

# Pre-trial detention and human rights in the Commonwealth: Any lessons from civil law systems?

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**Abstract:** There are a significant percentage of people in prison or police detention across the Commonwealth who have not been convicted of an offence. This raises many human rights issues, especially in regard to pre-trial procedures. The article analyses the international legal framework and the Commonwealth legal principles relevant to these issues. Within the course of this examination, consideration is given to the situation in those Commonwealth States which have a civil law criminal justice system, in order to see if they can offer guidance for ways to improve the protection of human rights in pre-trial detention.

**Keywords:** pre-trial detention; human rights; criminal law; civil law; prison; Commonwealth

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## 1. Introduction

About one-third of the prison population in the world consists of those who have not been convicted of an offence. There are others who are detained in police custody.<sup>2</sup> These detainees are deprived of their liberty.<sup>3</sup> Given the large number of individuals affected by various forms of pre-trial detention, the relevant procedures must be considered in relation to compliance with international human rights legal standards.

This article considers the human rights of detainees during the entire period of pre-trial detention, starting from the time of police arrest, and analyses the application of these human rights to the conditions of pre-trial detention.<sup>4</sup> It

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2 A 'detained person' means any person deprived of personal liberty except as a result of conviction for an offence and 'detention' includes being in a police cell, a detention centre or a prison, following an arrest: Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment (adopted by General Assembly resolution 43/173 of 9 December 1988) UN GAOR 43rd Session Supp No 49 UN Doc A/43/49, 298 ('Principles on Detention').

3 Note that different terms have sometimes been used in certain legal documents or in the literature. For example, in some instruments detainees held in either police custody or prison custody are referred to as 'untried' or 'unconvicted' prisoners – see Rule 84(1), Standard Minimum Rules for the Treatment of Prisoners (adopted by the First UN Congress on the Prevention of Crime and the Treatment of Offenders held at Geneva in 1955, and approved by Economic and Social Council resolutions 663 C(XXIV) of 31 July 1957 and 2076(LXII) of 13 May 1977) ('Standard Minimum Rules').

4 Issues of juvenile justice, the role of the courts and of overcrowding in prisons are outside the scope of this article.

considers the legal responsibilities of the State, especially in regard to the key state authorities involved, being the police and prison officials.

The particular focus of this article is in relation to certain Commonwealth Member States. While there have been a number of analyses of the human rights protections within the Commonwealth,<sup>5</sup> these have tended to assume (understandably) that all 54 Commonwealth Member States have a common law legal system. However, since the admission of Rwanda in November 2009, there has been an increased awareness that there are a few Commonwealth Member States that have national legal systems based on civil law traditions.<sup>6</sup>

This article explores the experience of those Member States with criminal law systems based on civil law traditions – being Cameroon, Mauritius, Mozambique and Rwanda – to determine whether their experiences may be relevant to the rest of the Commonwealth in improving the protection of human rights in pre-trial detention. In relation to these four States, the authors used a questionnaire completed by their law ministries in order to supplement the research undertaken. The final section briefly considers the influence of customary law in these States, and then reflects on the possible differences between common law and civil law systems to consider for the further development of good practice in relation to pre-trial detention.

## 2. International legal framework

There is no single international instrument that sets out all the human rights standards on pre-trial detention. There are some relevant treaty obligations under the International Convention on the Elimination of All Forms of Racial Discrimination (CERD), the International Covenant on Civil and Political Rights (ICCPR), the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), the Convention on the Rights of Persons with Disabilities (CRPD), and the International Convention for the Protection of All Persons from Enforced Disappearance (ICCPED).

In addition, there are some additional relevant standards developed in non-binding instruments, principally being the following: Standard Minimum Rules for the Treatment of Prisoners;<sup>7</sup> the Code of Conduct for Law Enforcement Officials;<sup>8</sup> the Principles of Medical Ethics relevant to the Role of Health Personnel, particularly Physicians, in the Protection of Prisoners and Detainees against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment;<sup>9</sup> the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment;<sup>10</sup> the Principles on the Effective Prevention and Investigation of Extralegal, Arbitrary and Summary Executions;<sup>11</sup> the Basic Principles on the Use of Force and Firearms by Law Enforcement Officials;<sup>12</sup> the Guidelines on the Role of Prosecutors;<sup>13</sup> the Basic Principles on the Role of Lawyers;<sup>14</sup> the Basic Principles for the Treatment of Prisoners;<sup>15</sup> and the United Nations Standard Minimum Rules for Non-Custodial Measures, also known as the Tokyo Rules.<sup>16</sup> These

5 See for example, Jill Cottrell and Yash Ghai (eds), *Economic, Social and Cultural Rights in Practice: The Role of Judges in Implementing Economic, Social and Cultural Rights* (London: Interights, 2004), John Hatchard, *An Introduction to Law and Human Rights for Young People in the Commonwealth* (London: Commonwealth Secretariat, 2003) and Andrew Byrnes and Kirstine Adams, *Gender Equality and the Judiciary: Using International Human Rights Standards to Promote the Human Rights of Women and the Girl-child at the National Level* (London: Commonwealth Secretariat, 2000).

6 The Seychelles legal system is strongly influenced by civil law traditions. However, its criminal law system is common law based, so it is not considered in this article.

7 See above: Standard Minimum Rules.

8 Code of Conduct for Law Enforcement Officials (adopted by General Assembly resolution 34/169 of 17 December 1979) UN GAOR 34th Session Supp No 46 UN Doc A/34/46, 186.

9 Principles of Medical Ethics relevant to the Role of Health Personnel, particularly Physicians, in the Protection of Prisoners and Detainees against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (adopted by General Assembly resolution 37/194 of 18 December 1982) UN GAOR 37th Session Supp No 51 UN Doc A/37/51, 211 ('Principle of Medical Ethics').

10 See above: Principles on Detention.

11 Principles on the Effective Prevention and Investigation of Extralegal, Arbitrary and Summary Executions (Recommended by Economic and Social Council resolution 1989/65 of 24 May 1989) UN ESCOR 1989 Supp No 1 UN Doc E/1989/89, 52.

12 Basic Principles on the Use of Force and Firearms by Law Enforcement Officials (Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, 27 August to 7 September 1990) UN Doc A/CONF.144/28/Rev.1, 112.

13 Guidelines on the Role of Prosecutors (United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, 27 August to 7 September 1990) UN Doc A/CONF.144/28/Rev.1, 189.

14 Basic Principles on the Role of Lawyers (Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, 27 August to 7 September 1990) UN Doc A/CONF.144/28/Rev.1, 118.

15 Basic Principles for the Treatment of Prisoners (adopted by General Assembly resolution 45/111 of 14 December 1990) UN GAOR 45th Session Supp No 49A UN Doc A/45/49, 200.

16 United Nations Standard Minimum Rules for Non-Custodial Measures (adopted by General Assembly resolution 45/110 of 14 December 1990) UN GAOR 45th Session Supp No 49A UN Doc A/45/49, 197 ('Tokyo Rules').

standards are considered to be soft law, and do create a web of regulatory standards to which states should comply wherever possible.<sup>17</sup>

In 2012 the United Nations High Commissioner for Refugees issued Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention.<sup>18</sup> In accordance with those Guidelines, detention should be a last resort mechanism for asylum-seekers. These Guidelines include many of the human rights discussed in this paper. However, as they concern asylum-seekers and are not directed at those detained as part of pre-trial procedures, they will not be considered here.

### 3. The Commonwealth

The Commonwealth has long espoused that ‘raising awareness of, and strengthening respect for, human rights is a primary strategic goal of the Commonwealth’.<sup>19</sup> The assertion that the Commonwealth is founded on the promotion of ‘good governance, the rule of law and human rights’ or similar terms is found in many of the Commonwealth’s foundational documents, such as the Singapore Declaration of Commonwealth Principles,<sup>20</sup> the Harare Commonwealth Declaration and its implementing Millbrook Commonwealth Action Programme,<sup>21</sup> the Coolum Declaration<sup>22</sup> and the Latimer House Principles.<sup>23</sup>

Indeed, in the Charter of the Commonwealth, agreed by all Member States in 2012, which set out the core values of the Commonwealth,<sup>24</sup> the second value expressed was of a commitment to human rights:

We are committed to the Universal Declaration of Human Rights and other relevant human rights covenants and international instruments.

We are committed to equality and respect for the protection and promotion of civil, political, economic, social and cultural rights, including the right to development, for all without discrimination on any grounds as the foundations of peaceful, just and stable societies. We note that these rights are universal, indivisible, interdependent and interrelated and cannot be implemented selectively.

We are implacably opposed to all forms of discrimination, whether rooted in gender, race, colour, creed, political belief or other grounds.

While these Commonwealth instruments may be considered as not legally binding in themselves, they are the core documents and values that underpin the rationale for the Commonwealth and, as such, must be taken as having considerable impact on the actions of each Commonwealth Member State.<sup>25</sup> In addition, every Commonwealth Member State is a party to at least one of the international human rights treaties referred to above, which create legally binding obligations on them.<sup>26</sup>

In relation to the particular issues considered in this article, the authors have created a Table, which sets out information about the prison population in each Commonwealth Member State and the number of pre-trial detainees, as well as the prison population as a percentage of the national population, the number of female prisoners as a percentage of the prison population and the occupancy level based on official capacity. This Table is set out in the Appendix at the end of this article.<sup>27</sup>

17 On soft law, see Christine Chinkin, ‘The Challenge of Soft Law: Development and Change in International Law’ *International and Comparative Law Quarterly* 38 no.4 (1989): 850. Kenneth Abbott and Duncan Snidal, ‘Hard and Soft Law in International Governance’ *International Organization* 54 no.3 (2000): 421 and Andrew Guzman and Timothy Meyer, ‘International Soft Law’ *Journal of Legal Analysis* 2 no.1 (2010): 171.

18 These Guidelines, adopted in 2012, replace the Guidelines on Applicable Criteria and Standards relating to the Detention of Asylum-Seekers of 1999. The 2012 Guidelines are available online at: <http://www.unhcr.org/505b10ee9.pdf> (accessed 16 April 2014).

19 Statement on the Commonwealth Secretariat’s Human Rights home page: <http://www.secretariat.thecommonwealth.org/Internal/151469/hru/> (accessed 16 April 2014).

20 The Singapore Declaration of Commonwealth Principles was agreed in 1971.

21 The Harare Commonwealth Declaration agreed in 1991 and its Action Programme was agreed in 1995.

22 The Coolum Declaration was agreed in 2002.

23 The Latimer House Principles were agreed in 2003.

24 The Charter of the Commonwealth 2012, available at <http://www.secretariat.thecommonwealth.org/files/252053/FileName/CharteroftheCommonwealth.pdf> (accessed 16 April 2014).

25 See A. Duxbury, ‘The Commonwealth Secretariat and the Implementation of Human Rights’ *The Round Table* 95 no.385 (2006): 425.

26 For example, 53 of the 54 Member States are parties to CEDAW. The only State that is not a party is Tonga, which has ratified CERD. All 54 Member States are parties to the Convention on the Rights of the Child (CRC).

27 The purpose of this Table is to provide useful information of the situation across the Commonwealth. It does not examine the variances that

According to this Table, the average percentage of the prison population which consists of detainees (including both pre-trial detainees and on remand prisoners) in the Commonwealth is 31.9 percent, which is very close to the entire world's average of 33.6 percent.<sup>28</sup> An analysis of the percentages of detainees of the Commonwealth States in relation to the percentages of States from the rest of the world shows that Commonwealth States appear distributed across the spectrum. For example, 20 Commonwealth States are within the group of States with a percentage of pre-trial detainees and remand prisoners within prison population higher than the world average of 33.6 percent: Antigua and Barbuda, the Bahamas, Bangladesh, Barbados, Cameroon, Canada, Cyprus, Grenada, Guyana, India, Kenya, Malta, Mozambique, Nigeria, Pakistan, St Lucia, Sierra Leone, Sri Lanka, Uganda, and Tanzania. The rest of the Commonwealth States are below this average.

On average, Commonwealth prisons are over capacity, with an average prison occupancy level of 144.3 percent. This is higher than the world average of 124.5 percent. The prison population rate per 100,000 is at an average of close to 195 individuals, which is higher than that proportion at the world level, which stands at close to 175. Finally, the average of female prisoners is slightly lower within the Commonwealth in comparison with the world percentage, which is 5.4%.

These figures raise issues about the extent to which these large numbers of detainees have human rights protection. Thus the next section considers the human rights issues that arise for pre-trial detainees.

#### 4. Human rights issues

An individual is entitled to have respect for all his or her human rights when held in pre-trial detention, with the exception of the one right that cannot be exercised there, being the right to liberty, if limited for a legitimate reason.<sup>29</sup> The presentation of the relevant human rights set out in this section follows as closely as possible a time-line from the moment an individual is deprived of liberty until the moment a judicial authority orders release or convicts the individual in question.

##### 4.1. Conditions for deprivation of liberty

###### *Right to liberty and security of the person*

Both international and regional human rights instruments guarantee the right to personal liberty and security. A state party to these instruments has the obligation to ensure that this right is respected throughout its territory.<sup>30</sup>

With regard to the security aspect of this right, the Human Rights Committee ('HRC'), which supervises compliance with the ICCPR, has stated that Article 9(1) of the ICCPR 'protects the right to security of person also outside the context of formal deprivation of liberty', and that an interpretation of Article 9 'which would allow a State party to ignore threats to the personal security of non-detained persons subject to its jurisdiction would render totally ineffective the guarantees of the Covenant'.<sup>31</sup> In the view of the HRC, 'it cannot be the case that, as a matter of law, States can ignore known threats to the life of persons under their jurisdiction, just because he or she is not arrested or otherwise detained [on the contrary,] States parties are under an obligation to take reasonable and appropriate measures to protect them'.<sup>32</sup>

This makes clear that the legal obligation on a state to protect the right to security of individuals within its jurisdiction continues to the time of arrest, i.e. until the moment immediately before arrest and potential detention.<sup>33</sup> During arrest procedures, state authorities have to ensure the security of individuals from other individuals and, in addition, that the authorities are not the source of a breach of security.<sup>34</sup> For example, in a case where an individual

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will arise due to particular situation at any one time in a Member State, such as armed conflict, natural disasters, or other factors.

28 Ibid.

29 See generally, Nigel Rodley and Matt Pollard, *The Treatment of Prisoners under International Law* (Oxford: Oxford University Press, 2009).

30 See ICCPR art 9(1); African Charter art 6. See also UDHR art 3 and 9.

31 Communication No 195/1985, *W Delgado Páez v Colombia* (Views adopted on 12 July 1990), UN Doc CCPR/C/39/D/195/1985, para 5.5. See also the HRC's Communication No 711/1996, *Dias v Angola* (Views adopted on 20 March 2000), UN Doc CCPR/C/62/D/711/1996, para 8.3.

32 OHCHR, *Human Rights and Pre-Trial Detention: A Handbook of International Standards relating to Pre-Trial Detention* (2010) ('Human Rights Handbook') section 5.

33 See for example the case of *W Delgado Páez v Colombia*, where the author had received death threats, been subjected to one personal assault and had a colleague murdered, the HRC concluded that Article 9(1) had been violated since Colombia either had not taken, or had "been unable to take, appropriate measures to ensure Mr Delgado's right to security of his person": see above, para 5.5.

34 In the case of *Dias v Angola*, the HRC concluded that Article 9(1) had been violated since it was the Angolan authorities themselves that

was shot from behind by the police before being arrested and without warning, the HRC concluded that his right to security of the person as guaranteed by Article 9(1) had been violated.<sup>35</sup> It is thus important that the right of security of the person is respected during the arrest process and the moments leading to it.

With regard to the right to liberty of the person in general, the International Court of Justice ('ICJ') stated that:

[W]rongfully to deprive human beings of their freedom and to subject them to physical constraint in conditions of hardship is in itself manifestly incompatible with the principles of the Charter of the United Nations, as well as with the fundamental principles enunciated in the Universal Declaration of Human Rights [Article 3 of which guarantees...] the right to life, liberty and security of person.<sup>36</sup>

Therefore, any deprivation of liberty must be reasonable, i.e. justified by objective reasons, be lawful and only last for the duration that is absolutely necessary in the circumstances.<sup>37</sup>

The right to liberty also entails the right to freedom from arbitrary arrest and/or detention.<sup>38</sup> The HRC has stated that "arbitrariness" is not to be equated with "against the law", but must be interpreted more broadly to include elements of inappropriateness, injustice, lack of predictability and due process of law'.<sup>39</sup> According to Principle 2 of the Principles on the Effective Prevention and Investigation of Extralegal, Arbitrary and Summary Executions, each State 'shall ensure strict control, including a clear chain of command over all officials responsible for apprehension, arrest, detention, custody and imprisonment, as well as those officials authorized by law to use force and firearms' in order to prevent extra-legal, arbitrary and summary executions.

The United Nations Trainer's Guide on Human Rights for the Police, which is a non-legally binding guideline, highlights a number of human rights which have to be respected by the police during the exercise of their function.<sup>40</sup> For example, police forces shall not unlawfully discriminate on a basis such as race, gender, religion, language, political opinion, or origin. It underlines that police shall not commit any act of corruption, and that they shall rigorously oppose and combat all such acts. These principles are applicable to the procedures with which the police can arrest and detain an individual. Also, as mentioned above, any deprivation of liberty, and thus arrest and detention, must be devoid of arbitrariness and be legal, reasonable and necessary in any circumstances.

To summarise, restrictions on personal liberty may only be permitted under the following specific conditions:

- Clear stipulation in the law of the reasons, conditions and procedures for the arrest and the requirement of reasonableness and necessity in all the circumstances.<sup>41</sup> This means that the relevant law must be 'sufficiently precise to allow the citizen ... to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail';<sup>42</sup>

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were alleged to be the sources of the threats and the State party had neither denied the allegations, nor cooperated with the Committee. See above, para. 8.3.

35 Communication No. 613/1995, *Leehong v Jamaica* (Views adopted on 13 July 1999), UN Doc CCPR/C/66/D/613/1995, paras 2.1 and 9.3.

36 *Case Concerning United States Diplomatic and Consular Staff in Tehran* (United States of America v Iran), ICJ Reports 1980, 42 para 91.

37 Communication No 458/1991 *Albert Womah Mukong v Cameroon* (views adopted on 21 July 1994) UN Doc CCPR/C/51/D/458/1991 (1994), para 9.8. See also the case in which a person was detained for a prolonged period of time with a view to forcing him to disclose the whereabouts of his brother; this situation has been deemed arbitrary. Communication No 16/1977 *D Monguya Mbenge v Zaire* (Views adopted on 25 March 1983) UN doc GAOR A/38/40, 140, para 20-21. See also Communication No 305/1988 *Hugo van Alphen v The Netherlands* (views adopted on 23 July 1990) UN Doc CCPR/C/39/D/305/1988, para 5.8.

38 Human Rights Handbook, see above, section 5. On the individual right to liberty, the European Court of Human Rights has stated that 'article 5 enshrines a fundamental human right, namely the protection of the individual against arbitrary interference by the State with his or her right to liberty'. See, for example, *A and the others v United Kingdom* (App. No 3455/05) ECHR 19 February 2009, para 162 in which the Court stated that 'to avoid being branded as arbitrary, detention ..., must be carried out in good faith, it must be closely connected to the ground of detention relied on by the Government; the place and conditions of detention should be appropriate, and the length of detention should not exceed that reasonably required for the purpose pursued'. This reflects the importance of an early possibility for detainees to be removed from the hands of detaining authorities (whether by release or by transfer to custody in remand prison rather than police custody) to help reduce the risk of torture or other ill-treatment.

39 Communication No 1134/2002 *Fongum Gorji-Dinka v Cameroon* (views adopted on 10 May 2005) U.N. Doc. CCPR/C/83/D/1134/2002 (2005), para 5.1.

See also Communication No 458/1991 *Albert Womah Mukong v Cameroon* (views adopted on 21 July 1994) UN Doc CCPR/C/51/D/458/1991 (1994), para 9.8.

See also Communication No 305/1988 *Hugo van Alphen v The Netherlands* (views adopted on 23 July 1990) UN Doc CCPR/C/39/D/305/1988, para 5.8.

40 United Nations, *Human Rights and Law Enforcement, a Trainer's Guide on Human Rights for the Police* (New York and Geneva: United Nations, 2002) ('Trainer's Guide') 38.

41 According to the principle of legality, any deprivation of liberty must be done in accordance with the law.

See ICCPR art 9(1); African Charter art 6 and UDHR art 9. Communication No 702/1996 *Clifford McLawrence v Jamaica* (views adopted on 18 July 1997) UN Doc CCPR/C/60/D/702/1996 (1997), para 5.5.

42 See for example *Steel v United Kingdom* (1999) 28 EHRR 603, para 54. A deprivation of liberty must in all cases be carried out in accordance

- Reasonable suspicion that the person concerned has committed the alleged offence, such as ‘facts or information which would satisfy an objective observer that the person concerned may have committed the offence’;<sup>43</sup> and
- Sufficient evidence that the person concerned is likely to abscond, interfere with evidence or commit further offences,<sup>44</sup> or that he presents a ‘clear and serious threat to society which cannot be contained in any other manner’.<sup>45</sup>

In addition, the conditions of the arrest itself must follow international human rights standards. The authorities carrying out the investigation, arrest and detention may exercise only the powers granted to them under the law and be under the supervision of a judicial or other competent authority.<sup>46</sup> Officials carrying out arrest must present the appropriate identification and an arrest warrant issued by judicial or other competent authority. No person should be arrested without warrant or summons as it is a violation of Article 9(1) ICCPR to arrest a person without warrant or summons and then retain this person in detention without any court order.<sup>47</sup>

Furthermore, to ensure effective judicial supervision and the prevention of disappearances, any arrest must be accurately recorded and contain the following information:<sup>48</sup>

- the reasons for the arrest;
- the time (and date) of the arrest;
- the time (and date) the arrested person was taken into a place of custody;
- the time (and date) the arrested person’s first appeared before a judicial or other competent, impartial and independent authority;
- the identity of the law enforcement officials concerned; and
- the place of custody.<sup>49</sup>

These records must be communicated to the arrested person or his/her counsel.<sup>50</sup>

### Notification

At the time of arrest, the individual arrested must be informed of the reasons why they are being arrested and taken into custody.<sup>51</sup> The Principles on Detention extends the notification requirement to the rights of the arrested person. It requires the authority responsible for arrest or detention to provide, at the time of arrest and at the commencement of detention, arrested persons with information regarding their rights and how to avail themselves of such rights<sup>52</sup> in a language which they understand.<sup>53</sup> Arrested persons should in particular be made aware of their right to legal counsel.<sup>54</sup>

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with law. Arrest or detention on grounds not clearly established in legislation is a violation of the principle of legality (Communication No 702/1996 *C McLawrence v Jamaica* (views adopted on 18 July 1997) UN doc GAOR A/52/40 (vol II) 230–231, para 5.5).

43 See for example *Fox, Campbell and Hartley v UK* (1991) 13 EHRR 157, para 32.

44 Mukong, para 9.8; Alphen, para 5.8.

45 Communication No 66/1980 *David Alberto Cámpora Schweizer v Uruguay* (views adopted on 12 October 1982) in *Selected Decisions of the Human Rights Committee under the Optional Protocol, Vol 2, 17th to 32nd sessions* (October 1982 – April 1988) (United Nations, New York, 1990) 90, para 18.1.

46 Ibid.

47 Communication no 90/1981 *L Magana ex-Philibert v Zaire* (Views adopted on 21 July 1983) UN doc GAOR A/38/40, 200, paras 7.2 and 8. Human Rights Handbook para 47.

48 Human Rights Handbook, para 44.

49 Principles on Detention, principle 12(1).

50 Principles on Detention ,principle 12(2).

51 ICCPR art 9(2); Principles on Detention principle 10. Note that the European Court of Human Rights stated that whilst ‘this information must be conveyed “promptly”, it does not have to be related in its entirety by the arresting officer at the exact moment of the arrest. Whether the content and promptness of the information conveyed were sufficient is to be assessed in each case according to its special features.’ *Fox, Campbell and Hartley*, ECtHR judgment of 30 August 1990, Series A, No. 182, 19, para 40.

52 Principles on Detention, Principle 13.

53 Art 14(3) ICCPR and HRC General Comment No. 13, para 8. See also Principles on Detention, Principle 14.

54 Human Rights Handbook, para 56.

Any arrested person has also the right to have a family member notified of the arrest and the place of detention. Moreover, this right further entails the right to communicate with, and be visited by, relatives and others.<sup>55</sup>

After the arrest, the person arrested must also be informed of any charges against them.<sup>56</sup> The decision by the police whether to charge an arrested person should be made within a short period of time.<sup>57</sup> Any charge made must be notified to the arrested person:

- as soon as the charge is first made; or
- when in the course of an investigation a court or the prosecution decides to take procedural steps against the suspect.<sup>58</sup>

The arrested individual must also be informed of the nature and cause of the charge in detail in a language which they understand.<sup>59</sup> The HRC has explained that ‘one of the most important reasons for the requirement of “prompt” information on a criminal charge is to enable a detained individual to request a prompt decision on the lawfulness of his or her detention by a competent judicial authority’. It concluded that Article 9(2) of the ICCPR had been violated in a case where the complainant had not been informed upon arrest of the charges against him and was only informed seven days after he had been detained.<sup>60</sup>

#### *Appearance before a judicial or other authority*

As mentioned above, arrest and detention must be devoid of arbitrariness and therefore be legal, reasonable and necessary in any circumstances. According to the Body of Principles, the arrest may be ordered by a judicial or other authority before the arrest stage (‘ordered by’). In all other cases, the judicial or other authority shall at least be involved immediately upon arrest (‘under the effective control of’).<sup>61</sup> As any arrest has to be subject to judicial control or supervision to ensure its lawfulness, anyone arrested has the right to be brought before a judicial or other authority after the arrest.<sup>62</sup> For example, in a case where the detainee had no possibility of taking proceedings before a court to determine the lawfulness of his detention for the purpose of expulsion, the HRC concluded that Article 9(4) of the ICCPR had been violated.<sup>63</sup>

The relevant judicial or other authority should be one whose status and tenure afford the ‘strongest possible guarantees of competence, impartiality and independence’.<sup>64</sup> In case it is not a judge who decides on the lawfulness of the arrest and possible subsequent detention, the authority in charge has to benefit from the same attributes as a judge; in particular, it must be independent from the authority that conducted the arrest. This is an essential component of the rule of law.<sup>65</sup>

As this appearance before a judicial or other authority constitutes the first opportunity for the person arrested to contest the arrest and detention, it shall also take place promptly after the arrest. In fact, no one shall be kept in detention for an extended period without a court order.<sup>66</sup> The HRC has stated that delays ‘must not exceed a few days’.<sup>67</sup>

55 Principle on Detention, Principle 19.

56 ICCPR art 9(2); Principles on Detention, Principle 10.

57 Art 9(2) ICCPR. See also Human Rights Handbook, para 55. Detention of people without charges and without the possibility of bail constitutes an arbitrary deprivation of liberty within the meaning of art 6 ACHPR, see Communication No 102/93 Constitutional rights Project and Civil Liberties Organisation v Nigeria [1998] ACHPR decision adopted on 31 October 1998, para 55.

58 HRC General Comment No. 13, para 8.

59 ICCPR art 14(3)(b). The African Commission on Human and Peoples’ Rights (ACCommHPR) has held that the right to a fair trial includes, inter alia, the requirement to inform the persons arrested ‘at the time of arrest, in a language which they understand, of the reason for their arrest and shall be informed promptly of any charges against them’. See e.g. ACCommHPR, Media Rights Agenda (on behalf of Niran Malaolu) v Nigeria, Communication No. 224/98, decision adopted during the 28th session, 23 October – 6 November 2000; para 43 of the text published at: <http://www1.umn.edu/humanrts/africa/comcases/224-98.html> (accessed 16 April 2014).

60 Communication No 248/1987, G Campbell v Jamaica (Views adopted on 30 March 1992), 246, para 6.3. See also Human Rights Handbook, section 5.

61 Body of Principles, Principle 4.

62 ICCPR art 9(3) and 9(4). See also Principles on Detention, Principle 9 and 37; Declaration on the Protection of All Persons from Enforced Disappearance (adopted by General Assembly resolution 47/133 of 18 December 1992) UN Doc A/RES/47/133 (‘Declaration on Disappearance’), Art 10(1).

63 Communication No 155/1983, *E Hammel v Madagascar* (Views adopted on 3 April 1987), in UN doc. GAOR, A/42/40, 138, para 20.

64 Body of Principles para (f) of the Use of Terms.

65 On the rule of law generally, see Tom Bingham, *The Rule of Law* (London: Allen Lane, 2010).

66 Communication no 90/1981 Luyeye Magana ex-Philibert v Zaire (views adopted on 21 July 1983) in Selected Decisions (Vol 2) (n 41) 124, paras 7.2-8: it is a violation of art 9(1) ICCPR to arrest a person without warrant or summons and then keep him in detention without any court order. See also the Body of Principles, Principle 32.

67 HRC General Comment No. 8.

The Trainer's Guide has developed a specific rule under which a detainee should be brought before a court as soon as reasonably possible but no later than 48 hours after arrest in order to be charged and be considered for bail or release: this is called the '48-hour rule'.<sup>68</sup> An exception to this rule may only apply if the court is not open on the day the 48 hour period expires and, in such cases, the individual shall be brought before a court on the first possible day following the 48-hour period. The Guide even states that if the 48 hour rule is not observed, the individual in question should be released.<sup>69</sup> This strict rule ensures the early involvement of a judicial body in the assessment of the lawfulness of the arrest and the supervision of a possible extended detention. Limiting the time period under which an individual may be detained in custody without being charged or considered for bail ensures the protection of the rule of law and human rights.

If the judicial or other authority deems the arrest and detention unnecessary and thus unlawful, the individual has to be released. No individual should be kept in custody after his release has been ordered.<sup>70</sup>

#### *Detention as last resort*

International law provides that pre-trial detention must not become the general rule and must remain an exception.<sup>71</sup> Pre-trial detention is thus a means of last resort.<sup>72</sup> As long as appearance for trial is guaranteed, the defendant should be released.<sup>73</sup> Such release may be conditional to ensure that the defendant appears for trial.<sup>74</sup> The African Commission has also stated that suspects must not be kept in custody without a charge and without the possibility of bail.<sup>75</sup>

During the assessment of the validity of the detention, substitutes for confinement have to be considered. International standards encourage the use of alternative measures to avoid unnecessary use of detention.<sup>76</sup> Such alternatives should be employed 'at as early a stage as possible'.<sup>77</sup> The criminal justice system should provide a range of non-custodial measures as alternatives to pre-trial detention, taking account of:

- the nature of the alleged offence;
- the gravity of the alleged offence;
- the personality of the defendant;
- the background of the defendant; and
- the protection of the society.<sup>78</sup>

As pre-trial detainees often lack financial means, monetary bail should not be the sole alternative to detention. Other means such as house arrest monitored electronically should also be available in order not to discriminate against pre-trial detainees based on their financial means.

All alternative measures should be governed and administered in accordance with the law and judicially supervised.<sup>79</sup> The dignity of the defendant should be 'protected at all times'.<sup>80</sup> The defendant's and their family's right to privacy should be respected throughout and the records of their case should be kept strictly confidential and closed to third parties, with access limited to officials duly authorized or directly concerned with the case.<sup>81</sup>

An alternative measure may involve certain conditions.<sup>82</sup> However, any alternative measure should not involve:

68 Trainer's Guide, 74.

69 Ibid.

70 See Communication No 8/1977 Ana Maria Garcia Lanza de Netto, Beatriz Weismann and Alcides Lanz Perdamo v Uruguay (views adopted on 3 April 1980) in Selected Decisions of the Human Rights Committee (Vol 1, 2nd to 16th sessions, United Nations, New York 1985) 45, 14 and 16.

71 ICCPR art 9(3) and HRC General Comment No 8, para 3.

72 Tokyo Rules, Rule 6.1.

73 ICCPR art 9(3); Principles on Detention, Principle 39.

74 ICCPR art 9(3).

75 Communication No 102/93, *Constitutional rights Project and Civil Liberties Organisation v Nigeria* (decision adopted on 31 October 1998) ACommHPR, para 55.

76 Tokyo Rules r 2.4 and r 2.3.

77 Tokyo Rules r 6.2.

78 Tokyo Rules r 2.3.

79 Tokyo Rules r 3.1, r 3.3, r 3.5 and r 3.10.

80 Tokyo Rules r 3.9.

81 Tokyo Rules r 3.11 and r 3.12.

82 See Tokyo Rules r 12.1–12.4.



- medical or psychological experimentation on the defendant; or
- undue risk of physical or mental injury to the defendant.<sup>83</sup>

Where an alternative measure imposes an obligation on the defendant, it should only be used with the defendant's consent.<sup>84</sup> He or she should also be entitled to make a request or complaint to a judicial or other competent independent authority if an alternative measure and its implementation affect the defendant's individual rights.<sup>85</sup>

An alternative measure may be modified or revoked if the defendant breaches conditions attached to it.<sup>86</sup> A breach of a condition should not, however, automatically result in detention.<sup>87</sup>

### *Supervision of detention*

If a judge or other authority decides that the individual arrested shall be kept in detention, the subsequent detention period must also be supervised by a judicial authority.<sup>88</sup> Such authority should be empowered to review the continuity and necessity of the detention.<sup>89</sup> The European Court of Human Rights has noted 'the possibility of subsequent review of the lawfulness of detention by a court', for instance with regard to the detention of persons of unsound mind, 'where the reasons initially warranting confinement may cease to exist'.<sup>90</sup> The person in custody shall also be entitled to appeal to such authority, as well as making a statement on the treatment received by him while in custody.<sup>91</sup>

While individuals may be detained in a police facility or in a prison, pre-trial detainees should not be kept in places administered by authorities responsible for investigation.<sup>92</sup> Thus detention in police facilities should not last for more than a very short period of time and officers responsible for supervising detainees should be independent from arresting officers or investigating officers.<sup>93</sup>

## **4.2. Standards for detention**

Even when a judge or other authority has decided that the arrest was lawful, the individual arrested retains the right to the presumption of innocence, according to which any individual who has not yet been convicted in a court of law must be treated as innocent. The presumption of innocence, which is 'fundamental to the protection of human rights', is enshrined in Article 14(2) of the ICCPR, which provides that '[e]veryone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law'.<sup>94</sup> Persons who are not convicted of a crime are, under Article 10(2)(a) of the ICCPR, entitled to the treatment appropriate to their status as innocent persons.<sup>95</sup>

Therefore the presumption of innocence is 'the starting-point for all standards in the area of pre-trial detention', which has to be respected in all pre-trial stages, from the time of the arrest until a judgment is rendered.<sup>96</sup> Unless the prosecution has proved the charge beyond reasonable doubt, guilt cannot be presumed and all public authorities have to 'refrain from prejudging the outcome of a trial'.<sup>97</sup>

83 Tokyo Rules r 3.8.

84 Tokyo Rules r 3.4.

85 Tokyo Rules r 3.6.

86 Tokyo Rules r 14.1. The modification or revocation should be made by the competent authority (Tokyo Rules r 14.2). The defendant should have the right to appeal in the event of such modification or revocation (Tokyo Rules r 14.6).

87 Tokyo Rules r 14.3 and 14.4.

88 Principles on Detention, Principle 4. N Rodley and M Pollard, *The Treatment of Prisoners under International Law*, 457–8.

89 Principles on Detention, Principle 11(3) and 39.

90 In the view of the Court, "this category of confinement" should not be immune from subsequent review of lawfulness merely provided that the initial decision was issued from a court'. See *Iribarne Pérez v France*, European Court of Human Rights, judgment of 24 October 1995, Series A, No. 325-C, 63, para 30.

91 Tokyo Rules r 6.3 and Principles on Detention principle 37.

92 Human Rights Handbook, para 66.

93 *Ibid.*

94 See HRC General Comment No 13, para 7. See also UDHR art 11(1).

95 Standard Minimum Rules r 84(2); Principles on Detention principle 36(1). HRC General Comment No 13 para 7.

96 Human Rights Handbook, para 42.

97 HRC General Comment No 13 para 7. See for example the case of *Barbera, Messegue and Jabardo v Spain*, ECtHR Series A, No. 146, 6 December 1988, para 77, in which the ECtHR stated that the presumption of innocence requires, *inter alia*, that when carrying out their duties, the members of a court should not start with the preconceived idea that the accused has committed the offence charged; the burden of proof is on the prosecution, and any doubt should benefit the accused. It also follows that it is for the prosecution to inform the accused of the case that will be made against him, so that he may prepare and present his defence accordingly, and to adduce evidence sufficient to convict him.

Any form of restraint imposed on detainees should be reasonable and necessary for the administration of justice.<sup>98</sup> In any case, as it will be shown below, detainees must not be subjected to torture, ill-treatment or other cruel, inhumane or degrading treatment or punishment.<sup>99</sup> Arrangements for the custody and treatment of pre-trial detainees must be kept under systematic review with a view to preventing torture and other cruel, inhumane or degrading treatment or punishment.<sup>100</sup>

Detainees should benefit from a 'special regime',<sup>101</sup> in which the treatment of pre-trial detainees must be guided by the following principles:

- the presumption of innocence;<sup>102</sup>
- the respect for dignity and humanity;<sup>103</sup> and
- the absence of torture and ill-treatment.<sup>104</sup>

Detainees should be placed in an officially recognised place of detention administered by and under the supervision of an authority separate from the police.<sup>105</sup> Pre-trial detention and all measures affecting the human rights of a detainee must be ordered by a judicial authority.<sup>106</sup> A person may only be kept under detention pending investigation or trial upon a written order of a judicial authority.<sup>107</sup> A detainee and his counsel should receive prompt and full communication of any order of the detention, together with the reasons for the detention.<sup>108</sup>

#### *Formalities – Registration, Record Keeping and Communication*

Record keeping is important for effective judicial control of detention. Rule 7(2) of the Standard Minimum Rules provides that the detention authority should keep a record (either in physical form like a registration book or in electronic form with a secured computer system) in every place of detention and enter details of the following:

- the identity of each detainee;
- the reasons for his commitment;
- the authority for his commitment (i.e., a valid commitment order or equivalent);<sup>109</sup> and
- the day and hour of his admission and release.<sup>110</sup>

There should also be a centralised register of all detainees.<sup>111</sup> Unless a detainee wishes the contrary, information on the detention and the place or places of detention (including transfers) should be made promptly available to the detainee's family members, his counsel or to any other persons who have a legitimate interest in this information.<sup>112</sup>

### **4.3. Access to Counsel and Legal Assistance**

98 Principles on Detention, Principle 36(2).

99 ICCPR art 7; UDHR art 5.

100 CAT arts 11 and 16.

101 See Standard Minimum Rules r 84(3).

102 ICCPR arts 10(2)(a) and 14(2); Standard Minimum Rules r 84(2).

103 ICCPR art 10(1); Basic Principles for the Treatment of Prisoners principle 1; Principles on Detention principles 1 and 6; Tokyo Rules r 6.2.

104 ICCPR art 7; CAT arts 2 and 16; UDHR art 5; Declaration against Torture arts 3-4.

105 Declaration on Disappearance art 10(1). See also HRC General Comment No 20.

106 Principles on Detention, Principle 4.

107 Principles on Detention, Principle 37.

108 Principles on Detention, Principle 11(2).

109 Standard Minimum Rules r 7(2) provides that '[n]o person shall be received in an institution without a valid commitment order of which the details shall have been previously entered in the register.'

110 See also Declaration on Disappearance art 10(3).

111 Declaration on Disappearance art 10(3). See also HRC General Comment No 20.

112 Declaration on Disappearance art 10(2).

Pre-trial detainees have the right to be assisted by legal counsel in order to prepare their defence, properly and without undue hindrance.<sup>113</sup> This right is derived from the principle of equality of arms.<sup>114</sup> According to the Body of Principles, detained or imprisoned persons are entitled to ‘communicate and consult’ with their legal counsel, ‘without delay or censorship and in full confidentiality.’<sup>115</sup> The term ‘without delay’ has been defined as no more than a matter of days, and therefore a detainee may not be denied access to counsel for a week or more.<sup>116</sup>

The HRC concluded, in a case where a pre-trial detainee had not had access to legal representation for a four-month period, that there was a violation of Article 9(4) of the ICCPR ‘since he was not in due time afforded the opportunity to obtain, on his own initiative, a decision by a court on the lawfulness of his detention.’<sup>117</sup> Thus a detained person has the right to consult with, and be assisted by, a lawyer in connection with the proceeding taken to test the legality of the detention.

Furthermore, international law provides that anyone shall be informed, if they do not have legal assistance, of the right to legal assistance. In addition, if the detainee in question does not have the means to pay for legal assistance, it should still be assigned to him or her free of charge.<sup>118</sup> According to the European Committee for the Prevention of Torture for example, ‘the right of access to a lawyer’ is also among the three ‘fundamental safeguards’ that ‘should apply as from the very outset of deprivation of liberty’.<sup>119</sup>

#### 4.4. Investigation of pre-trial detainees

The investigation of pre-trial detainees must be conducted according to the law and thus follow certain principles, such as the right to security of the person, the presumption of innocence, the prohibition of arbitrary interference with privacy, the protection of honour and reputation, the absolute prohibition of torture and cruel, inhuman or degrading treatment, the respect for confidentiality of information, the right not to confess or testify against oneself and the right to a fair trial.<sup>120</sup>

The duration of any interrogation of a detained or imprisoned person and the time between interrogations, as well as the identity of the officials conducting the interrogations and other persons present, shall be recorded and certified in such form as may be prescribed by law.<sup>121</sup> Recording this type of information is important in order to assist in determining possible responsibility in the event of an abuse.<sup>122</sup>

There exist additional standards that elaborate on the duration of interrogations, for example by advising to take into account the individual characteristics of the interrogated person or to provide regular breaks in the event the interrogation lasts for an extended period.<sup>123</sup> Conducting interrogation at night must be avoided and the person being interrogated shall not suffer from sleep deprivation.<sup>124</sup>

In any case, interrogation should not lead to the impairment of a person’s capacity of decision-making or judgment. Thus no one who is being interrogated shall be subjected to threats or violence of any kind. The rules or instructions in regard to the duties and functions of law enforcement personnel, medical personnel, and other officials who may be involved in the custody, interrogation or treatment of pre-trial detainees must include the prohibition against torture.<sup>125</sup> Interrogation rules, instructions, methods and practices must be kept under systematic review with a view to preventing torture and other cruel, inhumane or degrading treatment or punishment.<sup>126</sup>

It is also a contravention of medical ethics for health personnel, particularly physicians to apply their knowledge and skills in order to assist in the interrogation of prisoners and detainees in a manner that may adversely affect the physical or mental health or condition of such prisoners or detainees and which is not in accordance with the relevant international instruments.<sup>127</sup>

113 Body of Principles, Principle 17.

114 Human Rights Handbook, chap 5.

115 Body of Principles, Principle 18.

116 Body of Principles, Principle 15.

117 Communication No. 248/1987, G Campbell v Jamaica (Views adopted on 30 March 1992), in UN Doc GAOR, A/47/40, 246, para 6.4.

118 ICCPR art 14(3)(d).

119 European Committee for the Prevention of Torture (‘CPT’): The CPT Standards, CPT/Inf/E (2002) 1 – Rev 2006, 6.

120 *Trainer’s Guide on Human Rights*, 63–5.

121 Body of Principles, Principle 23(1).

122 Recording this information also acts as a deterrent against abuses. See N Rodley and M Pollard, *The Treatment of Prisoners under International Law*, 457.

123 See for example the standards of the Advisory Council of Jurists (‘ACJ’) of the South Pacific, art 3, 4 and 6.

124 N Rodley and M Pollard *The Treatment of Prisoners under International Law*, 456.

125 CAT art 10(2).

126 CAT arts 11 and 16.

127 Principle of Medical Ethics, Principle 4(a).

*Right to silence*

The right to remain silent and not to respond to an interrogation is not explicitly protected in international law but it is nevertheless guaranteed by the right not to be compelled to testify against oneself or confess guilt. The right to silence is sometimes also considered as part of a cluster of procedural rules that protect against self-incrimination.<sup>128</sup> Indeed, the European Court on Human Rights has determined that, although the right to remain silent is not explicit in the ECHR, an individual's right to remain silent under questioning and the privilege against self-incrimination are 'generally recognised international standards which lie at the heart of the notion of a fair procedure'.<sup>129</sup>

The rules of international courts such as the International Criminal Tribunal for the Former Yugoslavia and the International Criminal Tribunal for Rwanda do provide for an explicit right to silence during the investigation period.<sup>130</sup> The Rome Statute of the International Criminal Court goes even further as it does not only provide for the right to silence, but also states that silence cannot be used as 'a consideration in the determination of guilt or innocence'.<sup>131</sup>

**4.5. Prohibition of ill-treatment**

Pre-trial detention should not become a form of punishment or sanction.<sup>132</sup> No solitary confinement or restraining measure shall be imposed on a pre-trial detainee.<sup>133</sup> In general, for 'close confinement' to be allowed, a medical officer has to certify in writing that the prisoner is able to sustain it.<sup>134</sup> Thus it is recognised that, beyond certain limits, solitary confinement may amount to ill-treatment. Further, it is evident that prolonged solitary confinement may be incompatible with international law provisions and the HRC has in fact found violations of Article 10 of the ICCPR in cases of solitary confinement.<sup>135</sup> The HRC has also stated that solitary confinement can lead to a violation of Article 7 ICCPR.<sup>136</sup>

There is jurisprudence which addresses the issue of solitary confinement. For example, the European Court of Human Rights has stated that it can constitute inhuman or degrading treatment, explaining that: '...complete sensory isolation, coupled with total social isolation can destroy the personality and constitutes a form of inhuman treatment which cannot be justified by the requirements of security or any other reason. On the other hand, the prohibition of contacts with the others prisoners for security, disciplinary or protective reasons does not in itself amount to inhuman treatment or punishment'.<sup>137</sup>

Furthermore, medical personnel shall not certify the fitness of prisoners or detainees for any form of treatment or punishment that may adversely affect their physical or mental health.<sup>138</sup> Medical staff shall not participate in any way in the infliction of any such treatment or punishment.<sup>139</sup> It is also a contravention of medical ethics for health personnel to participate in any procedure for restraining a detainee, unless such procedure is necessary for the protection of the physical or mental health or the safety of the detainee, fellow detainees or his guardians, and does not endanger his

128 J Michael and B Emmerson, 'Current Topic: The Right to Silence' *European Human Rights Law Review* 1 no.4 (1995): 6.

129 *Murray v UK*, Application no. 14310/88, ECtHR, 1994.

130 International Criminal Tribunal for Rwanda, Rules of Procedure and Evidence, adopted on 29 June 1995 and amended thereafter, consolidated text dated 31 May 2000, Rule 42; International Criminal Tribunal for the Former Yugoslavia, Rules of Procedure and Evidence, last amended 12 April 2001, Rule 42.

131 Rome Statute of the International Criminal Court (UN Doc A/CONF.183/9) Article 66 (presumption of innocence) and Article 67 (to remain silent, without such silence being a consideration in the determination of guilt or innocence), available at [www.un.org/law/icc/statute/rome/rome.htm](http://www.un.org/law/icc/statute/rome/rome.htm) (accessed 16 April 2014).

132 Human Rights Handbook, para 64.

133 For example, the provisions of the Standard Minimum Rules, such as rule 31 or 32, are applicable to prisoners as well as detainees. As solitary confinement shall not be imposed on pre-trial detainees, it is evident that 'incommunicado detention', a situation where the detainee is in solitary confinement and is not given any access to anyone, not even people outside the prison, such as family members or legal counsel, is not permissible either. For more on this type of detention, see for example the judgment of the Inter-American Court of Human Rights in *Velásquez-Rodríguez v Honduras*, where it stated that 'prolonged isolation and deprivation of communication are in themselves cruel and inhuman treatment, harmful to the psychological and moral integrity of the person and a violation of the right of any detainee to respect for his inherent dignity as a human being. Such treatment, therefore, violates Article 5 of the Convention...' (Series C No 4/1988, para 156). See also the case of *Suárez-Rosero v Ecuador*, in which the same Court stated that '[O]ne of the reasons that incommunicado detention is considered to be an exceptional instrument is the grave effects it has on the detained person. Indeed, isolation from the outside world, in particular with his family, allows the Court to conclude that Mr Suarez-Rosero was subjected to cruel, inhuman and degrading treatment...' (Series C No 35/1997, paras 90–1).

134 Standard Minimum Rules r 32.

135 See for example *Brough v Australia*, UN Doc CCPR/C/86/D/1184/2003, para 9, 4.

136 HRC General Comment 20 (Article 7).

137 Ramirez Sanchez, para 123, citing *Öcalan v Turkey* (GC) (no 46221/99) ECtHR 2005-IV, para 191 and *Ilaşcu and Others v Moldova and Russia* (GC) (no 48787/99) ECtHR 2004-VII, para 432.

138 See for example ICCPR Article 7, which prohibits being subjected to medical or scientific experimentation without free consent.

139 Principle of Medical Ethics Principle 4(b).

physical or mental health.<sup>140</sup> The denial of adequate medical treatment or other basic necessities, such as food, may also amount to ill-treatment and thus is also prohibited under international law.<sup>141</sup>

### *Prohibition of torture*

Along with cruel, inhuman or degrading treatment or punishment, torture is also prohibited under international law.<sup>142</sup> The distinction between the torture and cruel, inhuman or degrading treatment or punishment is one of degree and the generally accepted definition can be found in Article 1 of the CAT.<sup>143</sup> The prohibition of torture has a particular status as it is part of customary international law and is thus binding on all states, in all circumstances; it is even considered as a *jus cogens* norm, which means that it is absolute and non-derogable.<sup>144</sup> Therefore, no exception to this prohibition is acceptable, even in the case of an imminent or grave threat of a terrorist attack for example.<sup>145</sup>

### 4.6. Conditions of detention

A corollary to the prohibition of all kinds of ill treatment is that detainees must be treated with dignity and humanity.<sup>146</sup> This principle is ‘a basic standard of universal application which cannot depend entirely on material resources’.<sup>147</sup> Thus a lack of resources shall not excuse substandard conditions of detention.<sup>148</sup> The conditions of detention must be different than the ones applicable to convicted prisoners, as pre-trial detainees must benefit from a ‘special regime’.<sup>149</sup> This is derived from the presumption of innocence, considered above.

### *Special regime*

International standards require pre-trial detainees to be held separately from convicted prisoners.<sup>150</sup> While pre-trial detainees and convicted prisoners may be kept in the same building, they must be kept in separate quarters.<sup>151</sup> If pre-trial detainees and convicted prisoners are kept in the same building, then contacts (if any) between pre-trial detainees and convicted prisoners must be kept ‘strictly to a minimum’ (for example if convicted prisoners work in the pre-trial detainees’ quarter as food servers or cleaners).<sup>152</sup> Obviously, the separation between male and female, and between adult and young detainees, shall apply in the same way as it shall apply for convicted detainees.<sup>153</sup> Pre-trial detainees shall also

140 Principle of Medical Ethics Principle 5.

141 N Rodley and M Pollard, *The Treatment of Prisoners under International Law*, 407.

142 CAT; ICCPR Article 7.

143 The 1975 General Assembly Resolution on torture said ‘[t]orture constitutes an aggravated form of cruel, inhuman or degrading treatment or punishment’. See the Declaration on the protection of all persons from being subjected to torture and other cruel, inhuman or degrading treatment or punishment, UNGA Res 3452, 1975, Article 1.

See also *Ireland v United Kingdom*, Judgment of the ECtHR of 18 January 1978, Series A, No 25 para 167.

144 ICTY, *Prosecutor v Furundžija* (Case no. IT-95-17/1-T), Judgment of the ICTY of 10 December 1998, para 153: ‘Because of the importance of the values it protects, this principle has evolved into a peremptory norm or *jus cogens*, that is, a norm that enjoys a higher rank in the international hierarchy than treaty law and even ordinary customary rules. The most conspicuous consequence of this higher rank is that the principle at issue cannot be derogated from by States through international treaties or local or special customs or even general customary rules not endowed with the same normative force.’

145 Yuval Ginbar, *Why not Torture Terrorists? Moral, Practical and Legal Aspects of the ‘Ticking Bomb’ Justification for Torture* (Oxford: Oxford University Press, 2008).

146 ICCPR art 10(1); African Charter art 5; Basic Principles for the Treatment of Prisoners principle 1.

147 HRC General Comment No 9, para 1.

148 Poor conditions amounting to violations of the ICCPR include the cell being overcrowded, flooded or without sufficient floor space, lack of natural lighting, insufficient sanitary conditions, lack of adequate food, lack of exercise, constant harassment and persecution, constant surveillance, solitude and isolation and lack of contact with families (See Communication No 25/1978 *Carmen Améndola Massiotti and Graciela Baritussio v Uruguay* (views adopted on 26 July 1982) in Selected Decisions of the Human Rights Committee (Vol 1, 2nd to 16th sessions, United Nations, New York 1985) 136, paras 11 and 13; *David Alberto Cámpora Schweizer v Uruguay* (n 41) paras 11 and 19; Communication No 74/1980 *Miguel Angel Estrella v Uruguay* (views adopted on 29 March 1983) in Selected Decisions of the Human Rights Committee under the Optional Protocol (Vol 2, 17th to 32nd sessions (October 1982-April 1988), United Nations, New York 1990) 93, paras 1.10 and 10; Communication No 92/1981 *Juan Almirati Nieto v Uruguay* (views adopted on ) in Selected Decisions of the Human Rights Committee under the Optional Protocol (Vol 2, 17th to 32nd sessions (October 1982-April 1988), United Nations, New York 1990) 126, paras 1.7 and 11.

149 See Standard Minimum Rules r 84(3).

150 ICCPR art 10(2)(a); Standard Minimum Rules r 8(b), 84 et seq.

151 Communication No 27/1978 *Larry James Pinkney v Canada* (views adopted on 29 October 1981) in *Selected Decisions of the Human Rights Committee* (Vol 1, 2nd to 16th sessions, United Nations, New York 1985) 95, para 30.

152 Communication No 27/1978 *Larry James Pinkney v Canada* (views adopted on 29 October 1981) in *Selected Decisions of the Human Rights Committee* (Vol 1, 2nd to 16th sessions, United Nations, New York 1985) 95, para 30.

153 United Nations Rules for the Protection of Juvenile Deprived of their Liberty, UNGA Res 45/113 (14 December 1990) r 28, 29. HRC

be kept in separate places or separate parts of an institution according to their criminal record, the legal reason for their detention and the necessities of their treatment.<sup>154</sup>

The separation between detainees and prisoners is appropriate because of the necessity to guarantee the presumption of innocence and because, from the special regime detainees benefit, there are a number of rights that would be difficult to guarantee without this separation. These include the right to see their legal counsel, the right to have food brought in from the outside, the right to wear civilian clothes and the right not to be required to work.<sup>155</sup>

#### *Accommodation*

The place of detention and sleeping accommodation for pre-trial detainees should meet all requirements of health, with particular attention paid to:

- climatic conditions;
- cubic content of air;
- minimum floor space;
- lighting (natural);
- heating; and
- ventilation.<sup>156</sup>

It is preferable if detainees have some control over lighting and ventilation so light switches should be found inside the cell and the detainee shall be able to open and close the windows and shutters.<sup>157</sup>

The European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment recommends that the minimum size for prison cell space, for both males and females, should be not less than 6 square metres per prisoner. It further states that in cases of overcrowding, staff should make arrangements to reduce the time spent in their cells. Detainees shall also sleep in single rooms.<sup>158</sup> In any event, they should be provided with a separate bed and separate and sufficient bedding.<sup>159</sup>

#### *Food and water*

Food should be supplied to pre-trial detainees at regular intervals throughout the day.<sup>160</sup> Drinking water should be available to every pre-trial detainee whenever they need it.<sup>161</sup> The European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment suggested that a situation where the last meal of the day is served at 4pm, with nothing to eat or drink until 7.30am the following day, is inappropriate.<sup>162</sup>

The food should be well prepared and well served, as well as nutritional, wholesome and adequate for the detainee's dietary needs.<sup>163</sup> These include those with medical conditions, as well as nursing or pregnant women. The detainees' specific diets for religious or cultural reasons shall also be respected.<sup>164</sup> Where a pre-trial detainee wishes to have at their own expense food of their choice rather than the food provided by the place of detention, they should be able to do so.<sup>165</sup>

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General Comment 20, para 15.

154 Standard Minimum Rules r 8.

155 Human Rights and Prisons, Manual on Human Rights Training for Prison Officials (United Nations, New York and Geneva, 2005) Series No 11, ('Prisons Manual') 184.

156 Standard Minimum Rules r 10.

157 Prisons Manual, 51.

158 Standard Minimum Rules r 86.

159 Standard Minimum Rules r 19.

160 Standard Minimum Rules r 20(1); Human Rights Handbook, para 129.

161 Standard Minimum Rules r 20(2).

162 See for example the Report to the authorities of the Kingdom of the Netherlands on the visit to the Netherlands Antilles carried out by the CPT (26–30 June 1994), para 87, which is available here: <http://www.cpt.coe.int/documents/nld/1996-01-inf-eng-1.pdf> (accessed 16 April 2014).

163 Standard Minimum Rules r 20(1); Human Rights Handbook, paras 129–30.

164 Prisons Manual, 55.

165 Standard Minimum Rules r 87.

*Medical care*

All detainees have the right to physical and mental health and thus to free access to the health services available in the country, in the same way as if they were not in detention, or to the doctor of their choice.<sup>166</sup> Decisions about their health should be taken only on medical grounds by medically qualified people and these people have a duty to provide them with the same care as would be provided to a non-detainee.<sup>167</sup> The medical staff shall be independent from the authorities supervising the detention.

In addition, when a detainee is sick or is complaining of illness, the medical officer shall attend to this detainee on a daily basis. In the event that the medical staff deems that the detention has affected or will injuriously affect the physical or mental health of the detainee, the director of the detention centre needs to be informed.<sup>168</sup>

It must be made clear to detainees that medical care is available to them as soon as needed. Specific care, such as to respond to the needs of female detainees, who may be pregnant, or to the needs of persons with disabilities, has to be available as well.

*Hygiene*

Pre-trial detainees should be provided with water and toiletries to keep themselves healthy and clean.<sup>169</sup> Bathroom facilities, including shower and bathing installations using water at a temperature that is suitable to the climate, shall be clean and decent. Care should be taken that the requirements of hygiene are not used as a cloak for imposing discipline.<sup>170</sup> The bedding provided to detainees should be clean and changed regularly to ensure its cleanliness.<sup>171</sup>

*Clothing*

A pre-trial detainee should be allowed to wear their own clothes unless such clothes are not clean or fit for use.<sup>172</sup> If it is not allowed, a clean outfit which is suitable for the climate and adequate to keep the detainee in good health should be provided.<sup>173</sup> Such outfit should not be degrading or humiliating and should be different from the outfit supplied to convicted detainees.<sup>174</sup> All clothing should be kept in proper condition and underwear should be changed and washed regularly to maintain hygiene.<sup>175</sup> A pre-trial detainee being removed outside the place of detention should always be allowed to wear their own clothes or other inconspicuous dress.<sup>176</sup>

*Property*

All belongings of a pre-trial detainee, including any money or effects received for them from outside, should be placed in safe custody and kept in good condition if they are not allowed to keep them.<sup>177</sup> An inventory of the detainee's belongings should be made and signed by the detainee.<sup>178</sup> On their release, all such belongings, except money spent, any property sent out of the place of detention or any article of clothing destroyed on hygienic grounds, should be returned to the detainee.<sup>179</sup>

**4.7. Other human rights***Right to vote*


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166 Basic Principles for the Treatment of Prisoners, Principle 9; UDHR art 25(1).

167 Principle of Medical Ethics principle 1. Prisons, Manual, 65.

168 Standard Minimum Rules r 25.

169 Standard Minimum Rules r 15.

170 Prisons Manual, 77.

171 Standard Minimum Rules r 19.

172 Standard Minimum Rules rr 18 and 88(1).

173 Standard Minimum Rules r 17(1).

174 Standard Minimum Rules rr 17(1) and 88(2).

175 Standard Minimum Rules r 17(2).

176 Standard Minimum Rules r 17(3).

177 Standard Minimum Rules r 43(1) and 43(3).

178 Standard Minimum Rules r 43(1) and 43(3).

179 Standard Minimum Rules r 43(2) and 43(3).

According to international law, every citizen shall have the right to vote except in the event of reasonable restrictions.<sup>180</sup> A conviction by a court of law may be considered by a government as a reasonable restriction to the right to vote. In such case, the law must clearly indicate the situations in which a citizen may lose its right to vote.<sup>181</sup> However, it is worth noting that the European Court of Human Rights reaffirmed in 2012 its view that blanket exclusion of all convicted prisoners from voting is illegal.<sup>182</sup> In the case of detainees, the situation is absolutely clear and the HRC has stated that they should not be excluded from exercising the right to vote.<sup>183</sup>

Note that it is a violation of Article 9(1) ICCPR to keep persons in detention simply on grounds of their political opinions.<sup>184</sup> It is crucial that detention is not used as a means to attempt to change the outcome of democratic elections processes.

### *Right to freedom of religion*

The religious beliefs and moral precepts of pre-trial detainees have to be respected.<sup>185</sup> Thus all detainees have the right to observe their religion and to have access to a qualified representative of that religion.<sup>186</sup> Ideally, the religious representative should not be a member of the detention centre's staff but come from the local community. Detainees shall also be able to attend the religious services provided in the institution and possess religious material, such as books.

Where reasonably possible, places of detention should provide detainees with special diets required by their religious beliefs and cultural preferences.<sup>187</sup> Detainees should also be given the opportunity to observe other requirements of their religion, such as particular clothing or specific ways of praying or washing.<sup>188</sup>

### *Right to education and/or work*

All detainees shall have the right to take part in cultural activities and education aimed at the full development of the human personality.<sup>189</sup> Detainees shall be able to take part in all cultural, recreational (sport) and educational opportunity available to the benefit of the prisoners' physical and mental health. Education would include, for example, access to a library.<sup>190</sup> The European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment has stated that pre-trial detainees should be provided with a satisfactory programme of activities so that they can positively spend their time during the eight hours or more each day. Most of this time should be spent outside their cells. In any case, pre-trial detainees should not be ignored because of the possible transient nature of their detention.<sup>191</sup>

Pre-trial detainees shall not be forced to work. However, they should have an opportunity to do so if they wish. Their work should be remunerated.

### *Right to non-discrimination*

As in most prison systems minority groups are often significantly overrepresented, it is important also to consider the international legal obligations in term of non-discrimination. Both CERD and CEDAW contain provisions on the prohibition of discrimination on the basis of race (including colour, national or ethnic origin) or gender.<sup>192</sup> Thus all individuals, whether in detention or not, must be free from discrimination as this right has to be guaranteed by the state on its entire territory.<sup>193</sup>

180 Art 25(b) ICCPR.

181 Furthermore, the reasons for such deprivation have to be 'objective and reasonable'. If it is the conviction for an offence which serves as a basis for suspending the right to vote, the period of such suspension should be proportionate to the offence and the sentence.

182 European Court of Human Rights, Case of Scoppola v Italy (No 3) (Application no 126/05), Judgment of 22 May 2012.

183 HRC General Comment No 25, para 14. See also M Leech, D Cheney, *The Prison Handbook*, 286.

184 Communication No 132/1982 *M Jaona v Madagascar* (Views adopted on 1 April 1985) UN doc GAOR A/40/40, 186, para 14.

185 Standard Minimum Rules r 6(2), r 41, r, 42.

186 Prisons Manual, 107

187 Human Rights Handbook, para 130.

188 Prisons Manual, 108.

189 Basic Principles for the Treatment of Prisoners, Principle 6.

190 Prisons Manual, 103.

191 Ibid, 186.

192 All instruments against discrimination are applicable to detainees. In addition to the Conventions, this also includes the following declarations: the Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief, the Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities, and the Declaration on the Human Rights of Individuals Who are not Nationals of the Country in which They Live.

193 Body of Principles, Principle 5.



#### 4.8. Women in detention

The Body of Principles is applicable in its entirety without discrimination, which means that measures applied in accordance with the law and designed to protect the rights and special status of women, especially pregnant women and nursing mothers, shall not be deemed to be discriminatory'.<sup>194</sup>

As mentioned above, detention in pre-trial procedures must be a last resort mechanism. The last resort principle must be particularly closely considered when assessing women, as they may be less likely to present a risk for society and should, therefore, only be detained in exceptional circumstances. Whether the woman in question has dependents must be taken into account when deciding on pre-trial detention. Also, it is important that women who have been raped, who are escaping marriage or who have had extra-marital intercourse (in those states where it is an offence) are not automatically placed in pre-trial detention.<sup>195</sup>

If detention is deemed mandatory for a woman who has been arrested, the Standard Minimum Rules apply and state that detainees of different gender shall be kept in separate institutions or parts of institutions; in an institution which holds both men and women in detention, the whole of the premises allocated to women shall be entirely separate.<sup>196</sup> Facilities for female detainees shall respond to the same standards as the ones for male detainees.

The Standard Minimum Rules also include special requirements to respond to instances of pregnancy, childbirth and childcare.<sup>197</sup> Thus there shall be special accommodation for all necessary pre-natal and post-natal care treatment and arrangements shall be made wherever practicable for babies to be delivered in a hospital outside the place of detention. If a child is born in a detention centre, it shall not be mentioned in the birth certificate. Where nursing infants can remain in the institution with their mothers, provision shall be made for a nursery staffed by qualified persons, where the infants shall be placed when they are not in the care of their mothers.

Moreover, female detainees should be supervised exclusively by female staff and should never be in a situation where there is a risk of abuse or harassment by male members of staff.<sup>198</sup> This is an important factor as all international standards provide for this requirement, which shows that many women held in detention have been victims of physical or sexual abuse by men or have committed an offence in response to male aggression or exploitation.<sup>199</sup> As, in general, men dominate detention centres, particular care should be taken in order to ensure that the human rights of women are protected. Their needs shall also be met and for example, they should also be able to make gender adequate choices in relation to their programme of activities (including for education and work possibilities).

#### 4.9. Vulnerable persons in detention

In its Handbook on Prisoners with Special Needs,<sup>200</sup> the UN Office on Drugs and Crime has identified different groups of prisoners who, given their vulnerable status in detention, require additional consideration, including:

- persons with mental health care needs;
- persons with disabilities;
- ethnic and racial minorities and indigenous peoples;
- foreign nationals;
- lesbian, gay, bisexual, and transgender (LGBT) persons;
- older persons;

<sup>194</sup> Body of Principles, Principle 5.

<sup>195</sup> On all these issues, see the UNODC Handbook for Prison Managers and Policymakers on Women and Imprisonment (United Nations, 2008) at 85–88, which is available at [http://www.unodc.org/pdf/criminal\\_justice/Handbook\\_on\\_Women\\_and\\_Imprisonment.pdf](http://www.unodc.org/pdf/criminal_justice/Handbook_on_Women_and_Imprisonment.pdf) (accessed 16 April 2014).

The Handbook further mentions that pre-trial detention should not be used as a form of 'protective custody' for women.

<sup>196</sup> Standard Minimum Rules r 8.

<sup>197</sup> Standard Minimum Rules r 23.

<sup>198</sup> See the Standard Minimum Rules.

<sup>199</sup> Prisons Manual, 154.

<sup>200</sup> The Handbook on Prisoners with Special Needs (United Nations, 2009) is available at [http://www.unodc.org/pdf/criminal\\_justice/Handbook\\_on\\_Prisoners\\_with\\_Special\\_Needs.pdf](http://www.unodc.org/pdf/criminal_justice/Handbook_on_Prisoners_with_Special_Needs.pdf) (accessed 16 April 2014).

- persons with terminal illness; and
- persons under sentence of death.

While the last category refers strictly to convicted prisoners, all other categories of persons should also be specifically considered when analyzing the human rights standards applicable to pre-trial procedures. The above list is not exhaustive and additional categories may be added, such as, for example, persons with drug dependency.

As in the case with women, alternatives to detention must be carefully considered with regard to all categories of vulnerable persons mentioned above. In fact, it is rare that a detention centre is able to meet the requirements of these individuals. As a result, pre-trial detention shall only be used in exceptional circumstances, as a last resort mechanism, in such instances.

#### 4.10. Emergency situations

International law has rendered certain human rights non-derogable, even in time of public emergency threatening the life of the nation.<sup>201</sup> For a derogation to be possible, the emergency in question must be grave and at least involve a violent assault.<sup>202</sup> The derogation measures must also be proportional and thus not exceed what is strictly required by the situation.<sup>203</sup> The measures shall then be the least stringent available to alleviate or end the emergency situation.<sup>204</sup>

As mentioned above, the right to freedom from torture and ill-treatment is one of them. However, other rights mentioned in this section, such the right to liberty and security of person and the prohibition of arbitrary arrest and detention, the right to challenge arrest or detention, and the right to humane and respectful treatment, are not listed among the non-derogable rights, which means that these rights are able to be limited in times of public emergency.<sup>205</sup> Among the regional treaties, only the Arab Charter expressly renders the right to challenge the lawfulness of detention as being non-derogable and only the Inter-American Convention on Human Rights renders the right to humane and respectful treatment as being non-derogable.

Nevertheless, the HRC has stated, with regard to incommunicado detention and arbitrary deprivations of liberty in times of emergency, that “although this right, prescribed in article 10 of the Covenant, is not separately mentioned in the list of non-derogable rights in article 4, paragraph 2, the Committee believes that here the Covenant express a norm of general international law not subjected to derogation”.<sup>206</sup> As a result, according to the interpretation of the treaties in practice, prolonged incommunicado detention and arbitrary deprivation of liberty are not permissible in emergency situations.

In the event of an armed conflict, international human rights law continues to apply, together with international humanitarian law.<sup>207</sup> As a result, they remain unlawful in all circumstances. However, a discussion of those laws is outside the remit of this research.

#### 4.11. End of pre-trial detention

Finally, according to international law, detainees must be ‘tried without undue delay’.<sup>208</sup> The HRC has stated that this guarantee must apply not only to the time by which a trial should be initiated but also to the time by which the judgment should be rendered (‘within a reasonable time’).<sup>209</sup> It has further stated that what constitutes ‘reasonable time’ needs to be determined on a case by case basis. For example, the lack of financial resources for the administration of criminal justice, the fact that criminal investigations are carried out by written proceedings, the seriousness of the alleged offence or the need for continued investigation cannot justify unreasonable delays in procedures leading to

201 ICCPR art 4.

202 HRC General Comment No 29 para 3.

203 Ibid, para 4.

204 For example, the European Commission of Human Rights rejected the claim of the Greek government to invoke a state of emergency as the situation was not severe enough, see *The Greek Case* (1969), 12 Yearbook of the European Convention on Human Rights, 76 and 100.

205 Note however that the Principles of Medical Ethics are all non-derogable ‘on any ground whatsoever, including public emergency’ (Principle 6).

206 HRC General Comment No 29 para 13.

207 Ibid, para 3.

208 Art 14 (3) ICCPR.

209 HRC General Comment No 13, para 10.

prolonged detention.<sup>210</sup> As a result, pre-trial detention should thus be ‘as short as possible’.<sup>211</sup> The ACommHPR has stated that indefinite detention of persons is ‘arbitrary as the detainee does not know the extent of his punishment’.<sup>212</sup>

### *Remedies*

Once a judgment is given, the detainee shall either be sent to prison or be released immediately. If the arrest or detention was unlawful, the individual concerned shall have appropriate means of redress. According to international law, ‘anyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation’.<sup>213</sup>

## **5. Commonwealth civil law systems**

While the vast majority of Commonwealth states operate under a common law system, there are four Commonwealth States which have a criminal system that is based on, or has been influenced by, civil law: Cameroon, Mauritius, Mozambique and Rwanda. A brief summary of each state is given here:

- While Cameroon’s legal system is largely based on civil law, it included for decades two regions operating under a common law system. Both systems were in place until a harmonization process was conducted, leading to the adoption of the 2005 Criminal Procedure Code.
- In Mauritius, which was under both French and British rule, the system is predominantly based on common law with regard to criminal procedure law.
- Mozambique, once it gained independence from Portugal, repealed its former legal system until it was revived through law reforms. Thus Mozambique’s legal system regarding criminal law is now largely based on civil law. In addition, customary law has played a significant role in the administration of justice of Mozambique and it is recognised at the constitutional level.<sup>214</sup>
- Rwanda has a civil law system by tradition, having inherited the Belgian legal system. However, following important judicial reforms introduced in 2004, it has moved towards a hybrid system, which incorporates certain common law concepts.<sup>215</sup>

This section highlights the criminal law areas having implications for pre-trial detention which present the most differences between the civil law and common law systems, through a focus on the experiences across these four states. In particular, it examines the issues with regard to the authority which can authorise an arrest warrant and consider the alternatives to detention, including the possibility of bail. There is then a brief summary of the possible influence of customary norms in these four jurisdictions. It should be recalled that the human rights considered above, such as the right to legal representation and the right to a prompt trial, are all applicable no matter the type of jurisdiction.

### **5.1. Civil law**

Criminal procedures in a common law system follow an accusatorial process whilst those in a civil law system are inquisitorial.<sup>216</sup> The criminal procedure in the civil law system is said to be inquisitorial because of the active role played by the judge in the conduct of the trial, and often, in the investigative process. Criminal proceedings in the civil law system include an extensive pre-trial investigation, conducted by a judge or by a public prosecutor. In contrast, the

210 *Fillastre v Bolivia*, Communication No 336/1988.

211 HRC General Comment 8, para 3.

212 Communications Nos 25/89, 47/90, 56/91 and 100/93 *World Organisation against Torture v Zaire* [1996] ACHPR decision adopted during the 19th session, March 1996, para 67: person detained indefinitely after having protested against torture.

213 Art 9(5) ICCPR.

214 Art 4, 2004 Constitution of Mozambique: ‘The State recognises the different normative and dispute resolution systems that co-exist in Mozambican society, insofar as they are not contrary to the fundamental principles and values of the constitution’.

215 While the civil law may still for now predominate, there is the caveat that ‘though criminal law had universal application, written civil laws were applied only to whites. Customary law continued to apply to the natives. Hence the current Rwanda civil law legal system is based on German and Belgian civil law systems and customary law’. See Eunice Musiime, ‘Rwanda’s Legal System and Legal Materials’ (April 2007) available at <http://www.nyulawglobal.org/globalex/rwanda.htm> (accessed 16 April 2014).

216 M Delmas-Marty and JR Spencer, *European Criminal Procedures* (Cambridge: Cambridge University Press, 2002) 5.

role of the court in the accusatorial system is limited to governing the process of the trial and deciding on a verdict, and thus the division between investigating and judging a case is particularly clear.<sup>217</sup> The interviewing of witnesses, the gathering and testing of scientific evidence, the selection of evidence to be laid before the court, the decision as to what charges shall be brought and the conduct of the prosecution may be entirely under the control of the police in the common law system.<sup>218</sup> In that system, the public prosecutor does not direct the police during the investigation, and thus the role and power of the police is greater than in civil law jurisdictions.<sup>219</sup> With regard to coercive measures, in both criminal systems it is, in principle, only the judicial authority which has the power to authorize them, either by placing a restraining order on the accused or by keeping the accused in custody until the case comes to trial. The supervision of such measures is carried out by the public prosecutor in civil law jurisdictions.

In general, criminal proceedings run more speedily in common law states than they do in civil law states, where the cases that are complicated have traditionally involved a prolonged pre-trial investigation stage. In addition, the availability of guilty plea in a common law system, which shortens the duration of proceedings, has generally not been adopted by civil law jurisdictions.<sup>220</sup> However, there are other mechanisms used in civil law jurisdictions to reduce the length of some proceedings, such as trials without preliminary hearings.<sup>221</sup> Nevertheless, aside from the availability of a guilty plea, there are many procedures that were specific to one of the two legal traditions but which have now been introduced in the other. For example, while habeas corpus was originally only present in common law jurisdictions, it is now present in almost all jurisdictions around the world.

#### *Safeguards against arbitrary arrest and detention*

In the common law system it is generally easier to procure an arrest warrant than it is at civil law as that power is usually vested in a police officer (with some exceptions such as a justice of the peace). Some common law jurisdictions, such as England, have tended to move the right to procure a warrant away from the first point of contact (i.e. the police force) to reduce the chance for human rights violations.<sup>222</sup> Also police officers usually have the power to arrest and detain individuals (at least for short period) for alleged offences of a lesser gravity.

In civil law systems police officers must generally justify to a judicial authority why an arrest warrant must be issued. Thus the civil law approach should result in less arbitrary detention taking place. For example, in Rwanda the Criminal Procedure Code states that pre-trial detention must necessarily be ordered by the judge. This detention is further submitted to a range of limits, such as a maximum period of one month for minor offences, up to six months for offences and twelve months for crimes. For a person to be arrested without a warrant, the offence allegedly committed must be of a certain level of gravity. In addition, following the arrest, the necessary information must immediately be given to the public prosecutor. Article 37 of the Criminal Procedure Code states that '[T]he Judicial Police Officer records a statement of the arrest in four (4) copies, one of which is immediately transmitted to the competent public prosecutor, another is filed in the criminal case file, another given to the in-charge of the remand prison and the last given to the accused'. This is in accordance with the civil law approach, which takes the investigative authority away from the police force. Indeed, in Cameroon, there was criticism when the (then) Draft Criminal Procedure Code proposed that the power to issue arrest warrants should be in the hands of the state counsel or judicial police and not a judge.<sup>223</sup>

#### *Habeas corpus*

As mentioned earlier in this section, habeas corpus is a procedure which originates in the common law but is now present in civil law jurisdictions. It is protected under the ICCPR.<sup>224</sup> It has been defined as:

[A] judicial remedy designed to protect personal freedom or physical integrity against arbitrary decision by means of a judicial decree ordering the appropriate authorities to bring the detained person before a judge

<sup>217</sup> Ibid, 20.

<sup>218</sup> Mary Ann Glendon, Michael Wallace Gordon and Chris Osakwe, *Comparative Legal Traditions* (St. Paul, MN: West Publishing Co, 1985) 520–1.

<sup>219</sup> M Delmas-Marty and JR Spencer, *European Criminal Procedures*, 160–1.

<sup>220</sup> Ibid, 163.

<sup>221</sup> Ibid, 370–1.

<sup>222</sup> See for example section 1 of the Magistrates' Court Act 1980, which gives this power to a justice of the peace.

<sup>223</sup> International Bar Association, 'Review of the Draft Criminal Procedure Code of Cameroon' (Report, June 2003), available at [http://www.ibanet.org/Human\\_Rights\\_Institute/HRI\\_Publications/Country\\_reports.aspx](http://www.ibanet.org/Human_Rights_Institute/HRI_Publications/Country_reports.aspx) (accessed 16 April 2014).

<sup>224</sup> Art 9(4) ICCPR provides: 'Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful'.

so that the lawfulness of the detention may be determined and, if appropriate, the release of the detainee be ordered.<sup>225</sup>

Until 2007 habeas corpus was available only sporadically throughout Cameroon. The availability of habeas corpus in the two Anglophone regions provided those citizens with recourse during lengthy pre-trial detention. Yet it was not available in the Francophone areas. New legislation incorporated habeas corpus so that throughout Cameroon detained individuals have now recourse to have the legality of their detention examined.<sup>226</sup>

In Mozambique, Article 102 of the 1990 Constitution provides for habeas corpus as it states that “[I]n case of illegal imprisonment or detention, citizens, shall have the right to interpose a writ of habeas corpus.” This writ of habeas corpus shall be presented before a court, and the details of the procedure shall be fixed by law.<sup>227</sup>

#### *Length of pre-trial detention*

It appears from these civil law systems that the length of pre-trial detention has been longer than the average for common law jurisdictions. In Cameroon, the 2007 Code moves away from the civil law provisions that previously applied with regard to the maximum detention period in police custody, reducing it to a maximum of 6 days. This includes the first 48 hours limit, a duration which can be renewed once without the consent of the State Counsel and once more with the consent of the State Counsel, thus possibly amounting to 6 days.<sup>228</sup> The 48-hour time limit in police custody may also be extended depending on the distance between the place of arrest and the place of detention, a mechanism which has been criticized by the Committee against Torture.<sup>229</sup> In prison, the detention period shall not exceed six months as stated in Article 221 of the Criminal Procedure Code. This time limit can also be extended by the examining magistrate for another six months in the case of a misdemeanor or another twelve months in the case of a felony.

In Rwanda, according to Article 9 of the Law No. 20/2006 of 22 April 2006, the duration of detention for the purpose of the investigation by the police or by the prosecution service is limited to 72 hours and it cannot be extended.<sup>230</sup> The Article adds that ‘[A]ny person against whom there is no sufficient evidence to suspect that he or she committed or attempted to commit an offence shall immediately be released’. This change in the legislation appears to have been a move away from the civil law tradition as previously the 72-hour period seems to have been renewable for an extended length of time. Once this period in custody is over, the pre-trial detention period is ordered by the judge, with the maximum period of one month for minor offences, up to six months for offences and twelve for crimes. This is comparable with the limitations given in Cameroon.

#### *Right to counsel and legal aid*

In Cameroon, Section 417 of the Criminal Procedure Code 2007 states that the presiding judge shall assign legal counsel for any accused being prosecuted for a felony punishable with death or with life imprisonment. Here, the Code abandons the Code d’Instruction Criminelle’s stipulation that all indigent accused persons in criminal matters be assigned counsel automatically. The abandonment of this aspect of Cameroon’s civil law past in favour of a stipulation that the automatic appointment of counsel applies only to those ‘prosecuted with felonies punishable with death or loss of liberty for life’ is only sound as far as it goes, as it discriminates against other detainees and so is contrary to the rule of law.

#### *Bail*

In most of the common law jurisdictions, the criteria relating to when a person may be detained can be affected by the rules relating to the granting of bail. Through this mechanism, a person accused of an offence may be released by a magistrate or police officer, with or without conditions, until the start of the trial. The right to bail is granted, except when the accused might abscond, might commit a criminal offence or might interfere with witnesses or with the course

225 Habeas Corpus in Emergency Situations (Arts. 27(2) and 7(6) of the American Convention on Human Rights. Advisory Opinion OC-8/87, 30 January 1987, Inter.-Am.Ct.H.R. (Ser. A) No. 8 (1987) at para. 33.19

226 Section 583(1) reads: ‘The President of the High Court of the place of arrest or detention of a person or any other judge of the said court shall be competent to hear applications for immediate release based on grounds of illegality of arrest or detention or failure to observe the formalities as provided by law.’

227 Art 102(2) Constitution of Mozambique.

228 Act No 90/054 of 19 December 1990.

229 See the Committee Against Torture, ‘Conclusions and recommendations of the Committee against Torture: Cameroon 05/02/2004’ CAT/C/CR/31/6, available at <http://www.unhcr.ch/tbs/doc.nsf/%28Symbol%29/CAT.C.CR.31.6.En?Opendocument>.

230 Law modifying and complementing the law no 13/2004 of 17 May 2004 relating to the code of criminal procedure, available at [http://www.primature.gov.rw/index2.php?option=com\\_docman&task=doc\\_view&gid=341&Itemid=95](http://www.primature.gov.rw/index2.php?option=com_docman&task=doc_view&gid=341&Itemid=95) (accessed 16 April 2014)

of justice. Other reasons for not granting bail may be to protect the accused, to give time to a court to make a decision, or if the accused is already on bail for another offence.<sup>231</sup>

This measure has not been traditionally part of the criminal law systems of civil law jurisdictions. However, there have been over the last decades, a trend towards the introduction of such mechanism. For example, in Cameroon, one of the key changes introduced by the 2007 Code was the introduction of bail throughout the entire territory.

In Mauritius, the approach taken is that detainees are to be 'released on bail unless there are compelling reasons not to do so'.<sup>232</sup> Section 4 of the Bail Act 1999 indicates that if reasonable grounds exist for believing the suspect 'is likely to fail to surrender to custody, or commit an offence or obstruct the course of justice', bail would be refused. If bail is refused then section 4(b) requires that those refused bail must be brought to court once more within 21 days. With the general burden being placed on the prosecutor to indicate reasons why bail should not be granted, there is an increased chance of the human rights of the accused being protected. Though continued reappraising of the case can impose bureaucratic problems on the judiciary and actually slow the system, i.e. the sooner the detention must be re-examined the more clogged the system can become. The tendency in the common law systems has been to have regular periods of re-examination and to provide individuals with recourse under habeas corpus.

## 5.2. Customary law

It is of note that customary law does not play an important role with regard to criminal procedures in any of the states considered.<sup>233</sup> It appears that, officially at least, customary law has been removed in almost all Francophone African states, with the exception of Cameroon.<sup>234</sup> Yet customary law has had a limited impact on criminal justice in Cameroon, as the Cameroon Supreme Court established in 1972 that for the requirements for customary law to be applicable: 'it must exist, be clear and precise and above all confirm to public order and good morals'.<sup>235</sup> In Mozambique, customary law has played a significant role in the administration of justice and it is even recognised on a constitutional level,<sup>236</sup> but has not been actively applied in the criminal justice system, though there is a sense that while there is 'a position of vigilant criticism of customary law, in its normative dimension, is complemented with a position of active support in relation to its institutional dimension'.<sup>237</sup> Yet, it is important to highlight that human rights standards have to be upheld even when customary law applies, for instance with regard to gender equality. Customary justice must therefore also abide by the human rights obligations considered above.

## 6. Conclusions

It is evident that the number of those who are in detention without trial around the world is significant, as being nearly 34% of the prison population. This situation is very similar across the Commonwealth. It is clear that in some Commonwealth states pre-trial detainees can amount to more than half of the total prison population, with instances of some individuals spending several years before being heard by a court of law.

It has been shown that there are many international standards applicable to pre-trial detention. Treaties, such as the ICCPR, contain important human rights norms which protect individuals before, during and after pre-trial detention periods, such as the freedom from arbitrary arrest or the freedom from torture. Other international instruments set out clear standards by which those in detention should be treated so as to ensure that their human rights are protected.

231 M Delmas-Marty and JR Spencer, *European Criminal Procedures*, 208.

232 HRC, 'Consideration of Reports Submitted by States Parties Under Article 40 of the Covenant. Fourth periodic report: Mauritius' (24 May 2004) CCPR/C/MUS/2004/4.

233 Paul Kuruk, 'African Customary Law and the Protection of Folklore' *Copyright Bulletin* 36 no.2 (2002): 'Customary law consists of the indigenous customs of traditional communities... [and] for the most part, the rules are unwritten... Customary laws are not uniform across ethnic groups [as they tend to be similar among groups speaking the same language but can also be very different and can change with the social and economic conditions]... [O]ne of the most striking features of native custom is its flexibility, it appears to have been always subject to motives of expediency, and it shows unquestionable adaptability to altered circumstances without entirely losing its character'. See also S Roberts, 'Some Notes on "African Customary Law"' *Journal of African Law* 28 no.1 (1984).

234 Jacques Frémont, 'Legal Pluralism, Customary Law and Human Rights in Francophone African Countries' *VUWLR* 40: 149 (2009). As to former Portuguese colonies, see Narana Coissoro, 'African Customary Law in the Former Portuguese Territories, 1954–1974' *Journal of African Law* 28 no.1/2 (1984): 172.

235 Moïse Timtchueng, 'The Gradual Disappearance of the Particularities of Traditional Courts in Cameroon' October 2005, Open Society Institute Africa Governance Monitoring and Advocacy Project at 4, available at [http://www.afrimap.org/english/images/paper/Timtchueng\\_Cameroon\\_ENfn.pdf](http://www.afrimap.org/english/images/paper/Timtchueng_Cameroon_ENfn.pdf) (accessed 16 April 2014).

236 Art 4 of the 2004 Constitution: 'The State recognises the different normative and dispute resolution systems that co-exist in Mozambican society, insofar as they are not contrary to the fundamental principles and values of the constitution'.

237 Boaventura de Sousa Santos, 'From Customary Law to Popular Justice', *Journal of African Law* 28 no.1/2): 90–8 (1984).

These standards apply to common law and civil law jurisdictions, and the criminal procedures and processes in each system are becoming more similar.

Indeed, it appears that in the four Commonwealth States which follow a civil law based (or hybrid) criminal procedure, the traditional differences between civil law and common law approaches have been blurred. For example, the trend toward the adoption of stricter rules regarding who can issue of arrest warrants has been followed in many common law jurisdictions. This shows an entrenchment of the civil law approach to criminal proceedings which take powers of decision making away from the police and to a judicial authority. In comparison, habeas corpus and bail, two traditionally common law concepts, have found their way into some civil law based jurisdictions. This is particularly interesting to observe in Cameroon, where both legal traditions were distinct – common law in the Anglophone regions and civil law in the French regions – until the harmonization brought with the Criminal Procedure Code 2007. This indicates a trend towards the adoption of the measures, whether from a civil law or common law origin, which are more likely to protect the human rights of the detainee.

International legal supervision of the application of human rights protection of detainees in Commonwealth states would be considerably enhanced if all states ratified the key international human rights treaties, including the First Protocol of the ICCPR and the Optional Protocol to CAT. The former is of particular importance, as a major issue with regard to pre-trial detention is that it is not systematically considered by many states as an option of last resort. Therefore, any additional safeguards to guarantee the rights contained in the ICCPR, such as the right to be brought promptly after arrest before a judge or another authority, should reduce the immediate recourse to pre-trial detention that is currently evident. The latter gives the UN Subcommittee on the Prevention of Torture and other Cruel, Inhuman or Degrading Treatment or Punishment the right to visit and examine places of detention in member states. While this Subcommittee obliges states to put in place mechanisms to examine the treatment of detainees, it also supports and advises these national mechanisms, which can be helpful.

The continued development across the Commonwealth of the practice that only a judicial authority can issue an arrest warrant is a good method to protect some of the human rights of detainees. This offers an additional guarantee against arbitrary arrests, though recognising that issues of corruption and lack of independence – contrary to the rule of law – also need to be overcome. This should be accompanied by legislation that clearly sets out all the alternatives to detention, such as parole, bail, and home confinement, and that these are used. Indeed, all states need to be encouraged to limit the overall maximum duration of pre-trial detention. Although there is no international binding law on what constitutes the maximum acceptable duration of a detention period,<sup>238</sup> rules at the national level provide guarantees so that pre-trial detention is not unduly extended.

There are also a number of administrative and practical actions that can occur that would protect the human rights of detainees. These include: to respect the separation between pre-trial and convicted individuals; to respect the separation between male and female detainees; and to respect the separation between detainees depending on the gravity of the charges against them. The detention facilities should comply with international hygienic and health standards, including appropriate washing facilities, clean bedding, single occupancy cells, and appropriate subsistence, as well as access to medical care.

While the above changes may necessitate additional resources for implementation by the police or prison authorities, there are some practical actions that are less demanding in terms of resources. These are: guaranteeing visits to pre-trial detainees during working hours; ensuring that any correspondence between the detainee and their legal counsel remains confidential; guaranteeing the right to vote to all pre-trial detainees (for example by setting up a temporary polling station in the detention centre); allowing detainees to obtain food from the outside if it is available to them; and allowing detainees to wear their civilian clothing.

One particularly important practical action that should be taken is that detainees be made aware of their rights from the time of their arrest. At the time of arrest, police officers should inform them of the reasons of their arrest and their right to seek legal counsel. Of particular benefit would be the drafting of a handbook, which could be given to all pre-trial detainees. This manual would need to be accessible and could be read to them in cases of illiteracy. For example, in 2008 the Mauritius government produced and distributed to convicted prisoners a manual, informing them in English, French and Creole of their rights and duties and the disciplinary measures under the Prisons Regulations 1989.<sup>239</sup> Such a manual could also be distributed to pre-trial detainees, with necessary modifications to reflect their status as innocent persons.

Such actions would assist in the protection of detainees' human rights. It would also assist in the clarification, as established by this article, of better practices for pre-trial police investigation and prison use, including police arrest

238 Art 9 ICCPR only states that '[A]nyone 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' (emphasis added).

239 National Human Rights Commission (Mauritius), *Annual Report for the Year 2007* (National Human Rights Commission, Port Louis 2008) para 123; National Human Rights Commission (Mauritius), *Annual Report for the Year 2008* (National Human Rights Commission, Port Louis 2009) para 79.

## Appendix

and investigation methods, and conditions of pre-trial detention, for all those who are detained and have not been convicted of an offence.

### Table of prison population in the Commonwealth

The following table has been devised to set out the various percentages relating to the prison population in all Commonwealth Member State jurisdictions as at February 2013.<sup>1</sup>

The first column indicates the percentage of detainees (pre-trial and on remand) in relation to entire prison population in these States. The date of the available figures for each Member State is given in the table below.

STATE <sup>2</sup>	Pre-trial detainees/ remand prisoners (percentage of prison population)	Prison population total (including pre-trial detainees/remand prisoners)	Prison population rate (per 100,000 of national population)	Female prisoners (percentage of prison population)	Occupancy level (based on official capacity)
Antigua and Barbuda (35)	54.8% (December 2012)	361 (December 2012)	397 (December 2012)	4.7% (December 2012)	240.7% (December 2012)
Australia (125)	23.4% (30.6.2012)	29,383 (30.6.2012)	130 (end of June 2012)	7.5% (30.6.2012)	105.9% (30.6.2000)
The Bahamas (56)	c. 46% (2011)	1,300 (at 2011)	371 (at mid 2011)	1.8% (October 2002)	111.8% (2009)
Bangladesh (14)	69.0% (19.9.2008)	64,255 (14.11.2012)	38 (November 2012)	3.4% (31.12.2011)	192.2% (14.11.2012)
Barbados (81)	37.2% (31.8.2009)	1,032 (November 2011)	377 (November 2011)	3.5% (November 2011)	82.6% (November 2011)
Belize (99)	30.3% (9.2.2012)	1,324 (at May 2012)	407 (at May 2012)	2.6% (9.2.2012)	67.1% (9.2.2012)
Botswana (157)	17.0% (2.9.2009)	c. 5,063 (at December 2010)	c. 252 (at December 2010)	4.1% (2.9.2009)	131.5% (2.9.2009)
Brunei Darussalam (197)	9.1% (mid-2011)	427 (mid-2011)	105 (mid-2011)	9.6% (mid-2011)	132.8% (13.8.2007)
Cameroon (28)	60.7% (31.7.2008)	23,368 (31.12.2009)	119 (end 2009)	2.7% (December 2003)	153.2% (31.12.2009)
Canada (82)	37% (average, year to 31.3.2009)	38,691 (average for year to 31.3.2010)	114 (30.9.2009)	5.1% (average, year to 31.3.2009)	96.4% (average, year to 31.3.2009)
Cyprus (63)	44.6% (1.9.2010; this includes those held in police facilities)	900 (1.9.2010)	112 (September 2010)	6.0% (1.9.2010)	150.8% (1.9.2010)

- 1 All the below statistics have been extracted from the World Prison Brief supplied by the International Centre for Prison Studies available at <http://www.kcl.ac.uk/depsta/law/research/icps/worldbrief>, as at February 2013. The number only contains the individuals held in custody in prison facilities. Detainees held by the police are not included. The Central African Republic, China, and the Democratic Republic of Congo are not included in this world average. Note that the sources for the statistics vary depending on the jurisdictions; statistics may emanate from a ministry of the State in question itself, the United Nations or the U.S. State Department. Note also that for the United Kingdom (UK), separate statistics for England and Wales, Northern Ireland and Scotland have been kept as such as they show a notable difference between the average of Northern Ireland and the averages of the other two jurisdictions, with the percentage of unconvicted detainees (or unsentenced prisoners) within prison population being greater in Northern Ireland than in the other UK jurisdictions.
- 2 The number in brackets besides the State's name is the ranking of the State among the 196 entities comprised in the World Prison Brief of the International Centre for Prison Studies with regard to the percentage of pre-trial detainees within the prison population (see second column). In this ranking, the State with the highest percentage of detainees within prison population is ranked first (within the entire world, Libya is ranked first with 88.7% of its prison population consisting of pre-trial detainees or remand prisoners) and the State with the lowest percentage of unconvicted detainees within prison population is ranked the lowest (Tuvalu is ranked last (206th) with none of its prison population consisting of pre-trial detainees or remand prisoners). Thus a high number shows that this State has a low percentage of unconvicted detainees within its prison population. Please note that the number of pre-trial detainees include those on remand. While some of those on remand may have already been convicted and be awaiting sentencing, some are held on remand until the trial because of past convictions.



STATE <sup>2</sup>	Pre-trial detainees/ remand prisoners (percentage of prison population)	Prison population total (including pre-trial detainees/remand prisoners)	Prison population rate (per 100,000 of national population)	Female prisoners (percent- age of prison population)	Occupancy level (based on official capacity)
Dominica (146)	20.2% (10.1.2012)	242 (10.1.2012)	356 (January 2012)	2.1% (10.1.2012)	80.7% (10.1.2012)
Fiji Islands (118) *currently suspended*	25.9% (mid-2011)	1,537 (November 2012)	174 (November 2012)	3.2% (mid-2011)	105.4% (1.9.2010)
The Gambia (100)	c. 30% (31.12.2009)	c. 1,000 (31.12.2011)	c. 56 (end 2011)	1.2% (June 1999)	65% (June 1999)
Ghana (134)	21.8% (24.12.2012)	13,436 (24.12.2012)	53 (December 2012)	1.8% (24.12.2012)	171% (September 2011)
Grenada (41)	52.3% (13.2.2012)	419 (13.2.2012)	402 (February 2012)	1.7% (13.2.2012)	195% (16.9.2009)
Guyana (75)	c. 39% (31.10.2011)	1,962 (31.10.2011)	260 (end October 2011)	4.5% (31.10.2011)	124.2% (31.10.2011)
India (21)	64.8% (31.12.2011)	372,296 (31.12.2011)	30 (end of 2011)	4.3% (31.12.2011)	112.1% (31.12.2011)
Jamaica (187)	11.4% (2009)	4,500 (at December 2011)	163 (at December 2011)	4.2% (2009)	110.9% (1.10.2007)
Kenya (84)	c. 36% (October 2011)	52,000 (February 2012)	126 (February 2012)	5.3% (October 2011)	236.4% (February 2012)
Kiribati (195)	9.7% (August 2011)	124 (August 2011)	122 (August 2011)	5.6% (August 2011)	110% (31.5.2007)
Lesotho (153)	17.6% (2011)	2,243 (2011)	107 (mid-2011)	3.7% (2011)	78.3% (2011)
Malawi (183)	12.3% (31.12.2011)	12,033 (31.12.2011)	74 (end 2011)	1.3% (31.12.2011)	218.8% (31.12.2011)
Malaysia (130)	22.4% (mid-2011)	37,157 (31.8.2012)	126 (end August 2012)	6.9% (mid-2011)	116.4% (June 2009)
Maldives	–	c. 1,000 (January 2012) This includes pre-trial detainees and remand prisoners	c. 311 (January 2012)	21.6% (2004) This includes convicted prisoners only	147.4% (2004)
Malta (24)	64% (1.9.2009)	580 (August 2011)	138 (August 2011)	7.2% (August 2011)	102.9% (1.9.2009)
Mauritius (93)	32% (31.8.2009)	2,354 (30.11.2009)	182 (end November 2009)	5.9% (30.11.2009)	108.2% (31.8.2009)
Mozambique (78)	38% (June 2012)	16,881 (June 2012)	69 (June 2012)	2.2% (2009)	245% (October 2011)
Namibia (200)	7.9% (31.12.2007)	4,314 (October 2011)	191 (October 2011)	2.7% (31.12.2007)	96.4% (October 2011)
Nauru (120)	25% (31.12.2010)	20 (31.12.2010)	139 (end 2010)	5% (31.12.2010)	33.3% (31.12.2010)
New Zealand (144)	20.4% (30.9.2012)	8,623 (30.9.2012)	194 (end September 2012)	5.9% (30.9.2012)	83.7% (31.12.2011)
Nigeria (10)	70.8% (31.10.2012)	54,156 (31.10.2012)	32 (end October 2012)	1.9% (31.10.2012)	114.5% (31.10.2012)
Pakistan (11)	70.7% (2009)	c. 77,800 (31.12.2011)	c. 41 (end of 2011)	1.2% (31.12.2010)	177.4% (31.12.2010)
Papua New Guinea (104)	29.1% (31.12.2011)	4,134 (31.12.2011)	58 (end 2011)	6.3% (31.12.2011)	94.7% (31.12.2011)
Rwanda (112)	26.9% (October 2008)	58,461 (31.12.2011)	527 (end 2011)	14.5% (31.12.2011)	102% (31.12.2011)
St. Kitts and Nevis (102)	29.4% (7.12.2011)	344 (7.12.2011)	649 (December 2011)	0.9% (7.12.2011)	209.8% (7.12.2011)

STATE <sup>2</sup>	Pre-trial detainees/ remand prisoners (percentage of prison population)	Prison population total (including pre-trial detainees/remand prisoners)	Prison population rate (per 100,000 of national population)	Female prisoners (percent- age of prison population)	Occupancy level (based on official capacity)
St. Lucia (66)	49.5% (31.12.2011)	554 (31.12.2011)	313 (end 2011)	1.4% (31.12.2011)	110.8% (31.12.2011)
St. Vincent and the Grenadines (134)	21.8% (19.4.2006)	424 (2011)	389 (mid-2011)	3.5% (2011)	212% (2011)
Samoa (172)	14.0% (26.9.2007)	427 (2011)	227 (2011)	6.6% (2011)	108.1% (12.11.2003)
The Seychelles (124)	24.3% (13.8.2012)	593 (13.8.2012)	641 (mid-2012)	5.1% (13.8.2012)	80.8% (17.11.2009)
Sierra Leone (32)	57.3% (30.11.2011)	2,537 (30.11.2011)	42 (November 2011)	3.5% (31.10.2010)	108.1% (15.4.2009)
Singapore (193)	9.9% (31.12.2011)	12,555 (31.12.2011)	237 (end 2011)	9.5% (31.12.2011)	83.4% (31.12.2010)
Solomon Islands (94)	31.7% (31.12.2011)	262 (31.12.2011)	47 (end 2011)	0% (31.12.2011)	57.3% (7.6.2007)
South Africa (108)	28.2% (30.4.2012)	156,659 (30.4.2012)	307 (end April 2012)	2.4% (28.2.2011)	131.7% (30.4.2012)
Sri Lanka (39)	52.8% (mid-2011)	21,216 (31.12.2011)	100 (end 2011)	5% (mid-2011)	226.9% (2007)
Swaziland (145)	c. 20% (May 2011)	c. 3,764 (May 2011)	c. 314 (May 2011)	2.6% (May 2011)	92.6% (19.10.2009)
Tonga (207)	1.9% (31.12.2011)	158 (31.12.2011)	151 (end 2011)	2.5% (31.12.2011)	71.2% (31.12.2011)
Trinidad and Tobago (102)	29.4% (9.2.2012)	3,500 (June 2012)	259 (June 2012)	2.8% (June 2012)	c. 84% (31.12.2010)
Tuvalu (209)	0% (November 2011)	12 (November 2011)	120 (November 2011)	8.3% (November 2011)	–
Uganda (42)	52% (June 2012)	34,000 (September 2012)	96 (September 2012)	4.2% (March 2010)	213.8% (June 2011)
United Kingdom: England and Wales (174)	13.6% (30.9.2012 – 9.2% untried and 4.3% convicted but unsentenced)	83,909 (28.12.2012)	149 (end 2012)	4.7% (28.12.2012)	108% (26.10.2012)
United Kingdom: Northern Ireland (28.4)	28.4% (31.12.2012)	1,683 (31.12.2012)	92 (end 2012)	3% (31.12.2012)	103.6% (17.11.2011)
United Kingdom: Scotland (159)	16.5% (30.11.2012)	7,791 (30.11.2012)	147 (end November 2012)	6% (30.11.2012)	99.7% (30.11.2012)
United Republic of Tanzania (43)	51.3% (December 2011)	38,568 (December 2011)	84 (December 2011)	c. 3% (December 2011)	145.1% (1.9.2009)
Vanuatu (179)	12.6% (11.9.2012)	191 (11.9.2012)	74 (September 2012)	0.5% (11.9.2012)	87.1% (31.12.2011)
Zambia (89)	c. 33% (2008)	c. 17,000 (April 2012)	126 (April 2012)	c. 2% (March 2011)	207.3% (mid-2009)
Commonwealth	31.9%	1,279,523 <sup>3</sup>	194.9	4.4%	127.9%

3 The world prison population total currently stands at 10,142,113 individuals.