychological/psychiatric training _____

¹²⁷ This worksheet is drawn from *The Manual on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Istanbul Protocol)*. The full manual is available at www.unhchr.ch/pdf/81stprot.pdf. The U.N. Committee Against Torture has repeatedly stated in its country reports that countries should investigate reports of torture using the guidelines found in the Istanbul Protocol. The U.N. High Commission on Human Rights has urged compliance with the guidelines since 2000. The African Commission on Human and Peoples' Rights deliberated on the importance of the Istanbul Protocol in 2002 and concluded that investigations of all allegations of torture or ill-treatment, should be conducted promptly, impartially and effectively, and should be guided by the principles found in the Istanbul Protocol.

Experience in documenting evidence of torture and ill-treatment _____

Regional human rights expertise relevant to the investigation _____

Relevant publications, presentations and training courses _____

Curriculum vitae attached? (yes/no) _____

III. Background information of possible torture victim

General information (age, occupation, education, family composition, etc.)

Past medical history _____

Review of prior medical evaluations of torture and ill-treatment _____

IV. Allegations of torture and ill-treatment

1. Summary of detention and abuse _____

2. Circumstances of arrest and detention _____

3. Initial and subsequent places of detention (chronology, transportation and detention conditions) _____

4. Narrative account of ill-treatment or torture (in each place of detention) _____

5. Review of torture methods. _____

V. Physical symptoms and disabilities

Describe the development of temporary and long lasting symptoms and disabilities and the subsequent healing processes. _____

1. Temporary symptoms and disabilities _____

2. Long lasting symptoms and disabilities. _____

VI. Physical examination

1. General appearance _____

2. Skin (including bruises, burns and scars) _____

3. Face and head _____

4. Eyes, ears, nose and throat _____

5. Oral cavity and teeth _____

6. Chest and abdomen (including vital signs) _____

7. Genitals and urinary system _____

8. Muscular and skeletal system _____

9. Nervous system _____

VII. Psychological history/examination

1. Methods of assessment _____

2. Current psychological complaints _____

3. Psychological history Post-torture _____

4. Psychological history Pre-torture _____

5. Past psychological/psychiatric history _____

6. History of alcohol or drug abuse _____

7. Mental status examination _____

VIII. Documentation

How many photographs are attached _____
Attached are how many pages of anatomical drawings _____
Attached are how many pages of additional medical examinations _____
Additionally attached are: _____

