

Representing Individuals Facing the Death Penalty: A Best Practices Manual.

Written by
DEATH PENALTY WORLDWIDE

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Northwestern University School of Law, and the law firm of Fredrikson & Byron, P.A.*



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This manual is also available in French, and will be translated into Arabic and Chinese by the end of 2013.

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MY NOTES:

TABLE OF CONTENTS

	<u>Page</u>
CHAPTER 1: INTRODUCTION	7
I. How To Use This Manual	7
A. A Step-By-Step Guide To Defense In A Capital Case	7
B. The Law and Available Resources In Your Jurisdiction	7
II. What is International Law?	7
CHAPTER 2: UPHOLDING THE DUTY TO PROVIDE EFFECTIVE REPRESENTATION: WHAT WOULD A “GOOD LAWYER” DO?.....	9
I. The Right To Effective Representation.....	9
A. Why Do I Have a Duty To Represent My Client Effectively?	9
B. Are My Duties to My Client Different in Capital Cases?.....	9
C. What Exactly Does the Right to a Lawyer Include?	9
D. Scope of Representation.....	10
II. Legal Representation And Due Process.....	10
A. Right to a Fair Trial.....	10
B. How Can I Make Sure That I Have Adequate “Time and Facilities” to Prepare a Defense?.....	11
C. What Can I Do to Obtain Necessary Personnel and Resources?	12
D. What Resources Do I Need?	13
III. The Lawyer-Client Relationship.....	13
A. How Can I Establish Meaningful and Trusting Relationships with My Clients?.....	14
B. Addressing Conflicts of Interest	16
CHAPTER 3: PRETRIAL DETENTION AND BAIL.....	18
I. Right to Release/Bail.....	18
A. Right to Pretrial Detention Hearing	18
B. Right To Release With The Least Restrictive Conditions	19
II. Client Health and Welfare.....	20
A. Medical and Food Aid.....	21
B. Cruel, Inhuman or Degrading Treatment and Torture	21
CHAPTER 4: INVESTIGATION AND OTHER PRE-TRIAL PREPARATION	22
I. Introduction	22
II. What Is the Investigator Looking For?	23
A. The Crime.....	23
B. Events Surrounding the Arrest.....	25
C. Possible Affirmative Defenses.....	26
D. Predicate Offenses.....	27
E. Criminal History and Other Prior Misconduct.....	27
F. Eligibility for the Death Penalty	27
G. Mitigating Evidence	28

III.	The Process of Investigation	28
A.	When Should Investigation Begin?.....	28
B.	Who Is Responsible for Investigation?	28
C.	Sources of Information.....	29
IV.	Expert Witnesses.....	32
CHAPTER 5:	DEFENDING VULNERABLE POPULATIONS.....	33
I.	Certain Clients Require Special Care.....	33
II.	Who Are These Clients?	33
A.	Pregnant or Nursing Women.....	33
B.	Juveniles and the Aged.....	34
C.	Individuals with Mental Disabilities	36
D.	Foreign Nationals	39
CHAPTER 6:	PRE-TRIAL APPLICATIONS AND NEGOTIATIONS.....	41
I.	Plea Negotiations	41
II.	Pre-Trial Applications.....	42
A.	Requests for Information in the Prosecution’s File.....	43
B.	Applications to Exclude Evidence	44
C.	Applications Challenging Imposition of the Death Penalty.....	45
D.	Application for a Speedy Trial.....	45
E.	Application to Change Venue	45
F.	Application for Financial Assistance	45
G.	Application for Relief from Prejudicial Joinder.....	46
H.	Application to Seal Court File.....	46
CHAPTER 7:	TRIAL RIGHTS AND STRATEGY	47
I.	Your Client’s Fair Trial Rights	47
A.	Right to a Fair Hearing before an Impartial Tribunal	47
B.	The Presumption of Innocence	48
C.	Right to be Present at Trial.....	49
D.	Right to Confront and Examine Witnesses	49
E.	Right to Know the Grounds of the Tribunal’s Decision	50
II.	Trial Strategy.....	51
A.	Developing a Theory of the Case.....	51
B.	Identifying Witnesses You Will Call	52
C.	Identifying Evidence and Exhibits You Will Introduce.....	54
D.	Jury Selection	54
E.	Examining Witnesses	55
F.	Introducing and Objecting to Evidence.....	57
G.	Opening and Closing Statements	58

MY NOTES:

CHAPTER 8: SENTENCING	60
I. Introduction	60
II. Mitigating Evidence	60
A. Circumstances of the Offense	61
B. The Defendant’s Mental Condition.....	62
C. Personal and Social History	62
D. Evidence of Good Moral Character	63
E. Evidence Encouraging the Court to Exercise Compassion.....	63
III. Other Arguments that Challenge Imposition of the Death Penalty	64
CHAPTER 9: APPEALS & POST-CONVICTION RELIEF	65
I. Introduction	65
II. Defending Your Client’s Rights After Conviction	65
A. Your Client Has the Right to Appeal His Conviction and Sentence.....	65
B. Practical Suggestions	66
C. Can Your Client Physically Attend Hearings on Appeal?	70
D. Which Remedies to Seek	70
III. What to Challenge Now?	70
A. The Mandatory Death Penalty	70
B. Death Penalty May Only Be Imposed for the “Most Serious Crimes”	72
C. Death Row Phenomenon.....	72
D. Categories of Offenders Who Cannot Be Executed.....	73
E. Preventing the Execution of Mentally Ill Clients.....	73
F. Ineffective Assistance of Counsel.....	74
G. Foreign Nationals Deprived of Consular Rights	74
H. No Ex Post Facto Punishments	74
I. Your Client Was Sentenced to Death After an Unfair Trial	75
J. Factual Issues to Consider.....	75
IV. Clemency.....	77
A. Your Client Has the Right to Seek a Pardon or Commutation of his Death Sentence	77
B. Your Duties as Clemency Counsel	77
C. The Right to a Stay of Execution	78
V. The “Court of Public Opinion”	78
A. Taking Your Client’s Case to the Public	78
B. Using Traditional Media	79
C. Using Social Media	79
CHAPTER 10: ADVOCATING BEFORE INTERNATIONAL BODIES	81
I. When Do I Take a Case to an International Human Rights Body?	81

MY NOTES:

A.	Which of Your Client’s Rights Were Violated?	81
B.	Preparing Your Case	81
C.	Have you Exhausted Domestic Remedies?.....	82
II.	Where to Petition.....	83
A.	Factors to Consider	83
B.	Human Rights Instruments.....	83
C.	UN Mechanisms.....	84
D.	Other UN Mechanisms.....	85
E.	Regional Human Rights Mechanisms.....	86
III.	Weaknesses and Strengths of the International Bodies’ Jurisprudence.....	87
IV.	Interim Remedies	88
CHAPTER 11:	APPENDIX.....	89
I.	Resources	89
II.	Templates	89
A.	Model UN Complaint Forms	89
III.	List of Acronyms	89
IV.	List of NGOs, Law Clinics, and Other Organizations that may be able to assist you in presenting complaints to human rights bodies and publicizing your case.....	90
A.	Human Rights Clinics	90
B.	NGOs	90
V.	Mitigation Checklist.....	90
CHAPTER 12:	END NOTES	94

MY NOTES:

CHAPTER 1: INTRODUCTION

This manual was written by Death Penalty Worldwide, a project affiliated with the Center for International Human Rights at Northwestern University School of Law, and the law firm of Fredrikson & Byron, P.A. The manual aims to provide lawyers with legal arguments and strategic guidance in their representation of individuals facing the death penalty around the world. It sets forth the best practices in the defense of capital cases, based on the experiences of advocates around the world, international human rights principles, and the jurisprudence of both national courts and international tribunals. We hope you find it useful.

I. HOW TO USE THIS MANUAL

A. A STEP-BY-STEP GUIDE TO DEFENSE IN A CAPITAL CASE

This manual covers the representation of individuals facing the possible imposition of the death penalty, from the moment of their arrest until their final clemency application. The manual will guide you through all stages of the case, including pretrial detention, initial and ongoing investigation, pretrial motions and negotiations, trial, sentencing, and appeals to domestic and international bodies. The manual is intended not as an overview of the law or standards that may apply in a capital case in your jurisdiction, but rather a step-by-step guide to the best practices in capital case representation. You can find additional information on the application of the death penalty around the world by checking the comprehensive database maintained by Death Penalty Worldwide, at www.deathpenaltyworldwide.org.

B. THE LAW AND AVAILABLE RESOURCES IN YOUR JURISDICTION

This manual is meant to be used by lawyers in many jurisdictions throughout the world. As a result, you may find some sections more relevant to your practice than others. This is particularly true with regard to trial strategies and pretrial investigation, where practices in civil and common law systems may vary. Nevertheless, many of the principles and strategies outlined in the chapters that follow are of universal application. If these practices are not yet followed in your jurisdiction, courts and lawyers alike may benefit from training programs where they can discuss the relevance of international norms regarding the application of the death penalty. You may also face some challenges in persuading your colleagues and the courts to adhere to the principles outlined here.

This manual also recommends the use of experts, investigators, and other resources that may not be available in your area. For example, while we recommend consulting with a mental health expert in virtually every capital case, qualified experts are not always available. We are aware of the vast disparities in resources available to capital litigators. Wherever possible, we suggest creative strategies for overcoming resource constraints, so that you can provide the best quality legal representation under the circumstances.

II. WHAT IS INTERNATIONAL LAW?

Throughout this manual, many concepts, terms, and acronyms will be used that you may not be familiar with. Before consulting the manual, it may be helpful to read this short overview of international law. This is especially true if you

MY NOTES:

intend to use international law to challenge the imposition of the death penalty in your cases. You may also wish to consult the list and definitions of acronyms found in the Appendix to this manual.

International law, also called “public international law,” refers to the legal rules, norms, and standards that apply to the relations between sovereign nations. It also governs those nations’ treatment of individuals—and this is particularly true in the area of international human rights law.

There is no global governing body that creates international law. Generally, nations and inter-governmental organizations are the “primary players” in the creation of international law. Article 38 (1) of the Statute of the International Court of Justice identifies four sources of international law: treaties, customary international law, general principles of international law (*jus cogens*), and judicial decisions and the teachings of the most highly qualified experts of the various nations.

Treaties are the first and primary source of public international law. Treaties may be either bilateral (between two countries) or multilateral (between three or more countries). International agreements and treaties are binding only on the countries that elect to ratify them. The international human rights treaties that are most relevant to the defense of a capital case, and this manual, include: the International Covenant on Civil and Political Rights (“ICCPR”); the Convention against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment (“CAT”); the Convention on the Elimination of Racial Discrimination (“CERD”); and the Convention on the Rights of the Child (“CRC”). In addition, depending on where you practice law, there are several regional treaties that may apply, including: the African Charter on Human and Peoples’ Rights (“ACHPR”); the American Convention on Human Rights (“ACHR”); and the European Convention

on Human Rights (“ECHR”), as well as other regional human rights treaties. These treaties are discussed in more detail throughout the manual, as they relate to each stage of the defense of a capital case.

The second source of international law is customary law. Customary law derives from the practice of nations over time. For a practice to become customary law, two requirements must be met. First, the custom must be common state practice. Second, the nations that adhere to the practice must do so out of a sense of legal obligation.

The third source of international law consists of principles called peremptory norms or *jus cogens*, from which there may be no derogation by treaty or other agreement. For example, prohibitions against slavery, genocide, and torture constitute *jus cogens*. Under no circumstances may a country argue that such practices are permissible.

The fourth source of international law consists of judicial decisions and scholarly teachings. Past judicial decisions and scholarly teachings are considered by the International Court of Justice to be “subsidiary” or secondary sources of law. In other words, they are used only to interpret the three primary sources of international law. In practice, however, international courts tend to give prior judicial decisions precedential value.

Understanding international law, and its application in your country, is particularly important for capital defense lawyers. The constitutions of many countries expressly state that international human rights law must be considered in interpreting the rights of individuals. Human rights treaties and the decisions of international bodies can be exceedingly useful tools in advocating for restrictions on the application of the death penalty—and ultimately may help save the life of your client.

MY NOTES:

CHAPTER 2: UPHOLDING THE DUTY TO PROVIDE EFFECTIVE REPRESENTATION: WHAT WOULD A “GOOD LAWYER” DO?

I. THE RIGHT TO EFFECTIVE REPRESENTATION

A. WHY DO I HAVE A DUTY TO REPRESENT MY CLIENT EFFECTIVELY?

As a capital defense lawyer, you have a duty to provide high quality legal representation, which involves several essential prerequisites. You must be independent and free to advocate zealously on behalf of your clients. You must have “experience and competence commensurate with the nature of the offense.”¹ You should limit caseloads to a level at which you are able to provide high quality representation. And you should receive adequate resources to enable you to provide a competent defense.

Significantly, the duties of legal aid lawyers to provide effective representation are no different from those of private lawyers. This chapter describes the scope of your duties, provides guidelines on the effective use of resources and personnel during your representation, and provides practical tools to make you a better advocate. This chapter also aims to equip you with arguments you can make to the courts regarding your obligation to present a competent defense.

B. ARE MY DUTIES TO MY CLIENT DIFFERENT IN CAPITAL CASES?

In every criminal case your client has certain rights, and as a lawyer you have duties corresponding to these rights. In a capital case,

where your client’s life is at stake, you have an added responsibility to ensure that you conduct a thorough investigation of the crime as well as your client’s personal background in an effort to convince the decision-maker that your client – even if guilty – does not merit the death penalty.² The United Nations Economic and Social Council (ECOSOC) has called on governments to provide “adequate assistance of counsel at every stage of the proceedings, above and beyond the protection afforded in non-capital cases.”³ Moreover, international law requires that in a capital case, the due process rights of the accused must be rigorously observed. It is your job as your client’s advocate to ensure that the courts respect and enforce these rights.

C. WHAT EXACTLY DOES THE RIGHT TO A LAWYER INCLUDE?

The right to legal assistance is essential to secure a fair trial.⁴ International law establishes that every person accused of a capital crime, even if indigent, is entitled to legal representation.⁵ In addition, international law provides that the accused must be given adequate time and facilities for the preparation of his defense. At the least, this requirement entails a right to *effective* legal representation.⁶ States must also provide compensation to lawyers who are appointed to represent indigent defendants.⁷ Lawyers have a corresponding duty to cooperate in the provision of these services. Finally, legal authorities, including but not limited to lawyers and judges, have a duty to ensure that legal assistance is effective.⁸ In

MY NOTES:

Artico v. Italy, the European Court of Human Rights held that the state’s obligation to provide legal assistance is not satisfied by the mere appointment of a lawyer, “since the lawyer appointed for legal aid purposes may die, fall seriously ill, be prevented for a protracted period from acting or shirk his duties. If they are notified of the situation, the authorities must either replace him or cause him to fulfill his obligations.”⁹

D. SCOPE OF REPRESENTATION

Effective representation is not limited to the trial phase. You should attempt to be present and engaged as your client’s advocate at the earliest stage possible. This includes pre-trial detention and bond hearings as well as any plea negotiations. Your duties during the pre-trial proceedings are discussed in more detail in Chapter 3. You may also be required to pursue related litigation on the client’s behalf, including bail applications and challenges to detention conditions and limits on communication. Your client also has an established right to be assisted by counsel on appeal, including the right to free legal aid on appeal.¹⁰ Even if you do not represent your client on appeal, you must advise the client directly of all applicable deadlines for seeking post-conviction relief and immediately inform any successor counsel of the procedural status of the case, including whether an appeal has been filed.¹¹

👉 Success Story

• Setting Standards for Capital Defense in China

- In 2010, three provincial-level bar associations in the Chinese provinces of Shandong, Henan, and Guizhou issued death penalty representation guidelines as official policy guidance in their provinces. The guidelines apply to all lawyers under the supervision of the respective bar associations. Bar associations are now taking steps to ensure that the representation guidelines are implemented

effectively in order to improve the quality of criminal defense in death penalty cases.

- The American Bar Association (ABA) Death Penalty Representation Project and ABA Rule of Law Initiative China program have been working closely with the All China Lawyers Association, individual defense lawyers, and academics in China since 2003 in connection with the development of these representation guidelines. The ABA has unique and extensive expertise in this area as the author of the Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases (“ABA Guidelines”), adopted by the organization in 1989 and revised in 2003. The ABA Guidelines currently represent the national standard of care for criminal defense in death penalty cases.
- Lawyer associations in China are now using professional practice standards to standardize and elevate the quality of criminal defense provided in death penalty cases. The pioneering lawyers associations in Shandong, Guizhou, and Henan have examined the process through which the ABA Guidelines gained mainstream acceptance in the US and the ways in which the ABA Guidelines have been employed to provide better protection for criminal defendants and their legal advocates. This is an excellent example of how lawyers can work together across borders to improve standards of legal representation in capital cases.

- Robin Maher, Director, American Bar Association Death Penalty Representation Project

II. LEGAL REPRESENTATION AND DUE PROCESS

A. RIGHT TO A FAIR TRIAL

Your client has the right to a fair trial, including due process, within a reasonable time and without delay. This right is fundamental and well-documented in international law. It is your duty to assure, to the best of your ability and available

MY NOTES:

resources, that this right is upheld. All general and regional human rights instruments guarantee the right to a fair trial and there are several international law arguments that may be cited when advocating for a fair trial for your client.¹² For example, Article 14(1) of the ICCPR provides that all people are entitled to "...a fair and public hearing by a competent, independent and impartial tribunal established by law." Regional human rights treaties contain similar provisions. Article 9 of the ICCPR also provides that individuals must be tried without undue delay.

B. HOW CAN I MAKE SURE THAT I HAVE ADEQUATE "TIME AND FACILITIES" TO PREPARE A DEFENSE?

Article 14 of the ICCPR provides that "Everyone shall be entitled to ... adequate time and facilities for the preparation of his defense."¹³ Your client's right to sufficient time to prepare a defense also applies to you, as capital defense counsel. In other words, *you*, as your client's advocate, have a right to sufficient time and resources to defend your client, not only during the trial but also during pre-trial hearings, plea negotiations, post-trial appeals, and sentencing hearings. It is your duty to vigorously assert these rights.

For example, if you are appointed to defend a client facing capital charges only days or weeks before his trial is scheduled to begin, you will likely need to request that the trial be postponed so that you can interview your client, investigate any defense he may have, and prepare for trial. If the court denies this request, then you should do everything possible to document the violation. This will include presenting a written motion or objection to the court in which you document the amount of time you have had to prepare and describe the obligations that you have not been able to carry out as a result of time limitations. It is important to recall that even if you are unsuccessful in persuading the trial court to grant

your request, your efforts to document the violation of your client's rights could serve as the basis for a successful appeal. Documenting the violation of your client's rights is also a critical first step toward exhausting your domestic remedies in the event you are considering an appeal to an international body.

The definition of "adequate time" varies according to the facts of each case, the complexity of the issues and the availability of evidence.¹⁴ The UN Human Rights Committee has found violations of the ICCPR in cases where a newly appointed lawyer was given only minutes or hours to prepare.¹⁵ These same cases also hold that a lawyer's preparation for trial is "inadequate" where he meets with his client only briefly before trial.¹⁶

△ Overcoming Barriers

- **I was appointed to represent my client at the time of the trial, and had no opportunity to meet with him beforehand. What should I do?**

➤ You should first ask the judge/court for more time. Your client has the right to adequate time to prepare his defense under well-established principles of international law. If your arguments are unsuccessful, it is imperative that you document your objection in writing, to the extent possible. You should explain how much time you were given to prepare and provide a list of all the things you were unable to do as a result of the problem. This practice serves a dual purpose: it educates the court, and it may serve as a basis for a successful appeal.

MY NOTES:

Practice Tip

• Meeting your client on the day of trial

- In some countries, lawyers do not meet with their clients until the day of trial. The UN Human Rights Committee has found that this violates the rights of the accused to adequate time and facilities to prepare his defense. For example, in *Little v. Jamaica*, the petitioner only had 30 minutes for consultation with counsel prior to the trial and approximately the same amount of time for consultation during the trial. The Committee found that the time for consultation was insufficient to ensure adequate preparation of the defense with respect to both trial and appeal, stating: “the right of an accused person to have adequate time and facilities for the preparation of his defense is an important element of the guarantee of a fair trial and a corollary of the principle of equality of arms. In cases in which a capital sentence may be pronounced, it is axiomatic that sufficient time must be granted to the accused and his counsel to prepare the defense for the trial; this requirement applies to all the stages of the judicial proceedings.” ¶ 8.3, Communication No. 283/1988, U.N. Doc. CCPR/C/43/D/283/1988, HRC (Nov. 1, 1991)

In the interest of upholding the right to a trial within a reasonable time period, some national laws may also impose limits on the amount of time that can pass before a trial is held. This may require that you seek your client’s permission to waive his right to a speedy trial, since it may be impossible for you to adequately prepare for trial within these time limits.

It is important for you to remember that the right to sufficient time to prepare a defense also applies to the appeals process. As a capital defense lawyer you are entitled to have adequate time between the date of conviction and the date of execution in order to prepare and complete appeals, including petitions for clemency.¹⁷

MY NOTES:

△ Overcoming Barriers

• What if a prison guard, courthouse employee, or other individual won’t let me see my client?

- Try to keep your cool and maintain an even tone. It is usually a poor strategy to yell or berate an employee who has the discretion to help you. First, try to reason with them. Rather than placing blame on the person (“why won’t you let me see my client?”), try to separate the person from your problem (“I know it’s not your fault, but I’m having a lot of trouble trying to see my client.”).
- If that does not work, ask to speak to their supervisor. If a supervisor is not available, write down their name and contact information, and leave peacefully. Be sure to note the date and time of your visit, and anyone that you spoke with. If you can wait until there is a shift change, you may have better luck with a different employee. If you are still unable to speak with your client, consider getting a court order or contacting a legal services organization for help. As a last resort, you may be able to file a complaint locally, or—if that fails—internationally.

C. WHAT CAN I DO TO OBTAIN NECESSARY PERSONNEL AND RESOURCES?

Legal aid lawyers (sometimes called “public defenders”) and court-appointed defense counsel may face significant challenges in carrying out their professional duty to provide quality representation. We address many of these obstacles in this manual, and we strongly encourage you to challenge the legal system when it fails to guarantee your client’s rights to a fair trial. For example, if lawyers are commonly appointed to represent defendants on the day of trial, this is a situation that should be met with objections and arguments founded on the international legal authorities that we provide in this manual. Sometimes, you can use these

obstacles as opportunities to educate others within your country's legal system and to advocate for system-wide change.

D. WHAT RESOURCES DO I NEED?

EXPERTS AND INVESTIGATORS: Effective representation requires consulting with investigators as well as experts such as psychologists and social workers. The American Bar Association emphasizes the importance of creating a defense “team” that is composed of at least two lawyers, experts, investigators, and “mitigation specialists.”¹⁸ This may not be feasible in every jurisdiction, but the concept of a team defense is critical. Capital case representation is challenging, and you should use all of the resources at your disposal. Where investigators are unavailable, paralegals, law students, or non-governmental organizations may be able to assist. Where psychiatrists are unavailable, nurses and others with mental health training may be useful.

INTERPRETERS: The importance of ascertaining a client's native language and level of fluency in a particular language cannot be underestimated. Do not assume that your client speaks the language of the country in which he is accused. Your client may appear to be fluent in a language that is not his native tongue when in fact he cannot fully comprehend nor fully express himself in that language. As his lawyer, you have an obligation to uphold the principle that everyone has a right to be informed of the charges against him in a language that he understands, and to be assisted by an interpreter in court.¹⁹ There are international standards for interpreters, but certified and/or qualified interpreters may not always be available. In this case you should make a record in court describing the lack of qualifications of the interpreter and the inability of the translator to competently translate the court proceedings for your client. Competent translation is particularly

important if your client and/or witnesses are testifying in a foreign language.

△ Overcoming Barriers

• What can I do if I do not speak the same language as my client?

- Try to find an interpreter who speaks the language your client is most comfortable with, not just a language that your client knows. Much of the information you need may be difficult enough for your client to express in his native tongue. Adding a language barrier makes it more difficult for him to express himself, to understand your advice, and can lead to misunderstandings with adverse consequences.
- If an official interpreter is not available, try to find someone who speaks your client's language fluently. Never use a family member or witness as an interpreter, since they have an intrinsic bias that may affect the quality and objectivity of their interpretation.

III. THE LAWYER-CLIENT RELATIONSHIP

You must develop and maintain an effective lawyer-client relationship in order to provide quality representation. This is especially critical in death penalty cases.²⁰ The quality of your relationship with your client may mean the difference between life and death. Effective communication will help you frame a theory of the case and develop a mitigation strategy.

You may find that establishing a good working relationship with a defendant in a capital case is a challenge. Many governments keep defendants in capital cases isolated from other prisoners and from their family and friends, so you may be the defendant's only link to the outside world. Under these circumstances, you may find it difficult to gain your client's trust. But if you communicate

MY NOTES:

with your client regularly, treat him with respect and professionalism, and are a zealous advocate for his rights, you will develop a better and more productive working relationship.

Success Story

• The Case of Ahmed Khan

- Ahmed (not his real name) was charged with blasphemy, a capital crime, in Pakistan. When we were first assigned to his case, the first thing we did was arrange a jail visit to meet him. Although this should be a regular legal/investigative practice, it is quite uncommon to visit your client in jail in Pakistan. A simple visit put us in touch with the jail superintendent who has now become a close ally of our chamber. We are now granted unfettered access to our client and can meet him unmonitored on any given day for any length of time; which is also unusual in Pakistan.
- Meeting our client in jail on a regular basis helped us in two ways:
 1. We discovered he had long been suffering from mental illnesses that had never properly been diagnosed and would never be evident to someone who met him once or twice.
 2. We were allowed to bring in our own international medical expert to the jail to evaluate our client. This evaluation was then presented in court and endorsed by local doctors.
 3. Based on our investigations into Ahmed's family, we were able to piece together his social history and tell a story of his mental illness.

Ahmed's case taught us how far using the simplest of practices can take us. We now have international and local experts testifying that our client is mentally ill which will, of course, go a long way in proving our client is not guilty of the charges.

-Sarah Belal, Director, Justice Project Pakistan

A. HOW CAN I ESTABLISH MEANINGFUL AND TRUSTING RELATIONSHIPS WITH MY CLIENTS?

In order to build a successful relationship with your client, it is important to be consistent in your communications and to keep your client informed of the substantive developments and procedural posture of the case. You should schedule regular visits with your client. Respecting a client's right to confidentiality and avoiding conflicts of interest are particularly important.²¹ Assure him that everything he tells you will remain confidential unless he agrees to disclose the information as part of your trial strategy. You should also be sure to respond to correspondence in a timely manner and to take your client's phone calls (in countries where prisoners have access to phones), and communicate with his family and friends as you see fit. As the case progresses, your client may become increasingly frustrated. This is a normal reaction to the delays inherent in many legal proceedings. If you find yourself unable to meet with your client as often as you would like, consider recruiting a qualified individual to maintain regular communication with him. Paralegals can serve as an excellent resource to facilitate regular communication.

Your discussions with your client will be more productive if you have established a trusting relationship with him. Your client will only disclose personal and painful facts that are necessary to craft an effective defense for the trial (such as his role in the crime) if he trusts you. For example, if you only meet your client 10 minutes before trial, he may be inclined to tell you that he simply was not there and does not know what happened. But if he trusts you, he may confide in you that he killed the "victim" in self-defense. This may be a much more viable defense in light of the prosecution's evidence.

MY NOTES:

△ Overcoming Barriers

- **What if it's not feasible for me to meet with my client?**

- It is important to identify the reason why you cannot meet with your client. Difficulties such as transportation and a heavy workload are obstacles that you can usually overcome. It is important to distinguish between true barriers to communication, and those that simply make your job more challenging. If it is truly impossible to meet with your client, however, you should still try to communicate with him by phone or by mail. These means of communication are far from ideal, since they can be monitored by prison staff. If communication with your client is not feasible, you should try to meet with his family and friends, since they may have information critical to your defense.

Trust is also essential to uncover facts that are relevant to the sentencing phase of a capital case, where it is your job as a defense lawyer to humanize your client by presenting mitigating evidence.²² Mitigating evidence can include evidence of a “defendant’s impulsivity, impaired judgment, youth and impressionability, mental and developmental impairment or retardation, history of childhood sexual and physical abuse, substance addiction, and manageability in prison.”²³

Defendants are often hesitant to disclose certain information to their lawyers, even if it has the potential to be used as mitigating evidence. For example, defendants may be defensive, ashamed or protective of family members when asked about mental, physical, or sexual abuse.²⁴ Also, in many cultures mental illnesses are taboo. They are rarely discussed, and in many parts of the world are linked to beliefs in witchcraft or other supernatural powers. Developing mitigating evidence takes time, persistence, and cultural sensitivity. Chapter 4 provides a detailed overview of the investigation required to gather mitigating evidence that may determine whether

your client is sentenced to death or a lesser punishment, and Chapter 8 discusses how to present that evidence at the sentencing hearing.

You may have a more difficult time developing a relationship with some clients than you do with others. When you represent a challenging client, it is important to keep in mind that the qualities that make a client difficult often serve as mitigating factors. For example, if your client has a mental illness, his ability to cooperate with you may be impaired. It is crucial that you spend sufficient time with your client to understand when this is the case, and to obtain expert assistance to evaluate your client’s mental status. As explained in more detail in subsequent chapters, the accused’s mental illness may serve to explain his conduct at the time of the crime – even if he was not legally “insane” at the time of the offense. This can be powerful evidence in mitigation, but most lawyers do not have a sufficient grasp of the signs and symptoms of mental illness to make use of this evidence in the absence of expert assistance. You will first need to educate yourself about the scope of your client’s mental disabilities before you can argue to a judge or jury that those disabilities should serve as grounds for a lesser penalty.

Practice Tip

- **Common mitigating factors (A more detailed analysis of mitigating factors can be found in Chapters 5 and 8)**
 - Age at time of the offense
 - Minor role in offense
 - Lack of premeditation
 - Provocation that led to commission of offense
 - Remorse
 - Offender acted under a threat, fear of harm to him or his family, or under a strong influence by someone who has power over him
 - Intoxication
 - Defendant's mental condition
 - Physical or sexual abuse

MY NOTES:

- Extreme poverty
- Evidence of good moral character
- Lack of prior criminal history
- Good conduct in prison
- Cooperation with the authorities
- Family ties
- Stable work history
- After the crime, offender repaired (or made serious efforts to repair) the consequences of the offence, or somehow compensated the victim or his family
- Significant rehabilitation after the commission of the crime (esp. if long time has passed)

Finally, establishing a positive and trusting relationship with your client can have an impact on how the jury or judge views your client. When a judge or jury is determining the appropriate punishment for a defendant, a major consideration will be the defendant's character. If you have a warm and friendly relationship with your client, you will go a long way toward "humanizing" your client in the court's eyes. If you succeed in demonstrating your client's inherent dignity, you are fulfilling your most important duty as a capital defense lawyer.²⁵

B. ADDRESSING CONFLICTS OF INTEREST

As a zealous advocate for your client, you must always put your client's interests ahead of your own.²⁶ As an impartial advocate for your client, it is important to recognize any potential conflicts of interest that are already in existence or that may arise during the course of your representation.²⁷ This commonly arises when lawyers are asked to represent co-defendants in the same criminal proceeding. In most cases, representing co-defendants presents an inherent conflict. For example, a prosecutor may want to enter into a plea agreement with one co-defendant in exchange for testimony against the other. The co-defendants may have inconsistent defenses, and they may not be equally culpable.²⁸

An excellent example of the practical problems of representing co-defendants arises in preparing a closing argument. If you represent only one defendant in a case involving multiple co-defendants, you are at liberty to argue that the weight of the evidence supports the guilt of other defendants, but not your client.²⁹ If you represent multiple defendants, however, you are constrained by competing obligations to represent each client aggressively and competently. If you argue that client A is less culpable than client B, you are violating your ethical obligations to client B. But if you refrain from pointing out that the evidence supports B's conviction, and not A's, then you are violating your obligations to A. The greater the discrepancy in the prosecution's evidence against each defendant, the greater the conflict of interest that impairs your ability to effectively represent both.

In some criminal cases, the co-defendants may have consistent defenses that would allow you to effectively represent both. This is rarely true in capital cases. Even if the accused have consistent defenses to the crime, you will be faced with the task of advocating for both defendants at the time of sentencing if they are convicted. In most jurisdictions, the defendant's lesser role in the crime can serve as a mitigating factor. If you are representing co-defendants, arguing that one had a lesser role in the crime is directly opposed to the interest of the other co-defendant: you have the choice between harming one client by not presenting the mitigating evidence to protect the other client or presenting the evidence to protect one client which then harms the other. It is an impossible dilemma.

If a court appoints you as counsel for co-defendants you should immediately assess whether a conflict exists. In most cases, you should ask that additional lawyers be appointed to serve as counsel for the other co-defendants. If this request is denied, you must file a written motion, or follow

MY NOTES:

whatever procedures are in place in your jurisdiction in order to document your objection, since this could serve as a basis to vacate a client's conviction on appeal. You should then inform your clients that you have been appointed to represent them even though they are co-defendants in the case. You should also make a strong argument that your clients should not be subjected to the death penalty, since the court is not able to guarantee their rights to effective and impartial representation.

△ Overcoming Barriers

- **I'm a public defender, and my office requires me to represent multiple clients. What should I do?**

- Many jurisdictions have hefty caseloads, and you may feel that you do not have the option to refuse a court appointment. Nonetheless, it is your duty as a lawyer to try to recuse yourself from representing any client where you have a conflict of interest. Even if it is commonplace for lawyers to represent co-defendants in your jurisdiction, it does not follow that the practice is justified, and that you should simply accept your appointment without objection.
- If you are unable to recuse yourself, you should notify the court of the conflict and why you are unable to recuse yourself. Wherever possible, you should file a written motion, since this may be required in order to preserve the issue for appeal. (Appeals are addressed in Chapter 9.)

MY NOTES:

CHAPTER 3:

PRETRIAL DETENTION AND BAIL

One of the most important issues in the pretrial stage of a criminal case is whether your client will be detained or released pending trial. Your client is presumed innocent until he is proven guilty,³⁰ and should not be punished unless and until he is convicted. Nevertheless, your client could be held in jail before trial on the grounds that he could harm someone if released, flee to avoid prosecution, or for other reasons. If your adversary or the court wants your client imprisoned until and through trial, then your client is at risk of being subjected to unwarranted punishment. Whether your client's defense is ultimately successful or not, if he is held in jail until trial, he will experience the mental and physical hardships of being in jail, he will have less access to you as you try to prepare a defense, and those that depend on your client for support may experience hardships as well. Your advocacy at this stage is crucial. You have a duty to protect your client's rights by resisting pretrial detention and by advocating for his release with the least restrictive conditions possible. If pretrial detention is unavoidable, you must try to lessen the impact the detention will have on your client and his defense.

I. RIGHT TO RELEASE/BAIL

Human rights treaties and many national constitutions make clear that an individual should not be punished before he is found guilty,³¹ but this is precisely what happens when your client is detained pending trial.³² As a result, there is a presumption that a defendant should be released from prison pending trial. But your client is not always entitled to be released, and a court has some discretion in determining whether your client will be released or detained pending trial.³³

△ Overcoming Barriers

- **There is a significant class difference between my client and myself, and I expect that it might be a problem. What should I do?**
 - It is common for there to be class differences between lawyers and their clients, especially in capital cases. The best approach will depend on local culture, but some general tips include:
 - Try to put your client at ease. Start conversations with small talk, and make sure your demeanor is friendly and casual. Where appropriate, ask if your client is comfortable. Where possible, bring food and drink to share with your client. If culturally appropriate, use everyday speech, dress in a way that will make your client feel comfortable with you, and express empathy with your client's predicament.
 - Ask your client to explain his understanding of the circumstances, and fill in the blanks, making sure to ask whether he has any additional questions.
 - Do not avoid addressing important issues just because it requires you to acknowledge the class difference. If you are respectful and try to avoid offending your client, being straightforward and honest helps to establish trust.

A. RIGHT TO PRETRIAL DETENTION HEARING

In some cases, your client may be detained by the police or other government authorities without a court hearing to determine whether his pretrial detention is appropriate. Such detention violates his right to be presumed innocent until proven guilty.³⁴ If your client has been detained for more than a few days without a pretrial hearing, you should demand one as soon as possible.³⁵

Your client should have the earliest reasonable opportunity to go before a judge and request his release pending trial.³⁶ This opportunity should be

within days of your client's arrest so that your client, if he is to be released, is not unnecessarily detained for too long.³⁷ At that hearing, your client has the right to be represented by you, to present evidence as to why he should not be detained pending trial, to present witnesses, and to contest the government's evidence by cross-examining the witnesses who testify on behalf of the government.

It is important that you adequately prepare your client's case in advance of the pre-trial detention hearing. In order to satisfy this obligation, you must work very quickly and very hard to prepare for the hearing within a short amount of time, since you have a duty to have the question of your client's pretrial release or detention determined as promptly as possible. You will need to obtain access to your client. You should first assess whether there is enough evidence that your client committed the crime; in the absence of such evidence (in some jurisdictions called "probable cause"), your client cannot be kept in detention. In order to make this assessment, you should make use of your right to access the case file.³⁸ Also, you will need to obtain potential witnesses who may support your arguments in favor of your client's release into the community (*e. g.*, that he does not pose a threat or that he is not likely to flee). Potential witnesses include members of your client's family and the community, his employer, and any professionals who may have worked with him.

B. RIGHT TO RELEASE WITH THE LEAST RESTRICTIVE CONDITIONS

The court may consider competing factors in making its determination whether to release your client, and may have significant discretion in deciding what to do. The court should start out with the presumption that release is best. At the hearing, it should be the government's burden to show why your client should not be released

pending trial.³⁹ But most courts will also consider the following factors:

- **the likelihood that your client will appear for pre-trial hearings and at trial; and**
- **the need to protect other people in the community if your client poses a danger to them, including alleged victims and potential witnesses.**

In all cases, the court should make the decision that imposes the least amount of punishment on your client, while at the same time satisfying the public interest. Most courts have the ability to permit your client's release on whatever terms are necessary to balance these competing interests.

It is important that you be ready to argue for your client's release with the least restrictive conditions possible. In order to be successful, you should be prepared to present evidence that shows the court that with no or minimal conditions, your client will attend upcoming hearings and trial, and does not pose a threat to others. You meet these conditions by showing that:

- **He has ties to the community (and is therefore unlikely to flee);**
- **He has a family;**
- **He has a job;**
- **He owns a home;**
- **He has a good character;**
- **Witnesses can attest to his good character (including by presenting testimony or affidavits of witnesses).**

You may also need to obtain statements from witnesses who promise to act as "sureties," or guarantors, that he will attend future court proceedings. If appropriate, you may also ask the court to enroll him in a drug treatment, mental health, work or other program.

MY NOTES:

The court may decide that your client can be released, but only if certain conditions are imposed to assure his appearance at trial. These conditions may include requirements that your client show up for certain meetings with pre-trial agencies, that he report to the local police on a regular basis, or that he pays a specified amount of cash bail to assure his future appearance at trial. In some situations the court may restrict his movements, or require him to undergo monitoring or partial confinement to ensure he appears at all court proceedings.

It is your duty to ensure that your client understands all of these conditions before he is released, to maximize the chances that he will not be re-arrested. If bail is too high for your client to pay, or your client is put under restrictions that are not warranted, his right not to be punished before he is found guilty will be compromised. The payment of bail is often impossible for impoverished prisoners. If the court is satisfied that a financial condition is sufficient to make sure your client attends additional pre-trial hearings and trial, but your client does not have the financial resources to satisfy the court, you have a duty to argue for reduced bail, and to assert that your client's inability to pay the required funds is not a sufficient reason to detain him. You should argue that although your client lacks financial resources, he is not likely to flee pending trial and is willing to meet with authorities at appropriate intervals to show that he is still within the jurisdiction of the court.

II. CLIENT HEALTH AND WELFARE

Every person has the right to be treated humanely, even if he is accused of a crime.⁴⁰ The only hardships that your client should face if he is jailed pending trial are those that directly result from the fact that he has been deprived of his liberty before he has been convicted.⁴¹ Practically speaking, your client's physical and mental health will be at risk. He will be isolated from his family and other

support networks, and he may face abuse from guards and other prisoners. You have a duty to protect your client's rights, and you will likely be the only person who is in a position to prevent mistreatment and other abuses.

Your client has several, independent rights that you must try to protect. Those rights include:

- **The right to be secure in one's person and to be free from torture or cruel, inhuman or degrading treatment, including prolonged solitary confinement;**⁴²
- **The right to be held separate from convicted persons;**⁴³
- **The right to be held separate from detainees of the opposite sex;**⁴⁴
- **If a minor, the right to be held separate from adults;**⁴⁵
- **The right to proper living quarters, including sleeping and bathroom facilities;**⁴⁶
- **The right to proper working conditions;**⁴⁷
- **The right to adequate recreational facilities;**⁴⁸
- **The right to necessary medical care;**⁴⁹
- **The right to food with nutritional value, and prepared in such a way as to obtain and/or maintain mental and physical health;**⁵⁰
- **The right to be free from discrimination of all types, including the freedom to practice religion;**⁵¹
- **The right to have contact with family members and/or friends;**⁵² and
- **The right to have confidential contacts with legal counsel.**⁵³

Each of these rights is important. You should argue in the detention process that, if your client is to be detained at all, it should be in such a manner or at such a place where your client's rights are

MY NOTES:

least at risk. Unfortunately, you may have very little control over the conditions that your client encounters. Many nations' jails are overcrowded, out-of-date, and run on budgets that are too small. Conditions at police stations, where individuals may be detained for days, weeks, or months before being transferred to jails or prisons, are often much worse. Police or prison officials may be hostile to your client and motivated to make things as uncomfortable and unbearable as possible for various reasons. If your client's rights are being violated—whether by police or prison officials or other detainees, or through active abuse or unacceptable neglect—you must take action.

△ Overcoming Barriers

• What should I do if I think my client may have literacy difficulties?

- It is important to ascertain early in your relationship whether your client is literate. In some countries, illiteracy may be so common that your client readily admits his inability to read or write. In countries where literacy rates are high, your client may feel deep shame because of his illiteracy. Be gentle in your approach, and when you suspect your client may be overstating his reading skills, take measures that will allow you to assess his capacity to comprehend written documents. This is particularly important in cases in which your client has allegedly signed a confession.
- Offer to read documents to your client. Ask your client to explain information that was contained in documents that he claims to have read, so that you can gauge his level of comprehension.
- Consider whether this raises any competency or other legal issues. (For more information, see Chapter 4.)

A. MEDICAL AND FOOD AID

Insufficient medication or food may affect your client's competence and his ability to communicate

with you. If your client is being deprived of sufficient medication or food, you should make a record of this situation with the court, which may include a complaint about general conditions of detention facilities.⁵⁴

B. CRUEL, INHUMAN OR DEGRADING TREATMENT AND TORTURE

If your client is being subjected to inhumane treatment or torture, your first step is to identify who has the authority to address the problem and what evidence you need to have the issue addressed. Typically, you will first complain to the prison authorities, but you must carefully weigh whether this places your client at even greater risk of mistreatment. It may be helpful to seek the assistance of local human rights organizations, or the national human rights commission or ombudsman, or any court competent for the supervision of prisons. In serious and urgent cases, you may be able to petition international human rights bodies to issue "interim" or "provisional" measures of protection to prevent further mistreatment. (Please refer to Chapter 10 for further information on appeals to international bodies). Even where your country is not party to any human rights treaties, you could appeal to the U.N. Special Rapporteur on Torture to issue a statement appealing to your government to protect your client's rights. Informing the media can also help to expose the abuse and prevent further mistreatment.

In some cases—for example, if your client is at risk of retaliation from other prisoners, guards, or police officers—it may be necessary to place him in protective custody. In this case, you should be prepared to present evidence to the court or the prison service about the risk your client faces and be prepared to argue what alternative detention conditions are most appropriate.

MY NOTES:

CHAPTER 4:

INVESTIGATION AND OTHER PRE-TRIAL PREPARATION

I. INTRODUCTION

One of your most fundamental obligations as counsel in a capital case is to investigate the facts of the alleged crime and the background of the accused. Lawyers who fail to conduct a thorough investigation are more likely to lose at trial, and their clients are more likely to be sentenced to death. As we explain in more detail below, investigation frequently reveals weaknesses in the prosecution's case and enables defense counsel to present a winning defense at trial. Investigation is also critical when you are seeking to avoid a death sentence, as you will need to gather mitigating evidence well before trial that will help you persuade the judge or jury to spare your client's life. Finally, investigation will be necessary to determine whether your client may be ineligible for the death penalty—a possibility we explain later in this chapter.

Legal developments in many countries over the past decade have made the investigation of your client's death penalty eligibility and personal circumstances more important than ever before. The use of the death penalty has been progressively restricted around the world, and a number of categories of persons have become ineligible for death sentences, including persons who are insane, pregnant women, and persons who were under the age of 18 at the time of the offence.⁵⁵ Those who suffer from mental disorders or disabilities may also be ineligible for execution.⁵⁶ And even when a person is eligible to receive a death sentence, courts in many countries have recognized that judges and juries should consider that person's individual circumstances in detail before deciding that he is sufficiently culpable to deserve the death sentence.⁵⁷ These trends create new opportunities for you to argue that a death sentence is impermissible or unwarranted in your client's case and to urge the

court to show your client compassion. But they also create an obligation on your part to conduct a thorough investigation so that you can take full advantages of those opportunities.

△ Overcoming Barriers

- **I think my client is lying to me. What should I do?**

- Clients sometimes tell their lawyers less than the complete truth. Rather than be offended, it is often better to consider their motives. First, do not assume that your client lied on purpose—it might have been a simple misunderstanding. And even if your client lied intentionally, he may not have had malicious intent. He may have lied to protect someone else, or to avoid embarrassment. It takes time for clients to trust their lawyers, and sometimes clients will lie when they do not have faith in their lawyer's willingness to work hard on their behalf. Many clients believe that their lawyer will only help them if they are innocent.
- If you think your client lied about something relevant to his case, ask for clarification without making it sound like an accusation. Before posing your question, explain that it is important to his case, and reassure him that you will continue to fight for him regardless of what he tells you. Express empathy for his situation (for example, tell him that you know it's not easy to be completely forthcoming with information that causes him pain and sadness).
- This reiterates the importance of building a relationship before asking your client about the facts of their case. Ideally, you should meet with your client on a number of occasions before you ask sensitive questions about his potential role in any offense he is accused of committing. Build rapport by getting to know your client, chatting with him about his family, work, and hobbies. Build trust by taking the time to explain what he can expect regarding the proceedings in his case.

Investigation and presentation of mitigating evidence is a crucial component of capital defense work. It offers defense lawyers an opportunity to provide the court with evidence that may be weighed against aggravating factors. You can facilitate the information gathering process by developing a trusting relationship with your client. This is especially important if you practice in a jurisdiction where you are not permitted to interview the prosecution's witnesses. Mitigating evidence normally includes any information about a defendant's character and record that may be helpful in persuading a court that the accused should not be sentenced to death. This can include evidence of a "defendant's impulsivity, impaired judgment, youth and impressionability, mental and developmental impairment or retardation, history of childhood sexual and physical abuse, substance addiction, and manageability in prison."⁵⁸ Defendants are often hesitant to disclose certain information to their lawyers, even if it has the potential to be used as mitigating evidence. For example, defendants may be defensive or ashamed when it comes to mental or physical abuse by family members.⁵⁹ Many defendants, however, will divulge painful information in response to their lawyers' continuous efforts to build meaningful relationships with them.⁶⁰

II. WHAT IS THE INVESTIGATOR LOOKING FOR?

When investigating a capital case, you are seeking facts relevant not only to your client's culpability for a particular crime but also, should he be convicted, to whether he should be sentenced to death. Thus, you must investigate each of the following areas:

A. THE CRIME

1. Identifying and Investigating Witnesses for the Prosecution

When investigating the facts of the crime, you should scrutinize possible witnesses for the prosecution to the greatest extent allowed by your jurisdiction, interviewing them if possible. Inquire into their backgrounds and their relationship to the defendant. Some of the issues your investigation should address include:

- **Did they actually witness the offense, or is their testimony based solely on hearsay?**
- **How were they able to observe what was happening, and are there reasons to question the reliability of their observations? For example, were they intoxicated or were the lighting or visibility conditions poor?**
- **Could they be biased against the defendant? For example, witnesses who were themselves involved in the offense may have a particularly strong motive to cast blame on others to avoid responsibility.**
- **Did the police or other individuals pressure them to give a particular statement?**
- **Did they have a motive to fabricate their testimony? For example, were they offered a lighter sentence or plea agreement in exchange for providing "helpful" information? Were there conflicts in the past between them and the accused?**

2. Identifying and Investigating Witnesses for the Defense

You must also search for additional witnesses, including expert witnesses, to challenge the prosecution's version of events and to corroborate the defendant's account. For example, if your client claims that he acted in self-defense, you must establish whether there are witnesses who

MY NOTES:

could attest to the aggressive behavior of his assailant. If your client claims to have an alibi, it is critical that you locate and interview alibi witnesses to assess the strength of the alibi defense. If character evidence is admissible in your jurisdiction and you believe introducing such evidence would be helpful, you should try to identify and locate character witnesses. Keep in mind that character evidence should be used with extreme caution. In some jurisdictions, introducing evidence of a defendant's good character allows the prosecution to respond by introducing negative character evidence. When interviewing witnesses who do not speak your language, bear in mind the principles we discuss in Chapter 2 about working with interpreters.

△ Overcoming Barriers

- **How do I know which witnesses to talk to if the police reports don't identify any eyewitnesses?**

- First, you should talk to your client. Your client may know whether anyone witnessed the incident that led to his detention. Your client can also provide critical information regarding potential biases of witnesses likely to be called by the prosecution.
- Wherever possible, you should also visit the crime scene and try to find anyone who may have frequented the area. Ask for help in locating witnesses from community leaders such as village headmen, religious leaders and others. Family members and friends can also provide useful information about potential defenses to the crime, in addition to mitigating evidence relevant to sentencing.

3. Use of Forensic Evidence

All too often, defendants are convicted based on flawed forensic evidence or questionable “expert” testimony. In the United States, for example, convictions have been reversed because of the unreliability of the underlying evidence, such as

comparisons of hair and bite marks or predictions by “experts” of the likelihood that a defendant would kill again, based on little more than a review of a case file or brief interview with the accused.⁶¹ In the Sudan, convictions have been obtained based on little more than footprints that supposedly match those of the accused.⁶²

To avoid such shaky convictions, you must attempt to procure or challenge evidence in the hands of the prosecution or law enforcement officials. If the prosecution seeks to present forensic evidence, you should investigate the qualifications of the experts the prosecution will rely upon at trial. Were they properly trained to assess the evidence? In addition, you must determine whether the evidence was properly tested using the best-available technology or whether additional forensic testing is possible. You may be able to argue that deficiencies in preservation or testing make the prosecution's evidence unreliable.

4. Cause of Death

In homicide cases, you must attempt to obtain the post-mortem report on the victim so that you may analyze the cause of death. This may reveal crucial information—the victim may actually have died of natural causes! Pay careful attention to details such as the location of wounds. When the prosecution's witnesses give their accounts of the incident leading to the death, you may be able to challenge them on cross-examination by pointing out inconsistencies between their stories and the post-mortem report. This information may also help you to prepare your closing argument. Finally, you should investigate the credentials of the individual who conducted the post-mortem examination as there may be grounds upon which to attack the reliability of his conclusions.

MY NOTES:

👉 Success Story

• Using medical reports to challenge the prosecution's theory in Guinea

- In a case involving seven police officers accused of beating a thief to death, I used medical reports to successfully challenge the prosecution's theory of the case. When the victim was transported to the hospital, doctors failed to specify the cause of death. Their omission was particularly important in this case, since other evidence indicated that the victim suffered from a pre-existing illness.
- In the absence of any expert opinion by a medical examiner, I argued that the prosecution could not prove that the police officers were responsible for the victim's death. I asked the court to order the exhumation of the victim's body so that it could be properly examined by an appropriate expert. Seeing as there was no means by which this could be carried out, the court was persuaded by my argument. Two of the accused were acquitted outright, four were given a two-year suspended sentence, and the commanding officer was sentenced to a 15-year prison term.

-Labila Michel SONOMOU, President
Avocats Sans Frontières Guinée

resources available through NGOs, paralegal associations, and law schools. Law students and legal clinics, for example, may be willing to assist you in your investigation in exchange for supervision and training. In Malawi, law students have assisted in interviewing family members and other mitigation witnesses in remote villages, and have helped to track down critical case files.

- If meeting in-person is not feasible, try to interview witnesses by phone.

B. EVENTS SURROUNDING THE ARREST

Frequently, individuals accused of crimes give statements to the police upon their arrest. It is your job to determine whether your client's statement was given freely and voluntarily, and in compliance with applicable laws, including constitutional provisions, statutes and international human rights law.

Be prepared to challenge evidence that is "tainted" because it was obtained in violation of the defendant's rights. In the United States, such evidence is subject to the exclusionary rule—meaning that it cannot be used at trial. In Europe, different mechanisms are used. In Germany, for example, the exclusionary rule is not automatic, but items of evidence may be excluded if they were obtained in violation of the human rights protected by the Constitution.

Be particularly alert to the possibility that your client's statements were coerced or less than fully voluntary. If your client signed a statement, make sure that he actually knew what it said. Was he given time to read the statement? Did he have sufficient education to genuinely understand it? Was it in his native language?

If a defendant has a mental disability or other vulnerability, he may have been susceptible to the influence of others and may have been more likely to confess to a crime. Studies show that individuals with intellectual disabilities are particularly prone to giving false confessions. Such

△ Overcoming Barriers

• The witnesses live very far from where I live and practice law, and I have no transportation. How can I locate and meet with them?

- If public transportation is not available, you can ask your client's family members and friends, as well as community leaders such as village headmen and religious leaders to help gather witnesses in a location that is accessible for you.
- You should also make full use of potential

MY NOTES:

individuals may not understand their right not to answer questions or to ask for a lawyer. Police can easily lead them through each step of the crime and suggest answers that would inculpate them. Reviewing transcripts of police interviews may reveal that your client was simply repeating the information given to him by the police.

A confession may also have been extracted under duress. This could involve physical abuse, heavy pressure, or threats. If you suspect your client was abused while in custody, you may need to request a medical examination to help establish that he was beaten or tortured. The accused could also have been in a weakened state and unable to resist police pressure if he was denied food or needed medication, or he may have feared for his own safety or that of his family. Statements taken under such conditions are not voluntary and must be challenged.

C. POSSIBLE AFFIRMATIVE DEFENSES

As a defense lawyer, you have an obligation to investigate any possible defenses your client may have to a crime.⁶³ Defenses to liability may include self-defense, insanity, diminished capacity or intoxication.

Generally, a person who fears for his own safety or that of another person is entitled to use force against an assailant. If your client claims to have killed in self-defense, you must endeavor to prove that his fear of the victim was reasonable. Carefully review with your client why he believed he was in danger. Attempt to find witnesses to the encounter who can verify his account. You may also be able to introduce evidence that the victim had a reputation for violence, which will help to demonstrate that the defendant's fear was justified.

MY NOTES:

Success Story

• Winning the Case Through Investigation

- In one murder case in Malawi, the legal team was able to corroborate their client's self-defense claim through investigation. None of the police reports indicated that the defendant had acted in self-defense and this information was not included in the defendant's statement to the police. Nevertheless, the defendant insisted that he had been attacked by the alleged "victim." He swore that when he was arrested, he had stab wounds to the back of his head and the back of his arm. He showed his lawyers the scars.
- Armed with this information, his lawyers tracked down the police officer who had arrested him. A paralegal from the region knew the police officer and located him at a roadblock. When interviewed, the police officer confirmed that the defendant had serious, deep wounds at the time of his arrest.
- At trial, the police officer was compelled to tell the truth about the defendant's wounds. The defendant also testified in his own defense. After hearing all the evidence, the court acquitted the defendant of all charges.

Requirements for the insanity defense, sometimes called the defense of mental disorder, vary by jurisdiction. Generally, however, a lawyer must prove not just that his client was mentally ill, but that at the time of the crime, the accused was incapable of distinguishing between right and wrong or was incapable of controlling his behavior. Even if the accused does not suffer from permanent mental illness, he may have been temporarily delusional, or he may have acted under the influence of an intoxicating substance administered involuntarily.

While a successful insanity defense is fairly rare, you may also be able to argue that the defendant committed the crime in a state of diminished capacity. This is usually not a complete defense, but it can be employed as a mitigating factor. If

presented convincingly, the charges may be reduced to a lesser offense or the sentence may be more lenient.

You should investigate a number of possible ways in which your client's capacity may have been diminished at the time of the crime. Mental illness or mental disabilities can affect a client's judgment and behavior, even where they do not meet the legal definition of "insanity." Intoxication is another important factor that may lead to a reduced sentence in some jurisdictions. Finally, you may be able to argue that your client was less responsible for his actions because he was provoked or under extreme stress or under a strong emotion or despair at the time of the crime.

△ Overcoming Barriers

- **What should I do if friends or family of the witness do not want me to interview the witness alone?**

- Interviewing each witness individually is the best practice to ensure that their statements are not tainted by the opinions of others within their family or community. This is particularly important when the alleged victim resides in the same community, and when witnesses live in a rural area or village where gossip about the incident has generated an accepted version of the truth that may not coincide with the facts. Sometimes, however, witnesses resist being interviewed apart from close friends and family members. In these cases, try to recognize and address their concerns. For example, in some cultures it may be inappropriate for a man to be alone with a woman who is not his wife or close relative. In such cases, it would be helpful to ensure that your investigative team includes members of both sexes.
- If having others present during the interview is unavoidable, try to limit the number of people, especially if their presence may make the witness uncomfortable or less forthcoming. Also, ask those present not to answer for the

witness, or make comments that may affect their statements.

D. PREDICATE OFFENSES

In some cases, guilt of a predicate offense, such as rape or robbery, could lead to a death sentence. Your responsibility as a defense lawyer extends to investigating facts relevant to that predicate offense.

E. CRIMINAL HISTORY AND OTHER PRIOR MISCONDUCT

If the defendant has a criminal history, the prosecution may seek to offer evidence of his prior convictions in support of a death sentence. You must investigate those prior offenses and be prepared to challenge their admission. If they are admitted, you must be able to explain your client's conduct and rebut the prosecution's arguments that your client's criminal history means he is incapable of reform.

F. ELIGIBILITY FOR THE DEATH PENALTY

Your investigation should ensure that your client does not belong to any category that would make him ineligible for the death penalty. For example, persons under the age of 18 are ineligible for the death penalty.⁶⁴ In many cultures, however, individuals do not have birth certificates and may not know their own age. Determining your client's age may require speaking with his parents, siblings, teachers, and others who could remember the month and year of his birth in relation to other current events, such as a particularly severe drought, the election of a leader, or the death of a prominent figure. For more information, see Chapter 5.

Counsel may also argue that conditions such as pregnancy or old age should make a client ineligible for a death sentence. The American Convention on Human Rights prohibits the

MY NOTES:

imposition of capital punishment on such persons.⁶⁵

G. MITIGATING EVIDENCE

Mitigating evidence is presented to humanize the defendant and explain his behavior to the jury or judge. In presenting such evidence, your goal is not to excuse your client's crime, but rather to elicit sympathy, to show that he is less culpable and deserves a reduced punishment. Mitigating evidence can include any aspect of the defendant's character or background that would call for a sentence less than death, such as his mental frailty, capacity for redemption, lack of future dangerousness, and positive acts or qualities.

Because it is such a critical part of a capital defense, Chapter 8 addresses the use and presentation of mitigating evidence in greater detail.

III. THE PROCESS OF INVESTIGATION

A. WHEN SHOULD INVESTIGATION BEGIN?

You should begin your investigation as soon as possible, ideally shortly after the accused is arrested. Valuable evidence may become unavailable if investigation is delayed.

👉 Success Story

• The Case of Shabbir Zaib (Pakistan)

- Shabbir Zaib was a dual British-Pakistani national charged with murdering his wife in 2009. Shabbir's wife was killed during a home invasion by a criminal gang (known as "dacoity" in Pakistan). The robbers entered their house, tied up Shabbir and his family, and when his wife refused to stay quiet, shot her in the head and killed her. Soon after the incident, Shabbir's mother-in-law (at the behest of her sons), changed her initial statement to the

police and accused Shabbir of shooting his wife.

- As a dual national, Shabbir was considered quite wealthy in his village and, like most foreign nationals of Pakistani origin with no strong ties to the community or the police, was a prime target for extortion. By framing Shabbir for the murder of his wife, his in-laws sought to gain control over his property.
- By actively investigating the case and meeting each and every person associated with it, we were able to mount considerable pressure on the Complainant. With each trip that our investigators made into his village, the word spread that Shabbir's defense team was asking questions. Soon, the prosecution's witnesses became so nervous about the truth coming out that they opted to withdraw their statements accusing Shabbir of the murder and to settle the case under Shariah law.
- This case demonstrates how rigorous investigation can reverse the power dynamics in favor of a defendant and eventually lead to his acquittal.

-Sarah Belal, Director, Justice Project Pakistan

You should also immediately begin to gather mitigating evidence relating to the accused's background. In jurisdictions where the prosecution can elect not to seek the death penalty, such evidence can help persuade the prosecution that the death penalty is not warranted.

B. WHO IS RESPONSIBLE FOR INVESTIGATION?

In common law countries, the defense lawyer or defense team is responsible for thoroughly investigating both the crime and the defendant's circumstances. Counsel has a duty to independently investigate the facts provided both by the client and by the prosecution and police.

In contrast, under an inquisitorial system, used in many civil law jurisdictions, the duty of investigation is primarily given to a judicial officer. This, however, does not mean that the

MY NOTES:

defense counsel is absolved of the responsibility to participate in the investigation. Your responsibility as a defense lawyer to investigate applies regardless of the civil or common law nature of your justice system.

For example, in France, although the criminal system relies on the direction of investigation by an instructing judge, a defendant can gather evidence and ask the judge to investigate points in his interest. The defense lawyer must therefore review the file during the preliminary investigation and ask for whatever investigations he feels are in the interest of the accused. The judge must address the lawyer's request—refusal to do so is grounds for an appeal.⁶⁶

If you are a lawyer practicing in a resource-poor country, you may need to seek out creative ways to investigate a case. For example, in some countries, properly trained paralegals are assisting with many of the tasks needed to prepare a case, such as interviewing the accused and tracing and interviewing defense witnesses, family members, neighbors, and even victims.

C. SOURCES OF INFORMATION

1. The Client's Role in the Investigation

Your client will likely be the starting point in your investigation and may help you identify additional witnesses and sources of exculpatory or mitigating evidence.

As explained in Chapter 2, you will need to develop a relationship of trust with the client. Developing rapport with a client in a capital case can be difficult. It can be particularly difficult to gather potential mitigating information from a client. Many capital defendants suffer from anxiety, depression, mental illnesses, personality disorders, or cognitive impairments that hinder communication and trust. Psychiatric disorders, for example, may seem embarrassing to him—he

may be reluctant to share information that makes him seem “crazy.” Clients may be similarly reluctant to share information about childhood or spousal abuse. You may have to meet with a client multiple times before he feels comfortable sharing some of the information that could constitute critical mitigating evidence. Because your client may be reluctant to volunteer information, you should not rely on him to volunteer evidence of past abuse, but should instead ask him a number of factual questions that will help you determine some of your mitigation themes. Be alert to clues of mental disabilities, such as when a client seems to have a poor comprehension of his situation or has difficulty communicating details.***

Practice Tip

• Detecting mental impairments

- How can you find out whether your client suffers from a mental illness? The questions you ask will vary, depending on the cultural context and your client's educational level. Here are some questions that lawyers have found useful to ask their clients:
 1. Has he ever suffered a head injury?
 2. Has he ever been in an accident?
 3. Has he ever lost consciousness?
 4. Has he ever been admitted to the hospital?
 5. Has he ever seen a traditional healer for any reason?
 6. Has he ever been prescribed traditional remedies for an illness of any sort?
 7. Has he ever suffered from seizures?
 8. Has he ever had periods where he lost track of time and “woke up” at a later time?
 9. Has he ever had inexplicable rages?
 10. Does he ever feel like he is possessed or “bewitched?”

MY NOTES:

11. Does anyone in his family have mental problems?
12. Has he ever been prescribed medication for any sort of mental problem?

Be careful not to rely solely on information provided by your client. You should instead investigate all facts independently of what the defendant tells you. Even if a defendant wants to plead guilty, you must conduct a thorough investigation. Without such an investigation, you cannot be sure that he is competent and able to make an informed decision about his case.⁶⁷

Furthermore, you should not rely exclusively on the client to reveal facts relevant to affirmative defenses or mitigating evidence. Not only may he be reluctant to volunteer potentially embarrassing information, he may not understand why certain aspects of his personal history bear on sentencing. Or he may simply not remember or be able to explain some critical events. Persons who have suffered a severe head injury may have little memory of the injury. A client with limited mental capacity may not be able to communicate his life story to counsel. Keep in mind, also, that a client may pretend to understand things when he does not. Because of these limitations, you will likely have to seek answers to some questions about your client's history from family members, school and medical records, or persons who knew the client and his family.

2. The Family

A proper investigation will usually involve multiple interviews with the family of the accused. The family may also be an important source of mitigating evidence. You may have to pay multiple visits to family members to convince them that the private family history they reveal will not shift blame to them, but rather may help to save the defendant's life.⁶⁸ For example, the defendant's mother may be reluctant to admit to drinking during pregnancy, but this evidence could

be valuable in arguing that fetal alcohol syndrome caused the defendant lasting brain damage. Family members can also explain how the execution of the client would adversely affect them, which is evidence that might lead the court to show compassion.

Success Story

• Creative Investigation Wins Cases

- Navkiran Singh, an Indian lawyer, once represented a client accused of killing his wife. Through his investigation, Navkiran discovered that several of the wife's relatives had committed suicide, supporting his theory that the victim had taken her own life. Discussions with family members also led them to produce the wife's diary, which further supported the defense argument that the wife had committed suicide.
- In order to find witnesses to one death penalty case, Taiwanese lawyer Yi Fan worked with a family that made flyers and posted them on the street.
- And in one case in the United States involving a Mexican defendant, lawyers obtained the help of the Mexican consulate to search for a witness using radio broadcasts.

3. Other Acquaintances and Professionals

You should also interview friends, neighbors, traditional leaders, teachers, clergy, sports coaches, employers, co-workers, physicians, social workers, and therapists. These people may be able to help complete the account of a defendant's life or may know details the family and defendant have been unwilling to volunteer. They may be able to share details about past trauma or hardship or events that demonstrate that the client is a compassionate, helpful, and caring individual.

MY NOTES:

4. Documentary Evidence

You should always seek documents that corroborate mitigation themes such as limited mental capacity and good character. While records may not be available in all countries, they are invaluable where they exist.

School Records

Evidence of mental disabilities is not always possible to detect simply by speaking with the client. Most disabilities are not readily apparent to the untrained observer, and clients may go to great lengths to hide a disability because of the stigma attached to mental illness or retardation. If you can obtain the defendant's academic records, they may reveal a learning disability or a history of disruptions in the defendant's schooling.

Medical Records

Prenatal or birth records may show that a mother was malnourished or that she used drugs or alcohol during pregnancy. Medical records may also reveal incidents of traumatic injury, episodes of mental illness, or the development of a mental disability.

Other Documents

Photos, letters of reference, awards and certificates from school, work, or military service may help to portray the client in a positive light and bolster evidence of his good moral character.

5. Prison Staff

Interviews with prison staff may provide valuable information about an offender's behavior in prison, including any education or training or treatment he has pursued.

6. The Victim's Family

In some countries, it can be important for a defense lawyer to visit the victim's family. In Taiwan, for example, the court will allow the victim's family to express their opinion about the appropriate sentence. Defense counsel should therefore ascertain the victim's family's attitude toward the accused. In some cases, the defense lawyer may be able to arrange a "settlement" in which the accused will make a donation to the family or to a charity in exchange for forgiveness. This is easier to do, of course, when the accused has the resources to compensate the family. In other cases, the lawyer may work with intermediaries, such as members of the clergy or social workers, to explore whether the victim's family would support a lesser penalty.

7. Psychiatric Evaluations

In all cases, you should consider retaining a mental health expert to assess your client's mental health through testing and a clinical interview. In many countries, the court will appoint a mental health expert at no expense if there are serious questions about a defendant's sanity or competence. The need for a mental health evaluation, however, goes beyond these threshold questions. As we described above, mental disabilities may arouse compassion in sentencing even when they do not rise to the level of insanity or incompetence.

In some jurisdictions, your client may be entitled to a psychiatric evaluation as a matter of right if defense counsel uncovers some evidence that the client may be mentally ill. For example, in *Dacosta Cadogan v. Barbados*, the Inter-American Court of Human Rights held that Barbados had violated an offender's right to a fair trial by failing to inform him that he had the right to a psychiatric evaluation carried out by a state-employed psychiatrist in a death penalty case.⁶⁹

MY NOTES:

You must not, however, rely on the court to identify whether a mental health evaluation is needed. If a client suffers from a disability that is not immediately apparent, such as serious depression, you may be the only one in a position to identify the potential disorder and request an evaluation.

IV. EXPERT WITNESSES

In most cases it is important to identify and retain experts in the investigation phase of the case. The expert may provide testimony to the court or may be a consulting expert not called to testify. Experts can be useful in evaluating defenses in the culpability phase of the trial and also for the penalty phase. For example, if physical evidence is significant to the case, an expert should be retained to conduct testing and evaluation of the evidence. The types of experts that may be necessary can vary widely, depending on the circumstances of the crime, the type of evidence that will be used to prove guilt, and the type of mitigating evidence that might be provided. For example, in a false confession case it would be important to retain a mental health expert to evaluate the client and offer opinion testimony on the client's mental condition. The same expert might be called on to evaluate the client's state of mind at the time of the crime and the impacts of a turbulent childhood to explain why the client's life should be spared.

An expert should be a recognized authority in his field. Usually the applicable rules of evidence will govern the issues an expert can testify to and require that the expert be recognized as such. Identifying appropriate experts can be difficult. A useful place to seek an expert may be at a local university or college where there are professionals recognized in their fields. Experts may also be identified from research into the particular field. Review of scholarly articles may provide a source

of potential experts. Bar associations and other legal organizations may also maintain lists of experts available for consultation. These organizations may also be able to provide funds to pay fees charged by experts.

When working with an expert, counsel should be mindful of any rules that may be available to protect the work product of counsel. It would be damaging to the defense to consult with an expert who forms an opinion adverse to the defendant's interest if that opinion can be discovered and used by the prosecution against your client. Therefore, counsel should be mindful of ways to protect the communications with the expert from discovery. For example, in some jurisdictions, drafts of an expert's report are not discoverable by opposing counsel. In such jurisdictions, the defense lawyer may review a draft of the expert's report and ask the expert not to complete the report if it would be detrimental to the defendant.

△ Overcoming Barriers

- **What should I do if courts in my jurisdiction don't typically allow expert testimony?**

- Do not assume that they will not allow it in your case—there is a first time for everything. Navkiran Singh, a human rights lawyer from India, reported that he worked on a case where, despite the odds, the court allowed him to present expert testimony concerning the suicidal tendencies of his client's wife, who his client was accused of killing.

MY NOTES:

CHAPTER 5:

DEFENDING VULNERABLE POPULATIONS

I. CERTAIN CLIENTS REQUIRE SPECIAL CARE

Over the years, international law has highlighted several categories of defendants that require special protection in the criminal justice system. It is likely that over the course of your career, you will represent defendants who fall into one or more of these categories. As a result, it is important that you are familiar with each of these categories and the special rights they provide for your client.⁷⁰

In some cases, international law prohibits the execution of an entire category of defendants: international mechanisms have disqualified individuals who were under 18 years of age at the time the crime in question was committed,⁷¹ pregnant women,⁷² the elderly,⁷³ mothers having dependent infants,⁷⁴ mothers of young children,⁷⁵ and the mentally disabled⁷⁶ from eligibility for the death penalty. In other cases, international law entitles certain categories of defendants to special legal procedures, such as in the case of foreign nationals. In still other situations, certain categories of defendants possess characteristics, such as mental disabilities, that are widely recognized as critical mitigating evidence during the sentencing process.

This chapter discusses each of these classes of defendant. It is designed to help you understand the parameters of the categories, to lead you through the rights to which your client is entitled if he falls within those parameters, and to suggest useful methods you might apply to best protect those rights.

Whether these international standards disqualify your client from eligibility for the death penalty, whether they require the state to act with extra precautions, or whether they simply provide you with evidence that may lessen your client's sentence, your awareness of these categories and their implications will make a critical difference

for your client as he moves through the criminal justice system.

II. WHO ARE THESE CLIENTS?

A. PREGNANT OR NURSING WOMEN

1. What Does It Mean for My Client If She Is Pregnant?

In situations where your client is a woman, it is important that you determine her pregnancy status. The international community has nearly universally condemned the execution of pregnant women, and the International Covenant on Civil and Political Rights (ICCPR) explicitly rejects the practice.⁷⁷ As a result, if your client is pregnant, you should present this fact to the court and argue that she should not be executed.

Unfortunately, while it is clear that pregnancy will temporarily disqualify your client from execution until she has given birth, it may not disqualify her from the application of the death penalty altogether.⁷⁸ As a result, it is important that you check local standards to determine the exact extent to which pregnancy disqualifies your client.

2. What Does It Mean for My Client If She Is Nursing Or Has Recently Given Birth?

Similarly, it is important that you determine the parental status of any clients who are women: if your client has just given birth or is still nursing, it may affect her eligibility for execution.

The extent to which this status will affect your client's eligibility varies dramatically according to your country's interpretation of international standards. For instance, while some interpretations of the ICCPR suggest that it also prohibits the execution of a woman for a period of time after she has given birth, not all interpretations agree.⁷⁹ This same ambiguity also exists with the American Convention on Human

Rights and the African Charter's Protocol on the Rights of Women. On the other hand, some regional mechanisms offer more clarity: The Revised Arab Charter, for example, states that nursing mothers may be ineligible for the death penalty for up to two years, and possibly longer where it is found to be “in the best interests of the child.”⁸⁰

Once you have determined that your client has recently given birth or is nursing a child, it is important that you determine how the situation affects her eligibility for the application of the death penalty in your jurisdiction: you should look to national, regional, and international standards alike to determine how the issue has been treated in the past. You can find information on how your country and others have addressed this issue by searching the Death Penalty Worldwide database, available at www.deathpenaltyworldwide.org.

B. JUVENILES AND THE AGED

1. Why Is the Age of My Client Important?

Depending on the jurisdiction in which you are practicing, the age of your client—either currently or at the time the crime in question was committed—may disqualify him from eligibility for the death penalty wholesale. Even if it does not, you may consider using youth or age as a mitigating factor in sentencing determinations.

Juveniles

If your client is a juvenile or was a juvenile at the time the crime in question was committed, a host of international standards exist to guide you in representing him.

Under international law, the age of majority, or age under which your client is considered a juvenile, is the age of 18, unless your country's laws specifically state otherwise.⁸¹ Courts cannot

deviate from this standard, even on a case-by-case basis. In 2006, for instance, the Committee for the Convention on the Rights of the Child reprimanded Saudi Arabia for allowing its justices to determine whether a defendant had reached the age of majority before they reached the age of 18.⁸²

If your client was a juvenile at the time the crime in question was committed, he cannot be sentenced to death. The international community universally forbids the execution of individuals who were below the age of 18 at the time the crime was committed,⁸³ and in 2002, the Inter-American Commission on Human Rights determined this to be a *jus cogens* norm.⁸⁴ As a result, if you know that your client was a juvenile at the time the crime in question was committed, you should bring his age to the attention of the court.

If your client is currently a juvenile, international law also provides him special protections as he makes his way through the criminal justice system. As his advocate, you must recognize the unique vulnerabilities that his youth creates for him in such settings and look to international guidelines for assistance in protecting him from dangers that may result.

International standards mandate that states avoid incarcerating juveniles except as a last resort. As a result, you must ensure that your client is not subject to such institutions as pre-trial detention. If a court determines that pre-trial detention is a necessity, you should make sure that your client is detained at facilities designated solely for juveniles, or at the very least that he is not detained with adults.

Juveniles may also not understand their rights as clearly as adults. You should take care to explain to them the procedures and protections provided to them by law. Because juvenile clients may not understand their right to communicate with counsel, you should make regular efforts to reach

MY NOTES:

out to such clients at regularly and frequently scheduled points in time.

The Aged

If you determine that your client is of an unusually advanced age, it may have similar implications for his criminal liability. Unfortunately, the international community is just beginning to address the situation of the aged in the criminal justice system, so it does not offer as much guidance as it does for juveniles.

Nevertheless, it is important that you research relevant local standards to determine if your client's age may disqualify him from the death penalty. The American Convention on Human Rights places an upper age limit on death sentences: it forbids the execution of individuals who were 70 years of age at the time the offense in question was committed.⁸⁵ In Belarus, persons 65 years or older at sentencing are excluded from the application of the death penalty.⁸⁶ The upper age limit may become more widespread in the future: in a resolution on implementation of the Safeguards, ECOSOC has called for the setting of a maximum age limit.⁸⁷

Even if your client's age does not disqualify him from the application of the death penalty, it may play an important role as a mitigating factor in sentencing determinations.

△ Overcoming Barriers

• What should I do if it's difficult to determine my client's precise age?

- Typically, the age of your client at the time the crime is easily determined. Countries are obligated under international law to provide effective birth registration systems,⁸⁸ and the production of a birth certificate should provide adequate documentation of your client's age.
- Often, however, developing countries or

countries recently emerging from conflict are unable to provide adequate birth registration systems. In situations where the age of a child involved in the justice system is unknown, the UN Economic and Social Council has mandated that countries take measures to ensure that the "true age of a child is ascertained by an independent and objective assessment."⁸⁹ Furthermore, international standards suggest that once there is a possibility that your client may be a juvenile, the state must prove he is not before he can be treated as an adult in the criminal justice system.⁹⁰

- Nevertheless, as your client's advocate, you should make every effort possible to prove that your client is a juvenile if you believe him to be one. There are a number of different steps that you can take to determine the age of your client when official state records are unavailable.
- Local community mechanisms that are in place to record births can be useful in providing documentation of your client's age: in Ethiopia, UNICEF has contacted religious communities for certificates issued at the time of baptism or acceptance into Muslim communities in order to establish the age of unregistered individuals. In Sierra Leone, it has reached out to local chiefdoms that maintain similar records.⁹¹ You should begin by interviewing the family to determine whether similar local community traditions exist in the case of your client.
- If you cannot obtain documentation of your client's age through such traditional mechanisms, you can also seek the assistance of a physician.⁹² Physicians are sometimes able to approximate age through dental or wrist bone x-rays.⁹³ It is important to be careful if you decide to seek such assistance, however: these methods can only estimate age. As a result, you must take care to emphasize the speculative nature of such procedures and ensure that an overbroad approximation does not disqualify your client from protections he might otherwise receive as a minor.⁹⁴
- Finally, you may be able to approximate the age of your client on your own by speaking to

MY NOTES:

his family members. Many families are able to connect the birth of your client with a historically significant event, such as an earthquake or warfare, even when they can't remember an exact date. This should give you a general sense for your client's age.⁹⁵

C. INDIVIDUALS WITH MENTAL DISABILITIES

1. What Does a Mental Disability Mean for My Client?

Depending on the type of mental disability your client possesses and the jurisdiction in which you are practicing, your client's mental disability may relieve him of criminal liability, disqualify him from death penalty eligibility, or serve as a mitigating factor in sentencing procedures. It is often extremely difficult for lawyers to assess whether their clients have a mental disability. It is impossible if you do not take the time to meet with your client on a regular basis. As we have emphasized elsewhere in this manual, spending time with your client is essential to develop trust, identify potential mitigating evidence and present an effective defense.

△ Overcoming Barriers

- **There are very few qualified psychiatrists in the region where I practice. How can I obtain a competent assessment of my client's mental health?**

- Even if there are no qualified psychiatrists in your region, most jurisdictions have devised a method by which to evaluate a defendant's mental health. Mental health assessments are sometimes carried out by qualified nurses or individuals with forensic training, even if they are not officially licensed. If you believe your client has a mental disability or illness, the court will often refer the defendant to a mental hospital or clinic where the assessment will be conducted.
- In regions where qualified mental health

professionals are lacking, the standards for forensic assessments can be quite low. Because your client's mental health is highly relevant to his culpability and to his sentencing, you should do everything possible to consult with the individual who is carrying out the evaluation. This is important for several reasons. First, you may have critical background information relevant to your client's mental health. If your client is uncommunicative or resistant to disclosing information about his mental illness, the person conducting the assessment may erroneously conclude that he does not suffer from a mental disability. Second, if you later intend to challenge the conclusions of the forensic assessment (for example, if you are raising an insanity defense and the forensic evaluation concluded that your client was not insane), you should learn as much as possible about the amount of time the forensic expert spent with your client, the testing methods he utilized, and his qualifications and training. Third, by meeting with the forensic expert you can help educate him about the scope of the evaluation in a legal context. This is particularly important when you are trying to establish that your client has a mental disability relevant to the sentencing determination. (For more information, see Chapter 8 on the use of mitigating evidence in sentencing.)

2. What Kinds of Mental Disabilities are Relevant?

The term "mental disability" refers to a broad range of possible conditions.⁹⁶ As a result, the mental health of your client can mean many different things for the outcome of his case. If you can determine that your client was insane at the time the crime in question was committed, you may be able to prevent trial in the first place: in many, if not most legal systems, insanity is grounds to eliminate criminal responsibility altogether. If your client is mentally incompetent, you may be able to argue that he is ineligible for the application of the death penalty, as

MY NOTES:

international law proscribes the execution of individuals with such conditions.⁹⁷ Even if your client's mental disability is not severe or is not significant enough to make him ineligible for the death penalty, it may serve as a critical piece of mitigating evidence during sentencing procedures.

3. The Importance of a Mental Health Assessment

The most important form of evidence you can use to support your client's claim of mental disability is an official assessment by a mental health expert. Many courts have held that individuals have a right to a mental health assessment prior to being sentenced to death,⁹⁸ and you should do your utmost to ensure that any assessment is conducted in accordance with the highest professional standards.

Who Should Conduct the Assessment?

While it is best that you seek out the assistance of a psychiatrist in this assessment, if one is not available, medical experts with training in psychology or social workers can assist in determining whether your client possesses a mental disability.

What Standards Should the Assessment Follow?

There are no universal standards guiding mental health assessments for legal purposes, but the Diagnostic and Statistical Manual of Mental Disorders (DSM IV-TR) is a widely respected resource.⁹⁹ Published by the American Psychiatric Association, it catalogs mental health disorders for children and adults and is used in many countries outside the United States. That said, the DSM is largely a product of research conducted in the United States, and its diagnostic criteria may not translate reliably across all cultures. Your client's mental health assessment should not be limited to disorders contained within the DSM IV-TR or

disorders that may disqualify the defendant from criminal liability or death penalty eligibility.

How Can the Mental Health Assessment Be Used?

You may be able to use a mental health assessment at a number of different stages throughout the capital defense process: even if the client is not incompetent or insane, other psychiatric conditions may serve as valuable mitigating factors and contribute to a reduced sentence.

The case of *Uganda v. Bwenge Patrick* is an excellent example of the use of mental disabilities as mitigating factors in a sentencing procedure.¹⁰⁰ There, Uganda's High Court re-sentenced a former death row inmate who had been imprisoned for seventeen years. The Court gave special significance to evidence surrounding the defendant's impaired mental state at the time of the offence, his history of alcohol addiction, the fact that he had maintained strong ties with his family throughout his long incarceration, his good relations with other prisoners, his remorse, and the lengthy period of time he had already served in prison.¹⁰¹ Based on these mitigating factors, the High Court found that the offender did not merit a death sentence, and it re-sentenced him to the seventeen years already served, along with an additional year in prison followed by a year of probation.¹⁰²

MY NOTES:

△ Overcoming Barriers

• What can I do if I don't have funds to hire an expert?

- First, consider asking for funds from the court. In many jurisdictions, lawyers file written motions asking for funding from the courts for necessary expert assistance. Remember, if you require expert assistance to effectively defend your client, it is critical that you make a written record regarding your inability to hire the expert. Your client has a right to a competent defense, and if you are deprived of necessary funding because your client is indigent, his rights to due process, a fair trial, and equal protection are at stake.
- If no funds are available, consider reaching out to universities that teach psychology and forensic assessment. You may also be able to find qualified individuals to conduct the assessment on a pro bono basis.
- In the alternative, you can look for qualified individuals who may not be licensed, but may be able to provide you with valuable information about your client. If they encountered your client before his arrest and can testify regarding his mental state, their testimony will still be relevant to the court's assessment of his culpability as well as its sentencing determination.
- As a last resort, some websites have information that will not necessarily help you in court, but could give you some direction.

4. What Other Duties Do I Have to a Client with Mental Disabilities?

Your client's mental disability may cause him to be more vulnerable to the complications of the legal system and the dangers of incarceration. As a result, you have special responsibilities to ensure he understands his rights at all times and ensure he is treated properly while incarcerated.

Ensuring Your Client Understands His Legal Rights

Individuals with disabilities may not completely understand their rights as they maneuver through the criminal justice system.¹⁰³ You must ensure that your client understands his rights and the procedures he is facing, taking care to explain the process at every step. You might also consider taking special steps to meet with the client on a regular basis, as your client may not be able to express a desire to meet with you when needed or may not understand how to request a meeting.

Ensuring Your Client Receives Treatment

You should also take steps to ensure that your client receives adequate treatment while he is incarcerated. Nearly all of the central international human rights mechanisms provide for a right to an adequate standard of living and health care, and the U.N. Standard Minimum Rules for the Treatment of Prisoners mandate that the standards set by these mechanisms should be applied unwaveringly in prisons.

You should ensure that your client is assessed by a mental health professional as soon as he is admitted to prison.¹⁰⁴ This allows medical staff to identify any pre-existing medical conditions to ensure that appropriate treatment is provided, identify disabilities or injuries that may be developing or may have been sustained during initial detention, and it will allow staff to analyze the mental state of the prisoner and provide appropriate support to those who may be at risk for self-injury.¹⁰⁵ You should also ensure your client receives periodic examinations, including daily checkups if he complains of illness.

MY NOTES:

△ Overcoming Barriers

• What should I do if I think my client won't consent to a psychological evaluation?

- First, be sure. Address your client directly and let him know why you think an evaluation would be helpful to their case. There are taboos surrounding mental disabilities in many cultures, so be respectful and avoid making him feel like you think there is something "wrong" with him. Again, being honest and forthcoming, while remaining considerate and respectful will make it easier for both you and your client to have this conversation and address the issue.
- If your client still refuses, you have a difficult decision to make. If you strongly believe that it is in his best interest to have an evaluation, you may be able to get a court to order the evaluation. However, this could damage your relationship with your client and his trust in you. You must carefully weigh a number of competing factors: the extent of your client's disability, the likelihood that he will be sentenced to death if evidence of his disability is not presented, and the availability of other defenses to the crime. In many cases, you will find that the need for an evaluation outweighs the potential harm to your lawyer-client relationship.

Mental Health Developments During Incarceration

If your client develops a disability over the course of his incarceration, you should raise this issue in all appeals and clemency proceedings, since international law prohibits the execution of individuals with severe mental disabilities. You should also take care to inform family members of any significant change in mental health.¹⁰⁶ If a client has been determined to be incompetent, you should also ensure that the client is removed from the prison entirely and given access to appropriate treatment.¹⁰⁷

D. FOREIGN NATIONALS

1. What Does Foreign Citizenship Mean for My Client?

If your client is a foreign national, he is likely entitled to legal procedures that may provide him with additional legal, diplomatic, and expert assistance over the course of his prosecution.¹⁰⁸ Under article 36 (1)(b) of the Vienna Convention on Consular Relations, the authorities must inform detained foreign nationals without delay of their rights to have their consular representatives notified of their detention. Detained foreign nationals also have the right to communicate freely with consular staff. As a result, you should always attempt to establish whether any foreign country would consider your client to be its national. If you discover that your client is a foreign national, you should immediately advise him of his right to communicate with his consulate, and if he wishes, you should contact the office of the consulate immediately to inform them of your client's situation.¹⁰⁹

2. What Can My Client's Consulate Do?

Your client's consulate may be able to provide a wide range of services, including financial or legal assistance. Consulates may also facilitate such critical elements of pre-trial investigation as contacts with family members and the development of a social history of a client. Consulates may also be able to serve as unique advocates for their nationals, providing diplomatic assistance and access to international tribunals. For example, the Government of Mexico sought and obtained judgments from the Inter-American Court on Human Rights and the International Court of Justice to vindicate the rights of its nationals who had been convicted and sentenced to death without being advised of their rights to consular notification and access.¹¹⁰

MY NOTES:

If the detaining authorities fail to advise your client of his consular rights, or if they prevent him from communicating with the consulate, you should also petition the courts for an adequate remedy. If your client is in pretrial detention, you should consider asking the court to order the detaining authorities to allow consular access. If the authorities took his statement without first advising him of his consular rights, consider filing an application to exclude his statements on that basis.¹¹¹ And if your client was convicted and sentenced to death without any opportunity to contact the consulate, you should ask that his conviction and sentence be vacated.¹¹²

3. Obtaining Your Client's Consent to Contact the Consulate

It is critical that you obtain your client's consent before you contact his consulate. There are a number of different situations in which a client may prefer not to contact his consulate. If the client is a political dissident, for instance, it is possible that informing the consulate may only have adverse consequences for the client or his family.¹¹³

4. Other Considerations

There is a range of other unique barriers that a foreign national may face as he works his way through the criminal justice system. A client may

not speak the necessary language sufficiently to understand the complex vocabulary of the legal system. As a result, it is critical that you offer an interpreter, regardless of the linguistic capacity a client may appear to have. If the client accepts an interpreter, you should ensure that the interpreter is present at all legal proceedings and meetings.

Similarly, a client may not understand the legal conventions of the country in which he is detained. You should take extra care to explain necessary rights to your client, as well as procedures to which he will be subject. Some consulates may even provide culturally appropriate resources to explain foreign legal systems to their nationals.¹¹⁴

MY NOTES:

CHAPTER 6: PRE-TRIAL APPLICATIONS AND NEGOTIATIONS

I. PLEA NEGOTIATIONS

In some jurisdictions, it may be possible to engage in plea negotiations with the prosecution before (and sometimes even after) trial.¹¹⁵ In states where this is an accepted practice, the prosecution may offer to reduce the charges, or to limit the sentence imposed, in exchange for your client's agreement to plead guilty. "A plea negotiation – or 'plea bargain' in American lingo – is the apparent or actual exchange of a concession by the government for a plea of guilty by a criminal defendant. Properly conducted, it is an appraisal of all the evidence produced by both the prosecutor and defense counsel."¹¹⁶ As a capital defense lawyer, you have an obligation to explore this possibility and to present any proposed agreement to your client.¹¹⁷

Plea bargains are much more likely to occur in a common law jurisdiction than in a civil law jurisdiction. Some civil law jurisdictions have banned plea agreements entirely while others use plea agreements sparingly.

Plea agreements can take many forms, the three most common of which are: sentence recommendations, pleas to lesser offenses, and dismissal of some charges in exchange for a guilty plea to another charge.¹¹⁸ These can effectively be separated into two categories of plea agreements: sentencing agreements, which include a recommendation by the prosecutor to the judge for a lenient sentence; and charge agreements, which include pleading guilty to a lesser offense like manslaughter rather than murder, and dismissal of additional charges in exchange for a guilty plea to one of many charges brought against the defendant.

Practice Tip

• Settling Cases With the Victim's Family Under Sharia Law

- In some countries where Sharia law is applied, it is possible to avoid the imposition of the death penalty if the accusers (or victim's relatives) "forgive" the accused. In Pakistan, for example, the legal heirs of the victim have the power to release the accused from all criminal liability by simply forgiving him for his crime. This process is called "affecting a compromise".
- Pretrial investigation can sometimes affect the willingness of the victim's heirs to affect a compromise. In one of our cases, our investigation team uncovered crucial evidence that our clients had been tortured. We also found witnesses who established that our clients had a strong alibi defense. As a result, the accusers indicated that they would like to affect a compromise.
- Trials tend to take anywhere between 4-7 years, therefore it is almost always advisable to accept the compromise if it is being affected on acceptable terms. Once the court is apprised of this compromise, our clients will be cleared from all criminal charges.

-Sarah Belal, Director, Justice Project Pakistan

Before engaging in plea negotiations, you should be thoroughly familiar with the prosecution's case. You should have investigated any defenses your client may have, so that you can weigh the strength of the defense case against the prosecution's evidence. It is unwise, and may be a breach of your ethical duties, to recommend that your client plead guilty to a charge without having familiarized yourself with the prosecution's evidence and ascertained the strength of any defense the accused may have.

Your client has the right either to accept the plea or continue to trial, and he will likely look to you for guidance. Many clients will be reluctant to enter a plea of guilty, even if it means that they will avoid execution. They will not be eager to accept a negotiated settlement of their case if it means they will spend a substantial amount of time behind bars. They will only do so if they trust you to represent their best interests. Here again, we must emphasize the importance of establishing a relationship of trust with your client from the earliest stages of your representation. You can foster trust and mutual respect by meeting with your client often, letting him know that you are fighting for his rights, and keeping him informed about the status of the case.

The advantages of a negotiated guilty plea depend on several factors, including your client's likelihood of conviction if sent to trial, post-trial detention conditions, and the likelihood of your client being executed if convicted. You should explain these factors to your client carefully, so that he can make an informed decision.

You have an obligation to thoroughly explain to your client the nature of each charge to which he is pleading guilty and the rights that he is waiving if he decides to plead guilty. You should do this in language that a lay person would understand:

- **The right to plead not guilty, or having already so pleaded, to persist in that plea.**
- **The right to a trial (by judge or jury, where appropriate).**
- **The right to be represented by counsel at trial and at every other stage of the proceeding.**
- **The right at trial to confront and cross-examine adverse witnesses, to be protected from compelled self-incrimination, to testify and present evidence, and to compel the attendance of witnesses.**

You should explain the advantages of pleading guilty where evidence of guilt is overwhelming. Also point out to your client that he should not feel coerced into pleading guilty. If your client is considering a guilty plea, make sure that the case is one in which there is sufficient evidence of guilt and/or the prosecution is ready to pursue the case. Is there physical evidence of your client's guilt? Does the prosecution have witnesses who are readily available and willing to testify? If the answer to the latter question is "no," then your client should probably not plead guilty.

II. PRE-TRIAL APPLICATIONS

As the name suggests, pretrial "applications," also known as "motions," are brought before the trial. You should consider filing pre-trial applications whenever you think your client is entitled to the remedy you seek, either as a matter of law, a matter of policy, or both. The form, timing, and process by which these issues can be raised will depend on your jurisdiction's criminal procedure rules. Some of the more common issues that you may raise in pre-trial applications include:

- **Abuse of prosecutorial discretion in seeking the death penalty**
- **Access to resources that may be necessary in the case**
- **Adequate time and facilities for preparation of your client's defense (see Chapter 2)**
- **Your client's right to an adversarial procedure, meaning the right to contest the charges**
- **Your client's right to bail or the right to be released pending trial (see Chapter 3)**
- **Calling and questioning witnesses, i.e., your client's right to put on evidence in his defense, including calling witnesses and questioning the prosecution's witnesses**

MY NOTES:

- **Challenging the imposition of the death penalty as the sentence (see Chapter 10)**
- **Change of venue**
- **Constitutionality of the governing statute(s)**
- **Defects in the charging process**
- **Discovery obligations of the prosecution or request to access the case file**
- **Effective legal assistance in a capital case**
- **Exclusion of a confession**
- **Exclusion of evidence obtained unlawfully**
- **Exclusion of hearsay**
- **Exclusion of victim impact evidence**
- **Free interpretation and translation**
- **Free legal counsel if your client is indigent**
- **Humane treatment**
- **Legal advice and representation by counsel of your client's choosing**
- **Matters of trial or courtroom procedure**
- **Notification of charges in a language your client understands**
- **Presentation of rebuttal evidence, i.e., the right to put on evidence after the prosecution's presentation of evidence**
- **Private and confidential communication with counsel**
- **Prohibition of double jeopardy (*ne bis in idem*)**
- **Propriety of, and prejudice from, joinder of charges or other defendants in charging documents**
- **Public judgment, i.e., the right to have the trial in public, rather than before a secret tribunal**
- **Right to reasoned decisions/rulings on pre-trial issues**
- **Removal of judge for bias or conflict of interest**
- **Request for more time to adequately prepare (see Chapter 2)**
- **Review of denial of pretrial motions by a higher tribunal**
- **Right to access the case file, including newly discovered evidence if investigation is still ongoing**
- **Right to a speedy trial**
- **Right to be present**
- **Right to object to evidence introduced by the prosecution**
- **Sufficiency of the charging document**
- **Suppression of evidence**
- **Trial by ordinary courts using established legal procedures**
- **Trial by independent and impartial court**

Whether to bring some, all, or any of these motions depends on the unique circumstances of your client's case, and the strategic decisions that must be made. Some of these motions are discussed in more detail below.

A. REQUESTS FOR INFORMATION IN THE PROSECUTION'S FILE

As part of your representation and preparation for trial, you need to make sure you have as much information as possible relating to the charge(s) against your client, and you should confirm that the information you do have is accurate. One way to do that is to get access to the information held by the prosecution. If the prosecution refuses to give you the requested information, you should bring an application to compel that information, sometimes called a motion to compel discovery. Even if your jurisdiction does not use the term "discovery," you should still request a clarification

MY NOTES:

of the indictment/charges and disclosure of evidence and information relevant to the trial.¹¹⁹

In civil law jurisdictions, you may be able to obtain access to the case file and copy it prior to trial. It is imperative that you do this at the earliest possible opportunity.

1. Disclosure of Evidence

You should request access to the evidence collected or created by the police, and request that it be available for scientific testing by experts. Even if the prosecution's experts have examined the evidence, you should obtain independent experts to examine the evidence as well, if at all possible.

You should also request notice of the state's evidence. Specifically, you should request disclosure of aggravating factors and information relating to mitigating factors.

2. Disclosure of Witnesses

Make sure to request disclosure of the names of witnesses the prosecution intends to call at trial, and any they may have called at an earlier phase of the prosecution (such as Grand Jury witnesses).¹²⁰ Also, it is important to request disclosure of rebuttal witnesses, since the state may know of witnesses who could testify in favor of your client, but choose not to call them.

B. APPLICATIONS TO EXCLUDE EVIDENCE

Often the prosecution may intend to use evidence at trial that the defense believes should not be admitted into evidence. For instance, you may believe that your client's confession was taken in violation of national or international law. Your client has the right against self-incrimination and the right to remain silent under Article 14(3)(g) of the ICCPR, Article 8(2)(g) of the American Convention, and Article 55(1)(a) of the Statute of

the International Criminal Court. Moreover, police abuse of criminal suspects is routine in many jurisdictions, and you should always inquire whether your client's statement was the product of coercion.¹²¹ Article 15 of the Convention Against Torture squarely prohibits the use of statements obtained by torture or cruel, inhuman, or degrading treatment in criminal prosecutions. And article 8(3) of the American Convention on Human Rights provides that a "confession of guilt by the accused shall only be valid if it is made without coercion of any kind."¹²²

Practice Tip

• Rights against torture

- Torture is prohibited, and state parties to the Convention Against Torture are required to "keep under systematic review interrogation rules, instructions, methods and practices as well as arrangements for the custody and treatment of persons subjected to any form" of deprivation of liberty.¹²³ If your client was interviewed, make sure to request a copy of any records created or retained by the state.
- An alleged victim of torture "has the right to complain to, and to have his case promptly and impartially examined by, its competent authorities."¹²⁴
- To determine if your country is a party to the Convention Against Torture, check the UN website at:
http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtmsg_no=IV-9&chapter=4&lang=en.

Normally, a judge will have the authority to consider an allegation of coercion or torture at any stage during the proceedings. Some jurisdictions do not permit the defendant to exclude any evidence at trial, regardless of the circumstances in which it was obtained. In those situations, you should consider whether to file an application to exclude evidence in order to preserve the issue for appeal and to ensure that you have exhausted local

MY NOTES:

remedies if you are considering filing an appeal to an international body.

Other types of suppression applications include: (1) an application to exclude evidence because it was obtained illegally or unfairly—for example, during your client’s unlawful detention or arrest, or during a warrantless search; (2) an application to exclude any information prejudicial to your client, including, for example, victim impact statements, evidence of prior criminal activity (particularly the introduction of offenses for which the defendant has not been convicted), and aggravating circumstances; and (3) an application to suppress inflammatory photographs of the crime scene or other scenes. In many jurisdictions, however, your client may be forced to surrender documents acquired pursuant to a warrant, as well as breath, blood and urine samples and bodily tissue for the purpose of DNA testing.¹²⁵

C. APPLICATIONS CHALLENGING IMPOSITION OF THE DEATH PENALTY

When your client has been charged with a crime punishable by death, you should consider challenging the imposition of the death penalty at every opportunity. Even if it is unlikely to be successful in your jurisdiction, you should still make a record of your client’s objection to the imposition of the death penalty. This will be helpful if your client appeals to an international body. There are multiple bases on which to challenge the imposition of the death penalty. The specific bases on which you might challenge the imposition of the death penalty are addressed fully in Chapter 9, “Appeals and Post-Conviction Appeals.”

D. APPLICATION FOR A SPEEDY TRIAL

International law also provides that individuals must be tried without undue delay.¹²⁶ Your client has the right to have his case heard within a reasonable time, beginning when he is charged and ending with the final decision delivered by

domestic courts.¹²⁷ In criminal cases, the time to be taken into consideration starts running with the entry of a charge. Time ceases to run when the proceedings have been concluded at the highest possible level, when the determination becomes final, and the judgment has been executed. What qualifies as “undue” delay will depend on the circumstances of your case, including its complexity, the conduct of the parties, whether the accused is in detention, and so forth.¹²⁸

Undue delay is a tremendous, recurring problem in many countries due to the high numbers of prisoners awaiting trial and the limited capacity of the judiciary to process the cases efficiently. If you represent a client who has been held without trial for years on end, you should strongly consider petitioning the courts for your client’s immediate release under domestic law and constitutional provisions.¹²⁹ If this fails, you should consider filing an appeal with one of the international bodies discussed in Chapter 10.

In addition, your client should not be subject to an unnecessarily long and drawn-out trial proceeding. These rights are *not* contingent on a request by the accused to be tried without undue delay or for a reasonable duration.

E. APPLICATION TO CHANGE VENUE

If your client will have a jury trial, you should consider whether a change of venue is appropriate. If a jury chosen in the jurisdiction where your client will be tried is likely to be particularly prejudiced against your client, you should request a change of venue. Your client has the right to an impartial jury.

F. APPLICATION FOR FINANCIAL ASSISTANCE

If your client cannot afford the necessities of his defense, you should request assistance from the court. This includes relief from payment of court fees, as well as funds to secure a mental evaluation

MY NOTES:

and other experts,¹³⁰ if not already provided by the court and if you believe they are necessary.¹³¹ Both Article 14(3)(e) of International Covenant on Civil and Political Rights and Article 6(3) of the European Convention state “[i]n the determination of any criminal charges against him, everyone shall be entitled to the following guarantees: the right to examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him.”

G. APPLICATION FOR RELIEF FROM PREJUDICIAL JOINDER

If your client is being tried along with co-defendants, you should consider challenging the joinder of their cases on the ground that it is prejudicial to your client.

H. APPLICATION TO SEAL COURT FILE

You should consider requesting that the court file be sealed from news media, to ensure that your client will receive a fair trial untainted by adverse publicity. This is especially true if your client will be tried by a jury.

MY NOTES:

CHAPTER 7: TRIAL RIGHTS AND STRATEGY

I. YOUR CLIENT'S FAIR TRIAL RIGHTS

Under international law, all individuals are entitled to due process and equality before the law.¹³² Both of these fundamental rights are multi-faceted. They include, among other things, the right to a fair hearing before an impartial tribunal, the right to trial without undue delay and for a reasonable duration, the right to be present at trial and to participate in a meaningful way, a presumption of innocence, and a right against self-incrimination.

A. RIGHT TO A FAIR HEARING BEFORE AN IMPARTIAL TRIBUNAL

Your client has the right to a fair trial before an independent, impartial tribunal within a reasonable time of being charged or taken into custody. This right is fundamental and well-documented in international law.¹³³

As a capital defense lawyer, it is your duty to assure, to the best of your ability and available resources, that your client's right to a fair trial before an impartial tribunal is upheld.

1. What is included in the right to fair and public hearing?

All general and regional human rights instruments guarantee the right to a fair trial.¹³⁴ Some of the basic guarantees from these sources include:

- “equality of arms” between prosecution and defense;
- right to adversarial proceedings;
- right to prompt, intelligible and detailed information about the charges; and
- adequate time and facilities to prepare the defense.¹³⁵

According to the Lawyers Committee for Human Rights, “[t]he single most important criterion in

evaluating the fairness of a trial is the observance of the principle of equality of arms between the defense and the prosecution. Equality of arms, which must be observed throughout the trial, means that both parties are treated in a manner ensuring their procedurally equal position during the course of a trial.”¹³⁶ It is impossible to identify all of the situations that could violate this principle. Such situations might range from excluding the accused and/or counsel from a hearing where the prosecutor is present or, perhaps, denying the accused and/or counsel time to prepare a defense or access to relevant information. This principle encompasses your access to the prosecution's case file to the extent that is necessary to refute the charges and prepare your client's defense. Watch closely for such situations and, where they arise, make appropriate objections before the tribunal.

Another aspect of your client's fair trial rights includes the right to a public hearing, which helps ensure that your client's due process rights are honored during trial. Although there are some circumstances under which the public can be excluded from judicial proceedings, this is not the case when the pronouncement of a judgment is involved. Under ICCPR Article 14(1), judgments “shall be made public” except where the interest of juvenile persons otherwise requires or where the proceedings concern matrimonial disputes of the guardianship of children.¹³⁷

2. How important is an independent and impartial tribunal?

Independence and impartiality of the tribunal are essential to a fair trial. Judges and jurors alike should have no personal stake in a particular case, should not have pre-formed opinions about the outcome, and should be free of any interference, pressures or improper influence from any branch of government or other source.¹³⁸ Without these obstacles, decision-makers are free to decide matters before them on the basis of the facts and in

accordance with the law. This right also guarantees that judges are selected primarily on the basis of their legal expertise. The tribunal must be independent of both the executive and the parties.¹³⁹

The presence of judicial or legally-qualified members in a tribunal is one indication of its independence.¹⁴⁰ You should also consider the following questions when protecting your client's right to an independent tribunal:

- **Is the practice of judicial appointment in your jurisdiction satisfactory, as a whole, with respect to the involvement and control of the executive?**
- **Was the establishment of the particular tribunal trying your client's case suspicious? In other words, was it tainted by motives that would tend to influence the outcome of the proceedings?**
- **Does the tribunal have the power to give a binding decision that cannot be altered by a non-judicial authority?**

If you or your client feels that one or more members of the tribunal cannot render an impartial or unbiased opinion in his case, you may also want to seek relief from a higher authority, as provided for in local law. To examine whether a judge is biased, the court may apply an objective test, in which case it will consider the outward conduct of the particular judge whose impartiality is questionable. If the court applies a subjective test, where it evaluates the actual motives and biases of the judge, success on such a challenge is more difficult. Normally, the impartiality of a properly-appointed judge is presumed, and you will have to bring strong proof of actual bias to have your case removed from the judge. Before making a challenge to the tribunal's partiality, you should have evidence that at least one judicial official has taken part in the proceedings in some prior capacity, that he is related to the parties, or that he

or he has a personal stake in the outcome of the proceedings. In the alternative, you should be able to demonstrate that the official has a pre-formed opinion that affects his decision-making or that there are other reasons giving rise to serious concerns about his impartiality.¹⁴¹ Before you make any allegations of bias against a member of the judiciary, you should check local law to see if there are any rules that allow you a "free strike" (i.e., rejection without giving reasons) of a judicial officer from the case.

B. THE PRESUMPTION OF INNOCENCE

Under international law, your client is entitled to be presumed innocent.¹⁴² According to Article 14(2) of the ICCPR: "Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law." Although Article 14(2) does not specify the required standard of proof, it is generally accepted that guilt must be proved "to the intimate conviction of the trier of fact or beyond a reasonable doubt, whichever standard of proof provides the greatest protection for the presumption of innocence under national law."¹⁴³

Does this presumption apply to affirmative defenses that your client may raise at trial? Not necessarily. ECHR Article 6(2), for example, does not prohibit presumptions of law or fact, but states that any rule that shifts the burden of proof to the defense must be confined within "reasonable limits which take into account the importance of what is at stake and maintain the rights of the defense."¹⁴⁴ As long as the overall burden of establishing guilt remains with the prosecution, the presumption of innocence does not generally prohibit statutes or rules that transfer the burden of proof to your client to establish his defense in a particular case. Therefore, if your client argues that he acted in self-defense or under duress, you may bear the burden of proof to demonstrate that the defense applies.

MY NOTES:

Case officials, adjudicators, and public authorities have a duty to maintain the presumption of innocence by “refrain[ing] from prejudging the outcome of a trial.”¹⁴⁵ You should pay close attention to the appearance of your client during a trial in order to maintain the presumption of innocence. For example, you should be prepared to object if the court requires your client to wear handcuffs, shackles or a prison uniform in the courtroom without a reasonable justification.

C. RIGHT TO BE PRESENT AT TRIAL

To properly conduct a capital defense, you will need immediate access to your client in open court in order to communicate about evidence and witness testimony, among other things. Therefore, your client must be present at trial to participate in his own defense.¹⁴⁶ For your client’s participation in the defense to be meaningful, he will have to understand what is happening during the proceedings. As noted in Chapter 2, international law establishes that everyone is entitled “[t]o have the free assistance of an interpreter if he cannot understand or speak the language used in court.”¹⁴⁷ You should ensure that the interpreter provided by the court is competent and experienced, and whenever you observe that the interpreter has failed to translate accurately, object. Generally speaking, the right to an interpreter includes the translation of all the relevant documents.¹⁴⁸ When granted, the right to the assistance of an interpreter is usually free and cannot be restricted by seeking payment from your client upon conviction.

△ Overcoming Barriers

• What should I do if my client fires me?

- This is a common response among capital clients. Often, they cannot control anything in their lives—what they eat, who they talk to, when they sleep, whether they can shave—and firing their lawyer is the only opportunity they have to exercise some control.

- It is important to note that this response is often attributable to a breakdown in the lawyer-client relationship. Spending time with your client to build a relationship of trust is the crucial first step in ensuring that your client will allow you to present the most effective defense. Open communication with your client can benefit your client beyond his relationship with you, and can improve his general wellbeing.
- If possible, try to address the fears behind the decision to fire you. It is important that you make it clear that your client is a partner in his defense, and that you will listen to his concerns and preferences. Take the time to explain recent developments in his case—or to address his concerns about lack of activity in his case.

D. RIGHT TO CONFRONT AND EXAMINE WITNESSES

Your client has the right to examine the witnesses against him. This right also allows the defendant to obtain the attendance of witnesses on his behalf under the same conditions as witnesses against him.¹⁴⁹ The general principle, adopted by most courts, is that accused persons must be allowed to call and examine any witness whose testimony they consider relevant to their case. Similarly, they must be able to examine any witness who is called, or whose evidence is relied on, by the prosecutor. Several other rights spring from these basic principles. First, the parties should be treated equally with respect to the introduction of evidence by means of interrogation of witnesses. Second, the prosecution must tell you the names of the witnesses it intends to call at trial within a reasonable time prior to the trial so that you may have sufficient time to prepare your client’s defense. Finally, your client also has the right to be present during the testimony of a witness and may be restricted in doing so only in exceptional circumstances, such as when the witness reasonably fears reprisal by the defendant.

To prevent violations of a defendant’s right to examine and have examined witnesses against him, you must press the courts to scrutinize closely

MY NOTES:

any claims by the prosecution of possible reprisals. Removal of your client or co-defendants from the courtroom should occur only in truly valid instances. You should immediately object when a witness has been examined in the absence of both the defendant and counsel. Similarly, the use of the testimony of anonymous witnesses at trial is generally impermissible, as it represents a violation of the defendant's right to examine or have examined witnesses against him.

The European Court on Human Rights has held that the right to a fair trial in criminal cases includes "the right of anyone charged with a criminal offence ... to remain silent and not to contribute to incriminating himself."¹⁵⁰ In the case of *Saunders v. United Kingdom*, the Court explained that, although not specifically mentioned in Article 6 of the ECHR, the right to silence and the right to refrain from self-incrimination are "generally recognized international standards which lie at the heart of the notion of a fair procedure under Article 6."¹⁵¹ They exist to protect the accused against improper compulsion by authorities, including coercion that is direct or indirect, physical or mental, before or during the trial—anything that could be used to force your client to testify against himself or herself or to confess guilt. The right not to incriminate oneself, in particular, presupposes that the prosecution in a criminal case will need to prove their case against the accused without resort to evidence obtained through methods of coercion or oppression in defiance of the will of the accused. Thus, the right is closely linked to the presumption of innocence contained in ECHR Article 6 (2).

This right means that your client may remain silent and not testify at trial if he should choose this option.¹⁵² Generally speaking, silence by the accused may not be used as evidence to prove guilt and no adverse consequences may be drawn from an accused's exercise of the right to remain silent.

E. RIGHT TO KNOW THE GROUNDS OF THE TRIBUNAL'S DECISION

You should advocate strongly for your client's right to access a reasoned, written opinion from the tribunal, completed in a prompt fashion. This right is inherent in the right to a fair trial and forms the basis for your client's right to appeal. If the tribunal does not automatically provide a written judgment, you should move the court to provide such a document.

Article 6 of the ECHR requires European courts to provide reasons for its judgments in criminal cases. While a court is not required to give detailed explanations of every aspect of a decision, it must address specifically any issue that is fundamental to the outcome of the case.¹⁵³ The Council of Europe *Recommendation Concerning Consistency In Sentencing* addresses specifically the need for giving reasons when imposing a sentence.¹⁵⁴ Also, article 74(5) of the Statute of the International Criminal Court, states that the decisions of the Trial Chamber "shall be in writing and shall contain a full and reasoned statement of the Trial Chamber's finding on the evidence and conclusions."

Jury verdicts in common law countries often are not accompanied by any kind of written explanation of the reason for the verdict.¹⁵⁵ You should inquire into local jury procedures. Pay particular attention to the questions or instructions to the jury formulated by the judge, checking if they are precise, if they are not misleading, if they include questions that match the defense's "theory of the case", and if necessary exercise the right to challenge them or to ask the judge to add or modify questions. Also, if you are allowed, you should ask for the members of the jury to be individually polled on their verdict. You should also ask the judge for permission to talk with members of the jury after the trial proceedings have concluded.

MY NOTES:

II. TRIAL STRATEGY

In order to effectively advocate for your client at trial, you will have to give significant consideration to developing your trial strategy. First and foremost, this involves developing a theory of the case that will give your defense at trial its overall shape. Your theory of the case should guide you through the evidence you plan to introduce, including your selection of witnesses and exhibits. A well-developed theory of the case should carry you through all phases of trial, including jury selection, witness examination, and opening and closing arguments.

This manual seeks to provide some general rules regarding trial strategy. Some of these, such as the development of a theory of the case, have universal application. Others, like the selection of a jury, will only apply in certain jurisdictions. Moreover, trial strategy will be affected by local rules, culture, and your assessment of how the decision maker (judge or jury) will respond to the tactics you employ.

A. DEVELOPING A THEORY OF THE CASE

Trials are often a contest between two versions of what happened: the version offered by the prosecution, and the version offered by the defense. A theory of the case is necessary in order to make sure that the case presented by the defense is consistent and believable. A theory of the case can also provide a guide for your investigation of the defense. For example, your theory may be that your client killed the deceased in self-defense. Or, it may be that this is a case of mistaken identity, and your client is not guilty of any crime. Whichever theory you choose, you will need to highlight evidence that is consistent with your theory, and provide an explanation for evidence that appears to undermine your theory.

1. Comprehensive

A good theory of the case will be comprehensive. Your theory should tie together all of the various facts of the case into a single, unified narrative. A theory of the case is more than just the legal defense. A good theory of the case must be simple to understand for an average person while presenting a narrative that accounts for every piece of evidence that will be presented in the case. You should analyze all the facts and legal arguments that you might present, and select the theory of the case that best fits every element.

2. Consistent

In order to convince the jury of your theory of the case, your theory must be consistent. In a capital trial, you must consider both the guilt phase and the penalty phase of trial. Your theme should be presented consistently through both phases. Stated another way, your theory at the guilt phase of trial must complement, support, and lay the groundwork for the theory at the mitigation phase. If you take contradictory positions at the guilt phase and the penalty phase, you will lose credibility with the judge and jury. You should be careful, then, to formulate a single consistent theory that will be reinforced at both the guilt and mitigation phases of trial.

Some lawyers may be tempted to argue every conceivable theory available, challenging every point of evidence, no matter how consequential, even if those theories contradict each other. This is a mistake you should avoid. If you offer multiple competing theories, the jury will not know which theory of the case to believe. Instead, focus on one, singular narrative theory of the case and make your presentation of the evidence consistent with that theory.

MY NOTES:

3. Constant

Judges and juries start forming an opinion about each case very early on. Because of this, you should be prepared to present your theory of the case constantly, at every stage of the trial, including jury selection, witness preparation, pretrial motions, opening statement, presentation of evidence and closing argument.

You should make sure to introduce concepts that will be important at the penalty phase of trial as early as possible. For example, if mental health issues are part of your theory of the case at the penalty phase, you should introduce evidence relevant to mental health during the guilt phase. If you practice in a jurisdiction where cases are tried before a jury, and if you are able to ask questions of potential jurors, you should ask them questions that reinforce the themes that they will hear during the presentation of evidence.

4. Concise

Even in complex cases, you should usually be able to state the theory of the case concisely, often in a single phrase or in a sentence or two. A concise and simple statement of your theme can be repeated throughout the trial, during your arguments and presentation of evidence. Repetition of a simple theme will help the judge and/or jury remember your theory of the case.

B. IDENTIFYING WITNESSES YOU WILL CALL

1. What Kind Of Witnesses Should I Call?

The number and type of witnesses you should call will vary widely depending on the crime your client is charged with, the strength of the prosecution's case and the resources available to you and your client. In rare instances, your client may be best served by not calling any witnesses

and instead focusing your client's defense on highlighting the prosecution's inability to meet its burden of proof for each element of the crime your client is charged with. In many cases, however, defending your client will require calling and examining witnesses. Decisions regarding the type and number of witnesses you are going to call should be made based on direct involvement with your client.

2. Fact Witnesses

Fact witnesses are often crucial to a successful defense strategy, and are discussed in Chapter 4. Witnesses who were with your client at the time of the crime can establish your client's alibi (and hence, his innocence). Witnesses who were at the scene of the crime may be able to testify that they did not see your client, that somebody else committed the crime, or that your client acted in self-defense. Witnesses who were with your client at the time of his arrest can also often provide valuable information about his actions and the behavior of the police.

3. Character Witnesses

Family members and witnesses who have known your client for a long time may be able to provide favorable testimony regarding your client's character or testimony that may be useful in humanizing your client. In rural communities in Africa, village chiefs may be very persuasive character witnesses. Former employers, religious leaders, and teachers can also provide compelling testimony regarding your client's good character.

4. Expert Witnesses

Where funding is available, it is important to consider calling expert witnesses to opine on the reliability of the prosecution's investigation techniques and forensic evidence, including the post-mortem report indicating cause of death, identification parades or "lineups," ballistics, DNA

MY NOTES:

evidence, and fingerprints. These witnesses are discussed at length in Chapters 4 and 5. If expert witness testimony is crucially important to your client's case, your client has the right to secure and produce such testimony.¹⁵⁶ Before hiring an expert witness or asking the court to appoint one, verify the credentials of the expert and determine whether they can qualify as an expert in your jurisdiction.

5. Should My Client Testify?

As noted above, your client has the right against self-incrimination and the right to remain silent.¹⁵⁷ Accordingly, one of the most fundamental decisions in defending a capital case is whether your client will testify. Allowing an accused defendant to affirmatively proclaim his innocence and tell his side of the story can be a powerful tool. Conversely, if your client does not possess the ability to be a convincing witness, or if he lacks the ability to withstand a strong cross examination, your client's interests may be best served by keeping him off the witness stand. The decision of whether or not to testify should be left to your client; however, you must assist your client by advising him how his testimony may help or hurt his overall defense and how his testimony may affect the strategy and themes you have developed.

6. What If A Witness Refuses To Cooperate?

If you identify a witness who may be helpful to your client's case, but who refuses to cooperate, you should attempt to compel his participation in the proceedings. In many jurisdictions the court can issue a subpoena to force a witness to participate; be sure you are familiar with the processes available in your jurisdiction to compel such witnesses to attend judicial proceedings. Be aware, however, that the Human Rights Committee has cautioned that the right to compel attendance of a witness, at least under article 14(3)(e), is limited to situations where the inability

to do so would violate the principle of equality of arms.¹⁵⁸

7. What Do I Need To Do After Selecting My Witnesses?

Once you have decided which witnesses to call, it is your responsibility to make sure they are prepared to testify and are able to come to court. On the most basic level, this means advising them about suitable courtroom dress and demeanor. Similarly, you need to ensure that your witnesses know when and where hearings will take place and to take every possible measure to ensure that they can attend the hearings at which they are expected to testify. In rural communities with poor roads, it may take witnesses a day or more to travel to court, and they will need advance notice. Transportation is often a challenge. If you are unable to provide transportation yourself, consider filing a motion to obtain necessary funds to compensate the witnesses for public transportation, accommodation and food. If a witness cannot appear at a hearing where they are expected to testify, it is important to notify the court immediately and to ask for a continuance. If the court refuses to delay the hearing, it is your duty to raise a formal objection.

Witnesses must also be prepared on a substantive level. To avoid witness tampering, some jurisdictions place strict limits on the amount of access lawyers have to witnesses prior to a trial. However, if your jurisdiction allows you to do so, providing a witness with an overview of how their testimony fits into your case strategy and theme can often lead to more compelling and useful testimony. If possible, you should let your witnesses review the demonstrative evidence and exhibits you will be questioning them about. It is equally advisable to notify your witnesses of questions you think they may be asked on cross-examination. When preparing a witness your obligation is to assist the witness in giving their

MY NOTES:

own testimony and not the testimony preferred by you or your client.

C. IDENTIFYING EVIDENCE AND EXHIBITS YOU WILL INTRODUCE

Tangible evidence and exhibits can have a disproportionately persuasive impact on a judge or jury. There is no substitute for allowing the court or a jury to come to its own conclusions after seeing, touching, smelling and/or hearing an exhibit. For instance, witness testimony regarding a crime scene becomes more convincing and credible if you can introduce an actual photograph that supports a witness's testimony.

While the specifics of each case dictate what types of evidence and exhibits you should introduce, you will want to consider whether physical evidence exists that can exculpate your client. Favorable expert reports regarding forensic issues, such as ballistics, DNA evidence, or fingerprints, should be submitted for consideration by the judge or jury. Similarly, if you have useful expert reports or letters detailing your client's psychological state, you should consider introducing those into evidence. To the degree your jurisdiction allows it, you may also wish to introduce demonstrative evidence that portrays your client in a favorable light (such as awards, trophies, military medals) and evidence that helps humanize your client (like family photos).

D. JURY SELECTION

Trial by jury is a common feature of common-law criminal justice systems, and is increasingly required in civil-law jurisdictions as well. Selection of the jury is one of the most important roles you have as a capital defense lawyer. Your client has the right to a jury that is free from bias and that is willing to consider the defenses you will offer. It is your responsibility to ensure, to the best of your ability under the rules of your jurisdiction, that the jury panel is composed of people who will give your client fair consideration.

You should be familiar with the rules in your jurisdiction relating to the questioning and challenging of particular jurors. Most common law jurisdictions will have rules that are available in every criminal case for questioning and challenging jurors for reasons of bias. In addition, there may be special rules that apply only in capital cases; for instance, rules about whether a juror is willing to consider imposing death as a criminal penalty.

You should have three major questions in mind when selecting a jury in a capital case:

1. Will this juror be able to consider all the evidence fairly?

You should ask questions designed to discover whether each juror is willing to listen to the evidence fairly, without bias or prejudice. You should make sure that individual jurors are not predisposed against your client for reasons of race, gender, religion, or other social grouping. You should likewise ask questions designed to discover whether each juror is willing to give meaningful consideration to mitigating evidence (this is particularly important if the jury plays a role in the sentencing process). These questions are also an opportunity for you to introduce the themes and theory of the case that you will develop throughout trial. For instance, if you will be presenting evidence of mental health issues, you should ask questions designed to make sure that each juror is willing to consider evidence of mental health in their deliberations. This serves two purposes: it allows you to discover and challenge any jurors who might be biased against such evidence, and it provides you an opportunity to introduce, at a very early stage of trial, that questions of mental health will play a role in the narrative you intend to present.

MY NOTES:

2. Will this juror be helpful to my client during deliberations?

Certain jurors, due to their background or experiences, may be more sympathetic to your client, or to the arguments you intend to make regarding your client's culpability, character, and life history. To the extent possible, you will want to direct your questions in a way that makes it more likely that these jurors will be permitted to sit on the jury.

Often, this goal requires you to ask your questions in a way that will make it difficult for the prosecution to find a legal basis to challenge these jurors. For instance, the prosecution may wish to exclude a juror who expresses reluctance to serve on a case in which the death penalty could be imposed. If you believe this individual would be a good, sympathetic juror, you should seek to establish, through your questioning, that the juror could be fair to both sides and will consider all the evidence. For instance, you might ask, "You will follow the law and the judge's instructions, won't you?"

3. Will this juror be willing to vote for a punishment other than death?

Finally, in the relatively small number of states (including the United States) in which juries are responsible for determining the sentence, you must ensure that each juror is willing to consider alternatives to the death penalty. You should make sure to ask questions designed to expose whether a particular juror is inclined to vote for a death sentence automatically after a finding of guilt, regardless of mitigating evidence or other circumstances.

E. EXAMINING WITNESSES

1. Direct Examination

Direct examination is your opportunity to present your client's case. Direct examination should be used to further your defense strategy and to develop your theory of the case. If your client is pursuing an affirmative defense, such as lack of mental capacity, you will need to elicit testimony that is sufficient to satisfy the applicable burden of persuasion. In common law jurisdictions, it may also be necessary to use your witnesses to lay the foundation for exhibits you intend to introduce into evidence.

You should create a direct examination plan for each of your potential defense witnesses. For each witness you are considering, ask yourself the following questions:

- **What do I intend to prove or disprove with this witness?**
- **How does this witness's testimony contribute to the theme I have developed?**
- **Can this witness undermine any of the elements of the crime my client is charged with?**
- **Can this witness bolster or undermine the credibility of other witnesses?**
- **Can I use this witness to introduce any of my intended exhibits?**

Avoid the temptation of trying to prove too much through any single witness. If you rely too much on a single witness, and that witness is disbelieved or disliked by the judge or jury, your theory of the case will be less convincing.

Another purpose of direct examination is to bolster the credibility of your witnesses. When appropriate you should ask your witnesses questions that will allow them to testify regarding the basis for their knowledge, their ability to

MY NOTES:

observe the incident they are testifying about and their lack of bias or interest in the outcome of your client's case. For expert witnesses, it is important to help your witness establish their expertise in the field they are testifying about.

2. Cross Examination

Cross examination presents your opportunity to undermine the prosecution's witnesses. To properly prepare for a cross examination you must evaluate what you expect the prosecution's witnesses to say and whether you will need to challenge that information.

If your jurisdiction allows it, your cross-examination should consist of leading questions that call for a yes or no answer. You should never ask a question when you don't know what the answer will be, unless there is no chance that the answer will damage your defense. Your questions should always concern only one fact at a time (e.g., "You said it was 7 p.m. when you saw the incident?" "The sun sets at 6 p.m.?" "There were no streetlights?" "You were standing 50 meters away?") Do NOT be tempted to ask the following question: "So therefore, you could not see what happened!" By asking this final question, you invite the witness to insist that he *could* in fact see, and you destroy the effect of your careful cross examination up to that point.

Asking yourself the following questions can help you prepare an effective cross examination:

- **Does the witness have a bias or motive for testifying against your client and for the prosecution?**
- **Does any part of the witness's testimony conflict with other portions of their testimony?**
- **Does the witness's testimony conflict with their earlier statements about the topic?**

- **Can you create inconsistencies in the testimony of the witness and a prior witness?**
- **Was the witness in a position to observe the incident he is testifying about?**
- **Can the witness help you establish facts that undermine aspects of the prosecutor's case?**
- **Can the witness help you establish facts that are helpful to your theory or theme?**
- **Can you minimize any damaging testimony that came out during direct examination?**
- **Can you make the witness retract or discredit his own testimony?**
- **Can you get the witness to admit that he is uncertain about an issue he testified about?**
- **Can additional facts be raised that will lessen the impact of the witness's direct examination?**
- **If the witness overstated his knowledge about an issue, can you make him retract or back away from that testimony?**
- **Has the witness ever been charged with lying under oath?**
- **Has the witness ever been convicted of a crime? (You should investigate the criminal record of *all* witnesses and demand that the prosecution provide you with criminal records in their possession).**
- **Has the witness attempted to introduce evidence that requires particular knowledge or expertise?**
- **Is the witness an expert whose expertise, training, knowledge or experience can be challenged?**
- **Does the prosecution's expert meet your jurisdiction's requirements to qualify as an expert witness?**

MY NOTES:

You should also prepare all documents and exhibits that you intend to use during your cross examination.

F. INTRODUCING AND OBJECTING TO EVIDENCE

1. Introducing Evidence

Generally, before you can ask the court to consider a piece of evidence, you must provide a basis for the court to determine that the evidence is relevant, authentic and does not violate the jurisdiction's evidentiary rules. The requirements for laying this foundation depend on your jurisdiction's rules, the nature of the evidence, and the purpose for which it is offered. However, to establish authenticity you will typically need a witness who can testify that he is familiar with the piece of evidence you are seeking to introduce and that the evidence is actually what you claim it to be. Likewise, the general rule regarding relevance is that the evidence you are seeking to introduce must make some disputed fact more or less likely. Proper trial preparation requires you to not only determine which evidence you would like to introduce, but to assure that the evidence is admissible and that you have a witness who can assist you in laying the foundation necessary to introduce the evidence.

2. Objecting to Improper Evidence and Hearsay

Each jurisdiction imposes its own unique limitations upon what types of evidence may be introduced during a criminal trial and the purposes for which that evidence may be admitted. While it is impossible to list all of the types of evidence that may be excluded, and the exceptions to those exclusionary rules, there are several common objections you should be familiar with. For example, many jurisdictions prevent the prosecution from using evidence regarding your client's alleged bad character or poor reputation to prove that your client committed the crime in

question. Similarly, you may be able to prevent the prosecution from introducing evidence of previous crimes your client has committed. Evidence that was illegally or improperly obtained can also often be excluded from a trial, as discussed in Chapter 6. In some jurisdictions, extremely prejudicial items, such as graphic photographs of a crime scene, may be objectionable if those items have little probative value. You may be able to object to a witness's testimony if he is speculating or guessing, or if he does not qualify as an expert witness and is attempting to testify about his opinions or conclusions. Finally, you should object if the prosecution attempts to introduce a document or tangible object into evidence without first offering adequate proof that the item is what the prosecution claims it is.

Perhaps the most important objection to keep in mind is hearsay. Typically, only statements made during a trial or hearing may be offered as evidence to prove the truth of the matter being testified about. The underlying reason for this rule is that in order to have a fair trial "an accused should be given an adequate and proper opportunity to challenge and question a witness against him, either at the time the witness makes his statement or at some later stage of the proceedings . . ." ¹⁵⁹ While this may seem obvious, the implications of this rule may be more difficult to apply in practice. For instance, prosecutors routinely attempt to introduce statements crime scene witnesses make to law enforcement officials. If those witnesses do not appear at trial and you have not otherwise had the opportunity to subject them to adversarial questioning, you should object that their earlier statements are improper and should not be considered by the tribunal. ¹⁶⁰ Be vigilant of attempts to circumvent your client's right to subject adverse witnesses to cross-examination and object when the court allows such statements into evidence.

MY NOTES:

In all cases, remember that your objections to the prosecution's evidence should be determined not just by what is or is not permitted under the rules of evidence and procedure that apply in your jurisdiction, but by your strategic judgment as to whether the evidence hurts or helps your defense. In other words, you may decide not to object to otherwise inadmissible evidence because it actually supports your defense theory. For example, you might not object to the admission of your client's prior crimes if the circumstances of those crimes reinforce your theory that your client is mentally ill.

G. OPENING AND CLOSING STATEMENTS

The opening and closing statements are critical opportunities for the defense. The opening statement is your first chance to present your theory of the case in a comprehensive fashion to the judge or jury. The closing argument, similarly, is your final chance to explain the evidence in light of your theory and convince the judge or jury of your client's innocence and/or the mitigating circumstances of the case.

For both your opening and your closing, you should spend a significant amount of time thinking about and practicing what you will say. This will help you present a convincing and credible demeanor.

1. Opening Statements

Your opening statement should be factual in nature. You should tell the jury the narrative that forms the theory of your case. You do not need to cover every fact in your opening, but you should make sure to cover each of the most important facts to your theory of the case. In essence, you are telling a compelling and believable story that is supported by the evidence.

You should open with a sentence or two that summarizes your theory of the case simply and

concisely. You should then proceed to tell the narrative that communicates to the jury your client's innocence or reduced culpability. As with every stage of trial, you should be mindful to weave in themes that apply to both the guilt phase and the penalty phase of trial. These themes should complement each other.

This is not the right time to explain to the jury what a trial is, or what procedures will be followed, or explain the burden of proof. Instead, you should focus on the narrative, giving the jury enough information to understand each of the key people in your theory of the case and to follow the events that the testimony will reflect.

Use language that can be understood by an ordinary person. Avoid legal jargon. The best opening statements are short and simple.

2. Closing Argument

Your closing argument is your last opportunity to leave the judge or jury with an impression of your case. This is a chance to summarize the evidence and, more importantly, to explain what the evidence means and how it fits into your overall theory of the case.

Your argument must be limited to the evidence presented and the reasonable inferences that can be drawn from that evidence. You should not use inflammatory language, or state your own personal belief as to the truth or falsity of the evidence presented. Instead, you should argue to the judge or jury what conclusions they should draw from the evidence they have just been presented.

Again, in a capital trial, you may have the opportunity to provide two closing statements – one at the end of the guilt phase of the trial, and one at the end of the penalty phase. These statements should be consistent and mutually reinforcing. Make sure that your arguments at the closing of the guilt phase do not contradict your

MY NOTES:

arguments at the penalty phase. Instead, use the opportunity in the closing of the guilt phase to reintroduce the themes you will pursue at the penalty phase.

In some jurisdictions, after the closing statements by the prosecution and defense counsel, there is an opportunity for the defendant to make a final statement. Where this is the case, and if your

client wishes to take advantage of this opportunity, you should work with him to prepare the content of his statement and the manner in which he delivers it.

MY NOTES:

CHAPTER 8: SENTENCING

I. INTRODUCTION

Capital defense lawyers should take advantage of every opportunity to argue against imposing the death penalty on their client at every stage of the case. In countries that have a separate penalty phase or sentencing proceeding, this is the primary purpose of presenting what is known as mitigating evidence. You must begin to investigate and prepare the case for mitigation in the earliest stages of your representation,¹⁶¹ since your mitigation theory must be consistent with your theory of the case in the culpability phase of the trial. (See Chapter 7 for a discussion of the theory of the case). This is particularly important in countries where there is no separate “penalty” phase. In Pakistan, for example, defense attorneys must present all evidence relating to both culpability and sentence in one unified trial.

The UN Human Rights Committee, the UK Privy Council, and other tribunals all require that sentencing courts consider mitigating evidence in capital cases. And in many jurisdictions, particularly in those that have recently abolished the mandatory death penalty, capital defense lawyers have new and expanded opportunities to present mitigating evidence. For example, in 2009, the Uganda Supreme Court held that an offender must be able to present evidence of his character and history for the purposes of determining the appropriate sentence.¹⁶² The Uganda court noted:

Not all murders are committed in the same circumstances, and all murderers are not necessarily of the same character. One may be a first offender, and the murder may have been committed in circumstances that the accused person deeply regrets and is very remorseful. We see no reason why these factors should not be put before the court before it passes the ultimate sentence.¹⁶³

The jurisprudence of the Indian courts offers additional examples of how such circumstances might be evaluated. In *Mulla & Another v. State of Uttar Pradesh*, the Indian Supreme Court noted that circumstances to be heavily weighted in imposing a sentence included the offender’s “mental or emotional disturbance,” age, likelihood of committing further acts of violence, potential for rehabilitation, sense of moral justification, duress, mental impairment, and socioeconomic status.¹⁶⁴ The court also emphasized that the burden fell to the state to prove that an offender was beyond reform. After reviewing these factors, the *Mulla* court declined to impose the death penalty on extremely poor offenders who had no criminal history.¹⁶⁵

The United States Supreme Court has recognized childhood deprivation and abuse, mental disabilities, and good conduct in prison as important mitigating factors. Evidence of mental disorders or mental illness—even if insufficient to support a defense of diminished responsibility—mitigates strongly against the death penalty.¹⁶⁶ The UN Commission on Human Rights has called upon countries to avoid executing any person suffering from any form of mental disorder or disability. In 2002, the U.S. Supreme Court cited an international consensus that “mentally retarded offenders are categorically less culpable than the average criminal.”¹⁶⁷

It is important to recognize that mitigation is not a legal excuse or justification for the crime. Instead, it serves to *explain* the behavior of the defendant and to inspire *compassion* on the part of the sentencing authority.

II. MITIGATING EVIDENCE

Mitigating evidence may include both the facts of the crime committed and the character of the offender. You should seek out several types of mitigating evidence to present on your client’s behalf, including: (1) evidence related to the facts

of the crime; (2) evidence related to the defendant’s mental condition; (3) evidence of the defendant’s personal and social history; (4) evidence that demonstrates the defendant’s good moral character; and (5) other factors that may encourage the court to exercise compassion.

👉 Success Story

• Obtaining Mitigating Evidence In Uganda

- In Uganda, the Foundation for Human Rights Initiative (FHRI) assists legal aid lawyers in conducting capital case investigations. Recognizing that legal aid lawyers are often unable to conduct sufficient research and investigation prior to trial, FRHI interviews the prisoners, gathers mitigating evidence, and passes on the complete file to the lawyers responsible for representing the accused in court.

-Doreen Lubowa, Foundation for Human Rights Initiative

In many countries, remorse is a powerful mitigating factor. Be aware that “remorse” can look different than you expect: expressions of remorse are affected by both cultural norms and mental illness. For example, individuals who have endured traumatic experiences may have difficulty expressing emotion. Nevertheless, it is critically important that you find a way to convey your client’s personal acceptance of responsibility and sorrow for the loss of life or harm to the victims.

A. CIRCUMSTANCES OF THE OFFENSE

First, look to the facts of the case itself. Article 6(2) of the ICCPR states that the “sentence of death may be imposed only for the most serious crimes,” which the Human Rights Committee defines as crimes that result in the loss of life.¹⁶⁸ The Human Rights Council’s Special Rapporteur on Extrajudicial, Summary, or Arbitrary Executions has further concluded, “the death penalty can only be imposed in cases where it can

be shown that there was an intention to kill which resulted in the loss of life.”¹⁶⁹ It follows from this that the imposition of the death penalty for economic crimes, drug trafficking, burglary, robbery, and other crimes that do not involve the loss of human life would violate international law. Likewise, unintentional and unpremeditated killings—such as an accidental death during a bar fight—would not warrant the death penalty. Nor should the death penalty be imposed for a murder conviction based on mere participation in a felony leading to death, where the defendant did not kill or intend to kill anyone.

It is widely recognized that even in cases of intentional murder, the death penalty should only be imposed in the most highly aggravated cases. India’s Supreme Court reserves the penalty for “the rarest of rare cases when the alternative option is unquestionably foreclosed.”¹⁷⁰ In other words, the presumptive sentence for any death-eligible crime is life or a term of years—even for highly aggravated murders.¹⁷¹ In February 2012, the Indian Supreme Court commuted the death sentence of a man to a term of 21 years because the crime—the murder of his wife and three children—lacked planning, and the circumstances suggested the defendant was mentally imbalanced.¹⁷² Similarly, before abolishing the death penalty altogether, South Africa applied it only when a case presented “no reasonable prospect of reformation and the objects of punishment would not be properly achieved by any other sentence.”¹⁷³ Thus, if the crime in your case was not premeditated and if it did not involve torture or other highly aggravated facts, you should argue that it does not merit the ultimate penalty of death.

You may also be able to argue that your client played a relatively minor role in the crime and thus deserves a lighter punishment than those who were most responsible. Alternatively, as noted earlier, your client may have been provoked or acting

MY NOTES:

under extreme stress at the time of the crime. For example, in a case involving a terrorist act by Muslims, an Indian session judge found that the defendants were less culpable because they had been reacting to the killing of other Muslims. This provocation diminished their culpability in the eyes of the judge.

In other cases, the client may have believed he was acting in self-defense or defense of another, even though his reasoning was flawed. This, again, may show that he was less culpable for the crime. For example, he may have acted to end the abuse of a family member by a spouse or parent. Even if he is found guilty, you should argue that such circumstances counsel compassion in his sentencing.

B. THE DEFENDANT'S MENTAL CONDITION

A defendant who does not meet the definitions of insanity previously described may nonetheless suffer from a mental disability that makes him less culpable for his crime. Such conditions include low intelligence, post-traumatic stress disorder, schizophrenia, bipolar disorder, mental retardation, fetal alcohol syndrome, poisoning by pesticides or lead, or a brain injury caused by accidents or beatings. Tests and psychiatric evaluations may be needed to establish that these conditions exist.

Mental health evidence may show that the defendant suffered from impaired judgment or impulse control, that he was vulnerable to mood swings and outbursts of anger, or that he has difficulty understanding or communicating with other people. None of these factors may rise to the level of an insanity defense that would completely excuse his crime, but they can help you to explain the commission of the crime and to inspire empathy for the defendant.

MY NOTES:

Practice Tip

• Understanding the mitigating value of mental disabilities

- It is not easy for lawyers and judges to grasp the mitigating value of mental disabilities that do not easily fit the legal definitions of “insanity” or “incompetence.” The case of Joseph Kamanga* in Malawi illustrates this point. Kamanga was convicted and sentenced to death in 2009 for killing his uncle’s maid by striking her in the head with a footstool. Kamanga argued that the victim’s death was not intentional. He testified that at the time of the crime, he was suffering from massive, debilitating headaches. His mother and aunt testified that he had suffered from headaches and inexplicable rages for some time, despite seeking treatment from a traditional healer.
- Kamanga’s legal aid lawyer argued that he was insane at the time of the crime, but failed to offer any expert testimony in support of his defense. The court rejected the defense and convicted Kamanga of murder. The defense failed to argue that Kamanga’s mental impairment should be considered in mitigation of sentence, and limited its mitigation presentation to Kamanga’s youth and lack of prior convictions. The court sentenced Kamanga to death without discussing any mitigating factors. This is a good example of how lawyers often fail to recognize how a mental disability relates to their client’s *moral* culpability. It also illustrates how many judges fail to grasp the concept of mitigation.
- *The name of the defendant has been changed to protect his privacy.

C. PERSONAL AND SOCIAL HISTORY

Whether or not tests and interviews reveal a serious mental disease or defect, you should look to the client’s social history for clues to explain his behavior. Elements of this history may include physical or sexual abuse, childhood neglect, extreme poverty, other trauma, experience with racial, religious, ethnic or gender discrimination,

learning disabilities, a history of drug or alcohol abuse, or difficult family relationships.

Even if an argument cannot be made that a defendant should not be held fully responsible for a crime, evidence of a difficult past or trauma or the client's immaturity, youth, or vulnerability may serve both to help the decision-maker make sense of the crime and to make the defendant appear more sympathetic. You should attempt to present a story that shows the court or jury how the defendant's difficult circumstances put him in the position to commit the crime.

D. EVIDENCE OF GOOD MORAL CHARACTER

You should also make every effort to portray your client's character in a positive light. You might point to your client's low level of participation in a crime and his lack of future dangerousness. If a client is a first-time offender, you should emphasize that fact.

You may also be able to demonstrate your client's remorse. Showing that the client voluntarily confessed to the offense or attempted to make reparations to the victim's family may be helpful. Take, for example, this description by Taiwanese lawyer Yi Fan of a case in which a client's remorse demonstrated that his crime did not warrant the death sentence:

The client went home and saw his wife having an affair. He killed her out of sudden anger. But his attitude after the crime demonstrated his remorse. He didn't try to conceal the body, and he turned himself in to the police.

Other evidence of good moral character may include the defendant's marriage or long-term relationship, responsibility for children, steady employment, military service, community activities, church attendance, educational efforts,

or participation in drug or alcohol rehabilitation programs.

Even the client's good conduct in prison and positive relationships with prison staff and fellow inmates may be introduced on his behalf. For example, in Malawi, many prisoners sentenced to death have continued their education while in prison. Some have learned to read, others have completed secondary school, and still others have learned useful skills like tailoring, carpentry, welding, or auto repair. Such activities demonstrate that an offender has the capacity for reform. Positions of service or responsibility in the prison community prove an additional source of potential mitigation. Religious activities are common among Malawian prisoners, who often serve as ministers, elders, or board members in prison churches. Malawi's prison staff also nominates certain prisoners to serve as supervisors or prefects over their fellow inmates. To serve in such a position, an offender must have earned the respect of both the staff and his fellow inmates. Service in these positions demonstrates that an offender has been rehabilitated and presents no danger to society.

E. EVIDENCE ENCOURAGING THE COURT TO EXERCISE COMPASSION

Many of the factors described above may inspire compassion. In addition, you should consider introducing evidence that the defendant suffers from ill health or has endured difficult conditions in prison. For example, an offender's HIV status may be a factor that merits the court's sympathy. Elderly offenders who have limited ability to withstand the rigors of prison life may also deserve compassion. Indeed, as previously mentioned, some international authorities have found it impermissibly cruel to execute the elderly.

Time served under difficult conditions may be another factor that counsels compassion. National and international tribunals have held that a lengthy

MY NOTES:

stay on death row may constitute cruel and unusual punishment.¹⁷⁴ In *Queen v. Patrick Reyes*, the Supreme Court of Belize noted that the fact that an offender had been on death row for more than three years would in itself be “an extenuating consideration not to pass the death sentence.”¹⁷⁵ Similarly, you may be able to argue that extended time spent in pretrial detention or “on remand” justifies the imposition of a lesser penalty since the offender has already been heavily punished for his crime. Prison overcrowding, lack of food, exposure to infectious disease, lack of activities, and the inability to have contact with one’s family are all factors that add to the punishment an offender has endured for his crime.

A final potential source of mitigating evidence is the victim’s family. In some countries, a defense lawyer may attempt to negotiate a reconciliation or settlement between the accused and the family of the victim. When permitted, a statement by the victim’s family that it does not support the death sentence could have a powerful impact on sentencing.

Practice Tip

- **Areas to look into during your investigation that may be relevant to the sentencing phase and/or mitigation:**
 - (1) Medical history (including hospitalizations, mental and physical illness or injury, alcohol and drug use, pre-natal and birth trauma, malnutrition, developmental delays, and neurological damage);
 - (2) Family & social history (including physical, sexual or emotional abuse; family history of mental illness, cognitive impairments, substance abuse, or domestic violence; poverty, familial instability, neighborhood environment and peer influence); other traumatic events such as exposure to criminal violence, the loss of a loved one or a natural disaster; experiences

of racism or other social or ethnic bias; cultural or religious influences; failures of government or social intervention (e.g., failure to intervene or provide necessary services, placement in poor quality foster care or juvenile detention facilities);

- (3) Educational history (including achievement, performance, behavior, and activities), special educational needs (including cognitive limitations and learning disabilities) and opportunity or lack thereof, and activities;
- (4) Military service, (including length and type of service, conduct, special training, combat exposure, health and mental health services);
- (5) Employment and training history (including skills and performance, and barriers to employability); and
- (6) Prior juvenile and adult correctional experience (including conduct while under supervision, in institutions of education or training, and regarding clinical services).¹⁷⁶

III. OTHER ARGUMENTS THAT CHALLENGE IMPOSITION OF THE DEATH PENALTY

In addition to developing mitigating evidence aimed at demonstrating that the defendant should not receive the death penalty, you should also consider challenging the imposition of the death penalty itself on your client. Challenges to the imposition of the death penalty in a specific case can usually be raised at three points during a trial: first, before trial, usually by motion or application; second, during the sentencing phase of the trial, as discussed in this section; and third, if the death penalty is imposed, during an appeal. (See Chapters 6 and 9). These arguments are more fully developed in Chapter 9, which addresses post-conviction appeals.

MY NOTES:

CHAPTER 9:

APPEALS & POST-CONVICTION RELIEF

I. INTRODUCTION

In this chapter, we will provide some insight on the duty of effective representation on appeal and advice on how to make sure that your client's right to a fair trial will be respected. You will also be invited to consider challenging the existence of the death penalty in your country and the lawfulness of its application to your client.

II. DEFENDING YOUR CLIENT'S RIGHTS AFTER CONVICTION

A. YOUR CLIENT HAS THE RIGHT TO APPEAL HIS CONVICTION AND SENTENCE

The right to appeal a capital conviction and sentence is usually guaranteed by a country's national legislation or Constitution. Numerous international human rights instruments likewise provide for the right to appeal.¹⁷⁷ For example, in its General Comment 32, the Human Rights Committee emphasized that the right to appeal is particularly important in capital cases.¹⁷⁸ Further, a state must provide free legal aid on appeal if the prisoner cannot afford to retain his own lawyer.¹⁷⁹

The scope of the right to have one's conviction or sentence reviewed by a higher tribunal varies from one international instrument to another, especially when it comes to the grounds for that appeal. While the European Convention of Human Rights admits that, in some instances, the review can be confined to questions of law,¹⁸⁰ the Human Rights Committee has held that review must encompass both the legal and factual aspects of the defendant's conviction and sentence.¹⁸¹

In many countries, the law provides that a prisoner may present new evidence on appeal. This can provide a crucial opportunity to introduce newly discovered evidence of innocence, prosecutorial or police misconduct, and mitigating evidence that the trial attorney failed to uncover. The Judicial

Committee of the Privy Council, which is the final court of review for many commonwealth countries, held in *Benedetto v. The Queen* that

[t]he discretionary . . . power to receive fresh evidence represents a potentially very significant safeguard against the possibility of injustice. . . While it is always a relevant consideration that evidence which it is sought to adduce on appeal could have been called at trial, the appellate court may nonetheless conclude that it ought, in the interest of justice, to receive and take account of such evidence. A defendant should be punished for the crimes he has committed, not for the failure of his representatives to conduct his defence as they ought.¹⁸²

In any case, there is general agreement that the right to appeal is a fundamental right, especially in capital cases, and it is crucial that your client obtains an opportunity to challenge the lawfulness of his conviction and sentence before a higher court.

Some countries impose limitations on the right to seek review. Reasonable limitations must pursue a legitimate aim and must not infringe the very essence of the right to review. Unreasonable limitations, such as an unduly short window of time in which to seek review, are those that make the right of review illusory and should be challenged. In March 2012, for example, the Eastern Caribbean Court of Appeal held that a 14-day time limit on filing a death penalty appeal was an unreasonable and arbitrary limitation on a death row prisoner's right to appeal.¹⁸³ The prisoners in that case had filed their appeals two days past the deadline. The court made clear that while states are entitled to enact rules governing the appellate process, those limitations "must not restrict or reduce a person's access in such a way or to such an extent that the very essence of the right is impaired."¹⁸⁴

Your client also has the right to have his appeal heard within a reasonable time—a principle that has been reaffirmed on a number of occasions by the United Nations Human Rights Committee.¹⁸⁵

△ Overcoming Barriers

• What should I do if my country's legislation does not provide for the right to appeal?

- If there is a higher court—be it a court of appeal or supreme court—to which access is denied because of the nature of your case (for example, if your client was convicted by a military tribunal), lodge an appeal anyway and maintain that it is proper, based on your client's right to appeal, using the sources listed above. If there is no such court at the national level, consider filing a communication or application to an international body, as described in Chapter 10. In any case, you should also be prepared to file an application for a stay of execution or clemency.

B. PRACTICAL SUGGESTIONS

1. Meet with your client as soon as possible

You should meet your client as soon as you are entitled to represent him, even if you have been contacted by his family. Make sure he understands the appeals process and timeline. Your client will sometimes be advised by the prison personnel or inmates to file for appeal soon after his sentence has been handed down, and you should warn him beforehand not to file anything without conferring with you. Explain how you will attempt to challenge the conviction. He needs to know that there is still something to be done, and to understand that you are fighting for him. If he does not understand what is going on, he may become depressed and uncooperative.

The psychological impact of the death sentence is immense, and is sometimes accentuated by harsh prison conditions. Both can weaken your client's

health and make him unwilling or unable to help you prepare for his defense on appeal. You should try to visit your client regularly, especially if you are the only person allowed to access the prison. Be attuned to the detention conditions and intercede with the officer in charge of the prison where necessary to register any complaints. Solitary confinement, in particular, can have devastating consequences for a prisoner's mental state, so you should always do everything possible to ensure, where appropriate, that your client has access to visitors, other prisoners, and work and educational opportunities.

Of course, it is never possible to predict the outcome of a trial or an appeal, and you should not be overly positive or negative about it with your client. Your client should also be aware of the potential legal consequences of his actions (like filing a pro se appeal). Your client should also be advised of any action he should take personally, according to your national law—for instance, that he has to file an application for legal aid. You should advise him in unambiguous terms what to do and when to do it.

Please refer to Chapter 2 for information on the duty to provide effective representation and the lawyer-client relationship.

2. Obtain the court records and transcript of the trial proceedings

You should obtain access to the court records and trial transcript, wherever they are kept, and make a copy of the entire file. You cannot be denied access to records from the lower court.¹⁸⁶ Access to these records is an inherent part of the right to a fair trial and the correlative principle of equality of arms.¹⁸⁷

MY NOTES:

△ Overcoming Barriers

- **When might my client's right to appeal be denied?**

- Two different situations may arise. Either your country's legislation does not provide for your client to appeal his sentence, or the right to appeal is provided by national legislation but you are prevented from enforcing it.

3. Get a copy of the file kept by the previous counsel

You should contact the trial counsel and arrange to obtain his file. Take the opportunity to discuss with him his relationship with your client, procedural and factual issues and strategic decisions made before, during and after trial. Not only will such a discussion help you better understand your client's behavior, but it will also allow you to assess what issues to raise on appeal.

4. Investigate the basis for your client's conviction and sentence

As noted in the introduction to this chapter, many jurisdictions allow for the introduction of new evidence on appeal. Where this is possible, you should always consider whether there are new avenues of investigation that have not yet been explored. For example, if the trial lawyers failed to present mitigating evidence, but you believe your client suffers from a serious mental disability, you may wish to introduce psychiatric reports or testimony from lay witnesses establishing the nature of his disability and the extent to which it impairs his judgment and behavior.

For example, in *Pitman v. The State*, the Judicial Committee of the Privy Council admitted two expert psychological evaluations and multiple affidavits from the appellant's relatives demonstrating the appellant's diminished mental capacity.¹⁸⁸ The Court admitted the evidence after finding that it was credible, that it constituted

prima facie evidence that "the extent of the appellant's intellectual handicap is substantial and such as to require proper investigation by the court," and finally, that the defense offered a reasonable explanation for the failure to adduce medical evidence at trial.

Similarly, in *Solomon v. State*, the Privy Council admitted new evidence suggesting the appellant, convicted of murder, did suffer "or at least may have suffered" from a depressive illness at the time of the incident. At trial, there was passing mention of the appellant's depression, but no investigation into his mental state and no medical testimony. After trial, upon reviewing new evidence that the appellant had been hospitalized for depression prior to the incident, that he attempted suicide after his arrest, and that he was diagnosed with depression one year after the incident, the Privy Council set aside the conviction and remanded the case to The Court of Appeal of Trinidad and Tobago to examine issues regarding the appellant's mental state.¹⁸⁹

Many civil and common law jurisdictions also permit the filing of post-conviction appeals, sometimes known as habeas corpus, in which new evidence can be presented. In the United States, attorneys typically conduct an exhaustive investigation of the crime as well as the factors relevant to sentencing during post-conviction review. Competent post-conviction attorneys obtain the support of multiple experts, investigators, and "mitigation specialists" who seek to uncover evidence attacking the validity of the conviction and sentence. The post-conviction process in the United States has served as a vital safeguard in preventing wrongful convictions and executions, and has led to new trials (or life sentences) for countless prisoners.

MY NOTES:

5. Master the procedural rules and jurisprudence related to capital cases

Deadlines

At the risk of stating the obvious, you should familiarize yourself with the **deadlines** for filing appeals. In many cases, appeals have been rejected after lawyers missed a deadline—even when the appeal was filed only one day late.

△ Overcoming Barriers

- **Is it really too late? What can I do if I am consulted by a client after the deadline to file for appeal?**

- Determine why no appeal was filed on time:
- 1. Your client was not assisted by counsel, and did not know that he had the right to appeal or that there was a time limit to do so.
- Your client's right to a fair trial includes the right to legal representation at all stages. You should present the appeal and argue that the late filing is excused because he was deprived of his right to be assisted by counsel on appeal.
- 2. Your client was assisted by counsel but the time limit was too short to file an effective appeal.
- You should present a new appeal, arguing that your client's right to a fair trial includes the right to adequate time for preparation of his defense and the right to access to court, which must be effective and not theoretical.
- 3. The delay is due to the negligence of the previous counsel.
- In this case, equitable reasons can be invoked for excusing this procedural error. You can argue that a lawyer's error in failing to file a timely appeal should not be held against the client, particularly when the client can demonstrate that he did not authorize or was not consulted about an untimely appeal. Error by counsel may allow you to argue that counsel was incompetent and therefore that the client was deprived of his right to counsel. Many countries have developed specific

jurisprudence on the matter, and you should research it. You can also fall back on international principles that provide for effective counsel and a right to an appeal.

△ Overcoming Barriers

- **What should I do if my jurisdiction's criminal procedure rules do not provide specific means of review that would allow me to explain the reasons my client did not file his appeal on time?**

- You should consider:
- 1. Lodging an appeal anyway, and maintain that it is admissible, based on the arguments above.
- 2. In many countries, there are mechanisms for filing extraordinary appeals where there has been a miscarriage of justice. Habeas corpus is another potential avenue for access to the courts.
- 3. Filing for clemency.

Jurisdiction

You should ascertain which court has jurisdiction over your case, and where the appeal petition should be filed. Also, you should be aware of the official form your petition is supposed to take: is it a simple declaration that will be recorded, or must you submit a written and detailed document? Those concerns are linked to the previous one: there is a risk that the deadline to file for appeal will have passed the moment you realize (or are told) that the petition you submitted is not admissible.

Jurisprudence

It is important that you have in-depth knowledge of capital punishment jurisprudence in your country, especially the landmark decisions issued by higher courts such as supreme or constitutional courts. If judicial decisions regarding the death

MY NOTES:

penalty are not easily accessible in your country, you might want to discuss and share experiences with other capital defense lawyers and NGOs specializing in criminal justice or campaigning against the death penalty in your country.

International remedies

Knowledge of international law governing death penalty cases is also crucial, especially when your country's legislation fails to meet international standards and international law allows greater protection for your client. You might also want to refer to the progressive jurisprudence of neighboring countries. You can find a list of international and national landmark capital cases throughout this manual. The main arguments that you can raise to challenge the existence of the death penalty or its application are discussed below.

△ Overcoming Barriers

- **What should I do if my country's statutes provide for a right to appeal, but I cannot get the court to schedule a hearing?**

- You should first assess whether the delay is detrimental to your client or not. Delays can sometimes be useful. If your client's guilt is certain, the crime is highly aggravated, and there is strong evidence against him, you should not necessarily urge the court to expedite his appeal. In cases such as this, time is your friend. Delays may extend your client's life and open up new avenues for appeal—for example, if your Supreme Court issues a decision limiting the application of the death penalty.
- If you have a solid strategic reason for expediting the appeal—for example, in a case where you have strong evidence of innocence, or where your client is gravely ill—you might consider contacting the office of the Public Prosecutor, who also might agree to expedite the appeal. Writing to the Chief

Justice/President of the court and/or the registrar of appeals may also be an option. Your request for a prompt hearing should cite the potential violation of your client's right of access to court and the right to be tried within a reasonable time. Another option, if available in your country, is to file for a writ of mandamus to be issued. Such a writ is, in essence, an order of a higher court requiring a lower tribunal to perform a lawful duty it has refused to carry out.

- If unsuccessful, you can consider filing a communication with international bodies, as described in Chapter 10.

6. Review the judgment of the trial court

In countries where a judge (or panel of judges) is responsible for determining your client's guilt and imposing sentence, you should pay particular attention to the reasons for the court's judgment. Your client's right to appeal encompasses the right to know why he was convicted so that he can formulate arguments on appeal. Therefore, defendants have a right to a reasoned judgment. A reasoned judgment will also help you determine if his case has been heard in a fair and equitable way. The right to a reasoned judgment is not expressly mentioned in the main human rights treaties but is considered as a component of the right to a fair trial.¹⁹⁰

The national laws of many states provide that the accused has the right to a reasoned judgment. In Cameroon, for example, judges are required by law to specify the facts and the law supporting their decisions.¹⁹¹ The Cameroon Supreme Court has held that all criminal judgments by lower courts must include a clear and detailed explanation of the facts – including aggravating and mitigating circumstances – so that the Supreme Court can effectively review the lower court's decision.¹⁹²

MY NOTES:

The right to a reasoned judgment was raised in a case before the Human Rights Committee involving prisoners on death row in Jamaica, who were unable to obtain a copy of the trial court’s judgment to prepare their appeals. The Human Rights Committee held that the failure of the Jamaican court to issue a reasoned written judgment violated the defendants’ rights under Article 14 of the ICCPR, including the rights to a fair trial, to be tried without undue delay, and to have their sentence reviewed by a higher tribunal according to law.¹⁹³

C. CAN YOUR CLIENT PHYSICALLY ATTEND HEARINGS ON APPEAL?

The answer depends on the country. In some countries, such as Cameroon, the convicted prisoner has a right to attend the appellate arguments. But if the court is only considering legal arguments, and is not re-examining the facts, your client’s presence is not required under international law.¹⁹⁴

D. WHICH REMEDIES TO SEEK

The type of relief you can ask for will depend on the type of issue and on national criminal procedure rules and jurisprudence.

For example, if your client belongs to a category of defendants who may not be sentenced to death, then he may be sentenced to any penalty provided lawfully in national law for that type of offense except death. If errors were committed during the culpability phase of the trial that call into question the integrity of the verdict, your client is entitled to a new trial on guilt and sentence. Where the error only affects sentencing—for example, as in the case of death row phenomenon (explained further on page 124)—the remedy may be life imprisonment or commutation to a term of years.

III. WHAT TO CHALLENGE NOW?

It is beyond the scope of this manual to evaluate all of the legal arguments that can potentially be raised on appeal. Many arguments will be founded on principles of national law that vary from one country to another. Nonetheless, there are a number of international legal arguments that have successfully been raised in national courts around the world. As noted in Chapter 1, you should examine the Constitution and laws of your jurisdiction to determine whether the court is required to consider international law. To the extent these rules or guidelines are not binding on the court, you should argue that they nonetheless have *persuasive value*. In addition, you should look for precedents from other national courts in your region to establish that they have relied on decisions by international bodies to determine the permissible scope of the death penalty.

A. THE MANDATORY DEATH PENALTY

The mandatory death penalty is on the decline around the world, largely as a result of judicial challenges to its application. Since 2000, at least eighteen nations have discarded the mandatory death penalty. In 1976, the United States Supreme Court was one of the first courts to strike down the mandatory death penalty, holding that the practice was both arbitrary and inhumane in violation of the Eighth Amendment to the U.S. Constitution.¹⁹⁵ The Court emphasized that “the fundamental respect for humanity underlying the Eighth Amendment requires consideration of the character and record of the individual offender and the circumstances of the particular offense” during capital sentencing.¹⁹⁶ In 1983, India’s Supreme Court likewise held that the mandatory death sentence was unconstitutional.¹⁹⁷ The Indian court stressed that “[t]he legislature cannot make relevant circumstances irrelevant, deprive the courts of their legitimate jurisdiction to exercise their discretion not to impose the death sentence in appropriate cases, compel them to shut their eyes

MY NOTES:

to mitigating circumstances and inflict upon them the dubious and unconscionable duty of imposing a preordained sentence of death.”¹⁹⁸ The gravity of an offense “furnishes the guideline for punishment,” and if applied without regard to the circumstances of the offense and offender, the death penalty is irrational.¹⁹⁹

Beginning in 2000, a series of cases decided by the Judicial Committee of the Privy Council and the Eastern Caribbean Court of Appeal struck down the mandatory death penalty in a number of Caribbean countries; the death penalty was repealed by statute in others.²⁰⁰ As a result, the only Caribbean country that retains the mandatory death penalty is Trinidad and Tobago. Three African countries—Malawi, Uganda, and Kenya—have likewise rejected the mandatory death penalty, albeit for slightly different reasons. In Malawi, the High Court struck down the mandatory death penalty as unconstitutional because, as a disproportionate penalty, it results in inhumane treatment, and because, as an unreviewable sentence, it violates the rights to a fair trial and access to justice.²⁰¹ In Uganda, the Supreme Court found that prohibiting discretion when life is on the line violates equal protection, because it indiscriminately treats all serious crimes or offenders as equally grave or culpable, and because it discriminates between death-eligible defendants and non-death eligible defendants, who are granted the right to present mitigating factors in their defense.²⁰² Furthermore, the court found that the mandatory death penalty violates the principle of the separation of powers, by allowing Parliament to tie the hands of the judiciary in executing its function to administer justice.²⁰³ The impact of international law and of the momentum created by this line of cases is particularly clear in Kenya, where the Court of Appeal struck down the mandatory death penalty on the grounds that it was inhumane and violated the right to a fair trial, ultimately because of its undiscerning nature.²⁰⁴ The Court of Appeal cited at length from the

reasoning in *Kigula* and the Privy Council’s Caribbean cases of *Reyes* and *Hughes*, observing that the laws analyzed in these decisions were “largely influenced by, and in some cases lifted word for word from international instruments which Kenya has ratified.”²⁰⁵

International tribunals have likewise condemned the mandatory death penalty. In a series of cases decided in 2000 and 2001, the Inter-American Commission on Human Rights found that the mandatory death penalty violated the right to life, the right to humane treatment or punishment, and the right to a fair trial.²⁰⁶ In *Boyce v. Barbados*, the Inter-American Court on Human Rights affirmed that laws that prohibit individualized sentencing are inherently arbitrary: “A lawfully sanctioned mandatory sentence of death may be arbitrary where the law fails to distinguish the possibility of different degrees of culpability of the offender and fails to individually consider the particular circumstances of the crime.”²⁰⁷ In *Thompson v. St. Vincent and the Grenadines*, the Human Rights Committee reached the same conclusion.²⁰⁸ And in *Interights (Bosch) v. Botswana*, the African Court on Human and Peoples’ Rights recognized that courts were required to consider both the circumstances of the offense and the characteristics of the offender before imposing a death sentence.²⁰⁹

A few countries, such as Singapore and Malaysia, have continued to uphold the mandatory death penalty in the face of repeated constitutional challenges. Singapore’s Court of Appeal has rejected arguments that the mandatory death penalty is unconstitutional on the basis that it bears a rational relation to the social objective of reducing crime and deterring would-be offenders.²¹⁰

MY NOTES:

B. DEATH PENALTY MAY ONLY BE IMPOSED FOR THE “MOST SERIOUS CRIMES”

Article 6(2) of the International Covenant on Civil and Political Rights provides that the death penalty may only be imposed for the “most serious crimes.”²¹¹ The Human Rights Committee has observed that this expression must be “read restrictively,” because death is a “quite exceptional measure.”²¹² The Human Rights Committee has held that the imposition of the death penalty for a crime not resulting in the victim’s death constituted a violation of Article 6(2).²¹³

In 1984, the Economic and Social Council of the United Nations further defined the restriction to “most serious crimes” in its Safeguards Guaranteeing Protection of the Rights of Those Facing the Death Penalty.²¹⁴ Those Safeguards, which were endorsed by the UN General Assembly, provide that the death penalty may only be imposed for intentional crimes with lethal or other extremely grave consequences. The United Nations Special Rapporteur on Extrajudicial, Summary, or Arbitrary Executions considers that the term “intentional” should be “equated to premeditation and should be understood as deliberate intention to kill.”²¹⁵

Consistent with these principles, courts in some common law jurisdictions have vacated death sentences imposed on accomplice defendants who did not conclusively act with lethal intent.²¹⁶ To illustrate, the Court of Appeal of Trinidad and Tobago vacated a death sentence imposed under a statute that did not require a determination that the accused intended to kill.²¹⁷ Similarly, the Supreme Court of India has opined that the death penalty should not be applied except in the gravest cases of extreme culpability.²¹⁸

Also, the Inter-American Court of Human Rights found a violation of Article 4.2 of the ACHR –which establishes an obligation to restrict the

death penalty to the most serious crimes– in a case where the applicant had been sentenced to death for the kidnapping of a minor not resulting in death.²¹⁹

These examples add support to an argument that the limitation of the death penalty to intentional crimes with lethal consequences is now part of customary international law.

C. DEATH ROW PHENOMENON

Article 7 of the ICCPR provides that “[n]o one shall be subjected to torture or to cruel, inhuman, or degrading treatment or punishment.”²²⁰ Other human rights treaties contain identical language.²²¹

Over the last two decades, a rich body of jurisprudence has developed in support of the notion that prolonged incarceration on death row (also known as “death row phenomenon”) constitutes cruel, inhuman, or degrading punishment.²²² These decisions have prompted scores of articles by legal commentators and mental health experts.

In *Pratt & Morgan*, the Privy Council held that a delay of 14 years between the time of conviction and the carrying out of a death sentence in the case of a Jamaican prisoner was “inhuman punishment.”²²³ The Privy Council further concluded that “in any case in which execution is to take place more than five years after sentence there will be strong grounds for believing that the delay is such as to constitute ‘inhuman or degrading punishment.’”²²⁴ In *Soering v. United Kingdom*, the European Court found that prisoners in Virginia spend an average of six to eight years on death row prior to execution.²²⁵ The court determined that “[h]owever well-intentioned and even potentially beneficial is the provision of the complex post-sentence procedures in Virginia, the consequence is that the condemned prisoner has to endure for many years the conditions on death row

MY NOTES:

and the anguish and mounting tension of living in the ever-present shadow of death.”²²⁶

More recently, the Supreme Court of Canada considered evidence that death-sentenced inmates in the state of Washington (United States) took, on average, 11.2 years to complete state and federal post-conviction review, when weighing the legality of extraditing two men to the United States to face capital charges.²²⁷ The court acknowledged a “widening acceptance” that “the finality of the death penalty, combined with the determination of the criminal justice system to satisfy itself fully that the conviction is not wrongful, seems inevitably to provide lengthy delays, and the associated psychological trauma.”²²⁸ Relying in part on this evidence, the court held that the Canadian Charter of Rights and Freedoms precluded the defendants’ extradition, absent assurances the United States would not seek the death penalty.²²⁹

The Ugandan Supreme Court has also embraced these arguments, holding that a delay of more than three years between the confirmation of a prisoner’s death sentence on appeal and execution constitutes cruel, inhuman or degrading treatment or punishment in violation of its national constitution.²³⁰ The Zimbabwe Supreme Court has held that delays of 52 and 72 months between the imposition of a death sentence and execution constitute inhuman punishment.²³¹ And in 2010, the European Court on Human Rights expanded its rule from *Soering in Al Saadoon & Mufdhi v. United Kingdom*. There, the Court found that the United Kingdom had violated its obligations under Article 3 of the European Convention merely by exposing the applicants to the threat of capital punishment.²³²

These examples demonstrate that, arguably, the prohibition against lengthy confinement on death row as cruel, inhuman, or degrading treatment has attained binding force as customary international law.²³³

D. CATEGORIES OF OFFENDERS WHO CANNOT BE EXECUTED

As discussed above, international law squarely prohibits the execution of certain categories of offenders. These are discussed in Chapters 4 and 5, above.

E. PREVENTING THE EXECUTION OF MENTALLY ILL CLIENTS

Your client may have developed a severe mental illness after he was sentenced to death. The United Nations Safeguards Guaranteeing Protection of the Rights of Those Facing the Death Penalty, which received almost unanimous support from U.N. state party members, prohibit the imposition of the death penalty “on persons who have become insane.”²³⁴ In 1989, the Economic and Social Council expanded this protection to cover “persons suffering from...extremely limited mental competence, whether at the stage of sentence or execution.”²³⁵ The U.N. Commission on Human Rights has likewise urged retentionist countries “not to impose the death penalty on a person suffering from any form of mental...disabilities or to execute any such person.”²³⁶ And the European Union has declared that the execution of persons suffering from any form of mental disorder is contrary to internationally recognized human rights norms and violates the dignity and worth of the human person.²³⁷

International law may not require that your client is formally found to be mentally ill for this prohibition to apply. In *Francis v. Jamaica*, the Human Rights Committee held that issuing an execution warrant for a mentally disturbed individual who was examined and found not to be “insane” amounted to cruel, inhuman or degrading treatment in violation of Article 7 of the ICCPR.²³⁸

If you suspect your client’s mental health has deteriorated during his stay on death row, you should seek a stay of execution and seek assistance

MY NOTES:

from a qualified mental health professional. See Chapter 5, “Defending Vulnerable Populations.”

F. INEFFECTIVE ASSISTANCE OF COUNSEL

As discussed in Chapter 2, your client has the right to effective legal representation at trial and on appeal. If your client’s trial lawyer did not fulfill his obligation to provide competent assistance, this is an issue that should be raised on appeal as grounds for a new trial or sentencing. In the United States, courts have reversed numerous capital cases based on ineffective assistance of counsel claims.²³⁹ Please refer to the cases cited in Chapter 2 for additional authority for such an argument under international and national law.

△ Overcoming Barriers

- **How can I raise an ineffective assistance of counsel claim on appeal when I was counsel for the accused at trial?**

- In many cases, the lawyer who handled the case at trial will also handle the appeal. Even if the lawyer is a different individual, he may be a close colleague of the lawyer who handled the trial. These situations can create a conflict of interest whenever you believe trial counsel failed to carry out his duties to his client. How can you raise an ineffective assistance of counsel claim against yourself or a friend? Are you obligated to do so?
- The answer to the latter question is YES. You must raise these claims because your duty is to your client, not to yourself or your colleague. But you should talk through the issue with your supervisor and your colleague so that they understand why you feel it is necessary to raise the claim. If you were the lawyer at trial and you feel you made serious errors, you should ask your supervisor or the court to appoint new counsel on appeal.

G. FOREIGN NATIONALS DEPRIVED OF CONSULAR RIGHTS

If your client is a foreign national, he has rights to consular notification and access under Article 36(1)(b) of the Vienna Convention on Consular Relations and customary international law.²⁴⁰ It is also possible that his home country has a bilateral consular treaty with the country in which he was sentenced to death. You should investigate whether the detaining authorities notified him of his right to have his consulate notified of his detention. With his consent, you should also contact consular officers from his home country to ascertain whether they are willing to assist in your client’s defense.

The Inter-American Court of Human Rights determined that the execution of a foreign national after his consular notification rights have been violated would constitute an arbitrary deprivation of life in violation of international law.²⁴¹ Also, in *Avena & Other Mexican Nationals (Mexico v. U.S.)*, the International Court of Justice determined that when a foreign national has been sentenced to a “severe penalty” or “prolonged incarceration” after being deprived of his consular rights, he is entitled to judicial “review and reconsideration” of his conviction and death sentence.²⁴²

H. NO EX POST FACTO PUNISHMENTS

Your client may not be subject to the death penalty if the penalty arose under a law that did not exist at the time of the offense. Such ex post facto punishments are prohibited by multiple international human rights treaties. Article 11, paragraph 2 of the Universal Declaration of Human Rights dictates that “[n]o one shall be held guilty of any penal offence on account of any act or omission which did not constitute a penal offence . . . at the time was it was committed.”²⁴³ The ICCPR, the African Charter on Human and Peoples’ Rights, the European Convention for the Protection of Human Rights and Fundamental Freedoms, the Charter of Fundamental Rights of

MY NOTES:

the European Union, and the Arab Charter on Human Rights also contain language to this effect.²⁴⁴ The ICCPR also directs that legal changes to reduce a penalty for a particular offense retroactively apply to those who committed the offense under the harsher version of the law.²⁴⁵

Because ex post facto punishments are prohibited, you should investigate the legal history of the offense for which your client was sentenced. If the law forbidding your clients conduct was not in effect when your client committed the crime, you should argue that his sentence was handed down in violation of international law. Similarly, because at least some international treaties require states to alter sentences if a change in the law mandates a lighter sentence, you should investigate what the current penalties for the offense are. If the offense is no longer sufficient justification for the death penalty under the state's law, you should point out that the ICCPR requires your client's sentence to be reduced.²⁴⁶

I. YOUR CLIENT WAS SENTENCED TO DEATH AFTER AN UNFAIR TRIAL

One of the greatest challenges facing practitioners in retentionist states involves the lack of sufficient due process safeguards. Due process is a broad concept, but in general refers to those procedural protections that are necessary to ensure that the accused is subject to a fair and impartial trial. The concept of equality of arms is also essential to this definition: the defense must be granted autonomy, confidentiality, the power to challenge the government's case, and adequate resources that are at least equal to those provided to the government to investigate the charges and prepare a defense.

Many retentionist states fail to provide even the most basic procedural protections essential to a fair trial. Some of the most essential due process safeguards are set forth in Article 14 of the ICCPR, and are described above in Chapter 7.

International agreements protect the accused's right to a fair trial even when national law does not. Article 6 of the ICCPR provides that the death penalty may only be imposed where these standards are observed. The Human Rights Committee has accordingly held that when a state violates an individual's due process rights under the ICCPR, it may not carry out his execution.²⁴⁷

J. FACTUAL ISSUES TO CONSIDER

1. Re-examine thoroughly the evidence that led to your client's death sentence—what convinced the first court that he should be found guilty?

Over the last several decades, hundreds of people have been exonerated after being sentenced to death for crimes they did not commit. In the United States alone, as of August 2012, approximately 140 people who were wrongly convicted and sentenced to death have been exonerated on grounds of innocence.

Even when the evidence against your client appears to be strong, you should re-examine the factual basis for his conviction. Although new evidence is not always welcomed by appellate courts, in some instances, the introduction of new evidence is permitted. For example, under American habeas law, the United States Supreme Court has said that although habeas relief is not generally available to those claiming actual innocence based on newly discovered evidence, "a truly persuasive demonstration of 'actual innocence' made after trial would render the execution of a defendant unconstitutional."²⁴⁸ Similarly, the United Kingdom's Court of Appeal will admit fresh evidence "if they think it necessary or expedient in the interests of justice."²⁴⁹ International courts may also be receptive to new evidence in some circumstances.²⁵⁰

MY NOTES:

What follows is a list of common sources of wrongful convictions in capital cases that you should consider²⁵¹:

Mistaken eyewitness identifications

Mistaken eyewitness identifications have led to countless convictions of innocent persons. Appellate and post-conviction counsel should re-interview all witnesses to test the veracity of their trial testimony. See Chapter 4: “Investigation and Other Pretrial Preparation.”

False confessions

False confessions are more common than many people think. Coercion during the interrogation process often leads to false confessions, but individuals can confess to crimes they did not commit even where the police do not inflict physical harm. Erroneous, suggestive, or misleading questions by the police can also induce false confessions. Mentally disabled or otherwise vulnerable suspects are most at risk to falsely confess.

Practice Tip

• False Confession: The story of Chiang Kuo-ching

- Sometimes a false confession is discovered too late. In October of 1996, Chiang Kuo-ching, a Taiwanese air force private, was arrested for the rape and murder of a five-year-old girl. After being subjected to brutal questioning, including being threatened with an electric prod, being deprived of sleep and being forced to watch a video of the victim’s autopsy, Chiang confessed to the murder. He was executed in 1997 shortly after his conviction.
- Following Chiang’s execution, the evidence linking him to the crime fell apart. Forensic experts found that the physical evidence could not link Chiang to the crime, that his confession was recognized as unreliable, and

that a likely alternative suspect existed. In response to this lack of evidence against Chiang, the Military Supreme Prosecutors’ Office filed a posthumous appeal with the Military Supreme Court in 2010. The next year, in a new trial, the Court acquitted Chiang and specifically found that his confession was made against his will.

- The Ministry of National Defense has announced that it would help Chiang’s family apply for national compensation for the loss of their son.

Testimony of unreliable jailhouse informants

A common police tactic at trial is to use the testimony of another prisoner, who will typically testify that, while in jail or prison, your client admitted his guilt or made incriminating statements—for example, that your client said things that could be known only by the person who committed the crime. Sometimes the fellow prisoner is placed in prison specifically to induce your client to make a “jailhouse confession.”

“Jailhouse informant” testimony is notoriously unreliable, in large part because the police and/or prosecution often promise favorable treatment for such informants in return for their testimony. You should always thoroughly investigate the benefits that informants received for their testimony. If favorable treatment was not disclosed by the prosecution, this can be grounds for a new trial.²⁵²

Mistaken forensic evidence

Use of dubious or fraudulent forensic scientific methods or incompetent experts has also led to wrongful convictions. You should always carefully scrutinize the basis for any expert testimony and the qualifications of any expert who testified for the prosecution. If feasible, you should obtain the assistance of a qualified expert to assess the methodology of any forensic experts who testified at trial. You should also be aware of new technology that was not available at the time

MY NOTES:

of the initial investigation that could lead to exculpatory evidence.

Prosecutorial misconduct

Police and prosecutors sometimes suppress exculpatory evidence or commit other professional misconduct, such as pressuring witnesses. They might decide to focus on a particular suspect and will exclude all evidence that is inconsistent with their theory of how the crime was committed. This is one of the reasons why, if you are in a jurisdiction where you are permitted to do so, you should re-interview all of the witnesses, seek out new witnesses, and carefully scrutinize the prosecution file to ensure that no exculpatory evidence was withheld.

IV. CLEMENCY

A. YOUR CLIENT HAS THE RIGHT TO SEEK A PARDON OR COMMUTATION OF HIS DEATH SENTENCE

Several international instruments guarantee the right to seek pardon or commutation of a death sentence, which may be granted in all cases of capital punishment.²⁵³ It is well established that the procedures for considering amnesty, pardon or clemency in death penalty cases must “guarantee condemned prisoners with an effective or adequate opportunity to participate in the mercy process.”²⁵⁴ These minimum due process safeguards must include the right “to present, receive or challenge evidence considered” by the clemency authority and “to receive a decision from that authority within a reasonable period of time prior to his or her execution.”²⁵⁵ Moreover, individual mercy petitions may be subject to judicial review and the prerogative of mercy must be exercised fairly and adequately.²⁵⁶ “In other words,” the Inter-American Court on Human Rights has instructed, “it is not enough merely to be able to submit a petition; rather, the petition must be treated in accordance with procedural standards that make

this right effective. . . . the State has a duty to implement a fair and transparent procedure by which an offender sentenced to death may make use of all favorable evidence deemed relevant to the granting of mercy.”²⁵⁷ The IACHR has also ruled that Guatemala’s death penalty violated Article 4.6 of the ACHR because there was no procedure for clemency or pardon; the Court ruled that Guatemala should adopt a clemency procedure that guarantees all persons sentenced to death the right to file and obtain a decision on a clemency petition; the sentence should not be executed before the petition is decided.²⁵⁸

B. YOUR DUTIES AS CLEMENCY COUNSEL

If you are representing an individual who faces a real risk of execution, you must be familiar with the procedures and possible time limitations for clemency petitions. You should also determine what factors the clemency authority usually finds persuasive. Examples of such factors are:

- **New evidence establishing innocence;**
- **Humanitarian reasons, such as a serious illness;**
- **Unfair trial;**
- **Personal characteristics of your client (youth, old age, mental illness, childhood abuse and deprivation);**
- **Behavior since the offense;**
- **Rehabilitation and remorse, and/or**
- **Support from the victim’s family.**

You should also assess the opportunity and feasibility of obtaining public opposition to your client’s execution from local and international NGOs, politicians, public figures, the victim’s family, religious and other community leaders.

MY NOTES:

C. THE RIGHT TO A STAY OF EXECUTION

Under international law, your client cannot be executed as long as his case is being reviewed, be it by a national or international body, appeal or clemency proceedings. The American Convention on Human Rights and the U.N. Death Penalty Safeguards expressly guarantee this right at the national level.²⁵⁹ And in its resolution 2001/68, the U.N. Commission on Human Rights urged all states “not to execute any person as long as any related legal procedure, at the international or at the national level, is pending.”

The HRC similarly decided that executing a prisoner when his sentence was being reviewed in a state party to the ICCPR violates the right to life provisions of Article 6.²⁶⁰ In *Ashby v. Trinidad and Tobago*, the HRC found that Trinidad and Tobago breached its obligations under the first Protocol to the ICCPR by executing Mr. Ashby before the Committee could formulate its views.²⁶¹ As Hood notes in his seminal work on capital punishment around the world, “for any right to have meaning there must be opportunity for its enjoyment. Thus, it may well be implicit in the [ICCPR] that the right to appeal in article 6, read together with article 14, and the express right to seek pardon or commutation of sentence in article 6 includes also an obligation on governments not to carry out a death sentence pending appeal or petition.”²⁶²

V. THE “COURT OF PUBLIC OPINION”

A. TAKING YOUR CLIENT’S CASE TO THE PUBLIC

Throughout your representation of your client, you should carefully consider whether he would benefit from media coverage. In many cases, media coverage and international publicity campaigns can cause a backlash. Judges or other decision-makers who might have been inclined to commute

your client’s death sentence may feel pressured by publicity to let the death sentence stand. Engaging with the media may also be risky for human rights defenders in certain states; we encourage everyone to carefully think through all possible repercussions before speaking out publicly about your client’s case. Despite these caveats, media coverage has proven to be an effective tool in many cases. As discussed below, given advances in technology such as the Internet, it is now easier to generate such publicity with both traditional media and social media.

Timing is an important consideration in all media campaigns. Highly visible media campaigns are most common when execution is imminent. Once a clemency petition has been filed, external pressure can influence an executive’s decision on that petition, especially a popularly elected executive sensitive to his country’s reputation in the international community. Amnesty International will often be willing to partner with local advocates to generate media attention and international support for a stay of execution. But media coverage may be useful earlier in the proceedings, as well.

It is a more difficult decision whether and when to go public while your client’s case is still under review in the courts. You must decide whether the risk of alienating the court (and perhaps the executive who may have to consider a clemency petition) is outweighed by the potential benefits of external pressure. This judgment should be made in consultation with experienced members of the bar in your country.

Many journalists look for a “hook” to write a story. Bear in mind that when you are working with the media, you need a theory of the case (see Chapter 7) and you need to be able to tell a compelling story that justifies either a commutation of your client’s death sentence or his release. Many potential claims in capital cases are newsworthy, especially claims of actual innocence,

MY NOTES:

but don't ignore claims of prosecutorial misconduct, discrimination, faulty investigative work, and your client's life history.

Success Story

• Using Social Media in Malaysia: The case of Noor Atiqah

- Noor Atiqah and her supporters were able to successfully leverage social media to tell Noor's story. The social media exposure enabled Noor's supporters to raise money and connect with advocacy organizations. Eventually Noor's appeal was successful and her sentence was reduced from death to a prison sentence.
- Noor, a single Singaporean mother, was struggling to find work. She started dating a man who promised to help her get a textile business off the ground. Unfortunately, Noor's boyfriend had no real intention of supporting her business; instead he intended to use her as a drug mule. In 2007, Noor's boyfriend sent her on a buying trip to Singapore with a suitcase packed by one of his friends. Malaysian authorities discovered an envelope containing heroin and derivative drugs inside this suitcase. Noor was unaware of the contents of the suitcase. Nevertheless, she was convicted of drug trafficking and sentenced to death under Malaysian law.
- After Noor was sentenced, her friends and family began an aggressive online campaign to get exposure and raise money. An active Facebook page and several blogs described Noor's situation and solicited donations. Through these online forums, Noor's supporters arranged to sell handmade crafts to help pay for Noor's appeal and to help support Noor's daughter and her elderly mother while she was incarcerated. Altogether, these efforts yielded over \$50,000. The Facebook page and blogs also allowed Noor's supporters to connect with established advocacy organizations like the Singapore Anti-Death Penalty Campaign.

- Under public pressure, the Malaysian Court of Appeal accepted Noor's application to introduce fresh evidence and reconsider her conviction. The court ultimately decided to reduce Noor's charge from trafficking to possession and her sentence from death to 12 years imprisonment. Because Noor has already served several years, she expects to be reunited with her daughter in 2017.

B. USING TRADITIONAL MEDIA

In the past, the only source of publicity for capital cases was local, national or international newspapers and magazines. Often these local or national newspapers reported the underlying crime, the investigation and trial. You should investigate prior media coverage about the crime, investigation and trial of your client before developing a strategy for further publicity.

One route to favorable media coverage is to educate a reporter by allowing him access to court filings. Many reporters will want to interview your client, but this is a step that is very risky. You must carefully evaluate whether your client is liable to say something that could harm his chances of commutation and/or release. Many criminal defendants are uneducated and can be easily manipulated, so you must control the interview as much as possible. Insist on being present. Ask for a list of questions in advance, and go through them with your client. Understand too that once you give a journalist access to your client, you have limited control over the nature of the publicity that follows.

C. USING SOCIAL MEDIA

Recent technological advances have transformed the ability to generate publicity, both good and bad. As noted above, the traditional route for publicity is through a journalist in mainstream media—for example, a newspaper, magazine, or TV reporter. Now, such traditional media can be supplemented or bypassed by internet appeals to the public (and indirectly to the government).

MY NOTES:

Counsel should consider Facebook, Twitter, YouTube and other forms of social media to raise the level of awareness of your client’s plight. In conjunction with this, you should contact national and international anti-death penalty groups to see if they can assist in publicizing your case either through the traditional media or through their own website/electronic mailing list.

Your client’s legal, moral and compassionate grounds for relief can be posted on the Internet for the world to see. You can consider posting some of your petitions and written arguments, as well as commentary about the case and your client’s plight. You can also direct sympathizers to where they can register their concerns or protests about your client’s trial or treatment by the courts or the government. Social media may be particularly useful to generate pressure on the executive who will decide whether to grant or deny clemency.

Finally, social media can be an effective tool to network with other capital defense counsel and human rights advocates. This is particularly true for advocates practicing in rural areas, where access to relevant statutes, case law, and human rights instruments may be difficult.

Success Story

• The Yemeni case of Hafez Ibrahim

- In 2005, a Yemeni Judge sentenced Hafez Ibrahim to death for a killing that occurred when he was 16-years old. The judge reportedly refused to hear from witnesses or the defense counsel and Ibrahim was denied the right to appeal. Two years later, Ibrahim managed to access a mobile phone and notify World Coalition member Amnesty International of his imminent execution. After a prolonged campaign, Ibrahim was finally released in 2007. He has since taken up the study of law, and dedicated his life to “campaigning against the death penalty and raising awareness about human rights.” The execution of juvenile offenders is prohibited under the International Covenant on Civil and Political Rights.

MY NOTES:

CHAPTER 10: ADVOCATING BEFORE INTERNATIONAL BODIES

I. WHEN DO I TAKE A CASE TO AN INTERNATIONAL HUMAN RIGHTS BODY?

Over the last few decades, it has become increasingly common for human rights bodies to review complaints of human rights violations in criminal cases. There are several situations in which you should consider the potential benefits of appealing to an international body. International appeals are often made when lawyers feel they have no recourse in domestic courts. In fact, most international bodies require petitioners to exhaust domestic remedies before they seek review at the international level. What this means, in practice, is that you will typically not file a case with an international body before you have sought a remedy in domestic courts, or with relevant local administrative bodies.

International appeals may be made for individual clients based on the legal issues presented in their cases, or they may be filed on behalf of multiple individuals who share a common plight. For example, lawyers in the United States filed a petition with the Inter-American Commission on Human Rights on behalf of numerous individuals detained in Guantánamo Bay, Cuba, as part of the United States' so-called "war on terror."

Experienced advocates strategize carefully before presenting a case to an international body. You must consider the body's previous decisions, the likelihood of a favorable outcome, and the utility of a decision in your client's favor. Can the international decision be enforced? Will it provoke a backlash? Or will it prompt a positive change in government policy?

A. WHICH OF YOUR CLIENT'S RIGHTS WERE VIOLATED?

Before you present your case to an international body, you must identify which of your client's rights have been violated. This will help you determine what arguments to make, as well as which international body to appeal to. You should refer to Chapter 9, above, for a list of the most common international legal arguments relating to the application of the death penalty. But in addition, you can raise any violation of your client's fair trial rights, as described in Chapter 7 and as set forth in Article 14 of the ICCPR. Finally, you can raise violations of your client's rights to be treated humanely, to a speedy trial, and to other rights that he has during the pretrial process as described in Chapter 3. (In addition, we have included a more comprehensive list of the treaty provisions pertinent to capital cases in the Appendix.)

B. PREPARING YOUR CASE

Once you identify the rights that have been violated by the government's actions in your case, you need to identify the instruments (treaties or other documents) that address those rights. You can begin with the list of rights contained in the Appendix and discussed throughout this manual. Another excellent resource is Amnesty International's Fair Trials Manual, available online.²⁶³

Once you have identified the relevant treaties and other instruments, you need to ascertain (1) whether your country is a party to any of the treaties you've identified; and (2) whether there is a mechanism under the treaty (or other instrument) that allows you to file a complaint on behalf of your client. You can quickly ascertain whether your country is a party to a particular treaty by checking the website of the High Commissioner on Human Rights, or other internet resources such as

the Death Penalty Worldwide database at www.deathpenaltyworldwide.org.²⁶⁴ This, however, does not necessarily determine whether you are permitted to file a complaint before an international body on behalf of an individual. We address this in more detail below, where we describe the appeal procedures for the human rights organizations that consider petitions from individuals.

Gather as many materials as you need to assist you in preparing the petition. Identify the procedural rules governing the submission of petitions by checking the website of the international body that enforces the particular instrument. The websites of many international human rights bodies offer free access to their cases and the text of relevant instruments.

If the workload is more than you can handle, you should solicit assistance from NGOs and legal clinics affiliated with law schools. Many law school clinics are eager for opportunities to assist local advocates with litigation before human rights bodies. A list of such organizations and clinics is listed in the Appendix. Consider requesting assistance from bar associations or national human rights commissions.

C. HAVE YOU EXHAUSTED DOMESTIC REMEDIES?

Most international mechanisms require that you exhaust all domestic remedies before filing your petition. Sometimes this means that you not only have to bring the issue before all relevant national bodies, but also that you raise at the national level the same legal arguments that you want to discuss at the international level. It is often best to err on the side of caution, and this manual often notes arguments that you should raise early on so that you preserve them for appeal.

There are some important exceptions to the exhaustion requirement, however. Also,

exhaustion is not required to bring a case before the ECOWAS Court of Justice.

Domestic remedies need not be exhausted if local remedies are unavailable or inaccessible (for example, denial of appeals or legal aid). However, under the HRC's jurisprudence, a remedy must also be *effective*—not merely formally available.²⁶⁵ In other words, domestic remedies need not be exhausted if they are inaccessible *or* if they are plainly ineffective (meaning they are accessible but unlikely to provide actual relief). For example, the Inter-American Court on Human Rights found in one case that domestic remedies were not sufficient to protect death row inmates from “illegal execution,” in part because the state executed the inmates while their cases were still pending before the Court.²⁶⁶

Similarly, under the Convention against Torture, domestic remedies need not be exhausted where “the application of remedies is unreasonably prolonged.”²⁶⁷

Communications may be sent to special rapporteurs and working groups even if local remedies have not been exhausted. The rationale is that these mechanisms are intended to intervene in urgent matters. You also may be able to seek interim measures of protection without exhausting domestic remedies.

The International Court of Justice has determined that States may waive the requirement of exhaustion.²⁶⁸

Most international bodies will not consider a petition if the issues have already been presented to another international body for resolution. This is called the rule against duplication of procedures. This means that in most cases, you will only be able to seek remedies before one international tribunal, even where you technically have access to multiple human rights bodies.

MY NOTES:

Finally, international bodies typically impose time limits for the filing of complaints. You must familiarize yourself with these rules so that you can file your petition in a timely manner.

II. WHERE TO PETITION

A. FACTORS TO CONSIDER

In deciding where to file your petition, you should be guided by several considerations. First, is your government likely to comply with any ruling in your favor? This will depend on several factors which are beyond the scope of this manual; most important, you will need to understand whether the decisions of international bodies are considered to be binding under domestic law, and whether your government will be receptive, as a political matter, to enforcing the judgment even where it is not legally binding.

Second, you must determine whether the human rights body is likely to rule in your favor. Although this may be difficult to predict, many bodies have issued previous decisions that can help you determine whether they will be receptive to your arguments.

Third, you will want to consider how a ruling from the international body fits with your domestic advocacy strategy. Sometimes, international court decisions can provoke a strong negative reaction from the government or the public. Other times, they serve to galvanize courts or policymakers to address human rights violations they had previously ignored. (Indeed, both of these responses may exist simultaneously!)

Finally, it is important to recognize that many international bodies have the power to issue “provisional measures,” also known as “interim” or “precautionary” measures. These measures are analogous to an injunction or a temporary restraining order. In a capital case, they are extraordinarily important, since the body may direct your government to refrain from carrying

out your client’s execution or from other harmful behavior while the body considers the merits of your complaint.

Once you decide whether and where to file your complaint, you need to consider the rules of the forum you have chosen. Monitoring bodies use different terms to apply to complaints submitted, which are used here interchangeably. These include terms such as “communication,” “complaint,” “application,” and “petition.” Similarly, the decisions of these institutions go by many names, such as “opinion,” “views,” and “conclusions.” We use those interchangeably as well. This section is organized by international treaties and covenants that have a procedure to hear individual petitions, and contains basic information concerning the body that implements or enforces the treaty at issue.

B. HUMAN RIGHTS INSTRUMENTS

Virtually every major human rights treaty provides for the establishment of a “treaty body” or committee of experts empowered to review compliance with the treaty and to receive and consider petitions from individuals alleging violations of their rights under the treaty. The right to submit individual petitions is not automatic, however. In some cases, the government will need to ratify a separate treaty, or “protocol,” that provides for the right of individual petition. In other cases, the right to petition is provided within the treaty itself, but the government may enter a reservation to that article.

What follows is a brief summary of the international bodies whose work is most relevant to the application of the death penalty. Information regarding each of these bodies is readily available on the internet. For that reason, we do not attempt to provide detailed guidelines regarding the procedures to be followed when filing a complaint.

MY NOTES:

C. UN MECHANISMS

1. International Covenant on Civil and Political Rights (ICCPR)

Requirements:

- **Your country is a party to the ICCPR**
- **Your state recognizes the HRC's competence to hear individual complaints (by becoming a party to the First Optional Protocol to the ICCPR)**

Competence:

The Human Rights Committee (HRC) consists of 18 members serving in their individual capacity.²⁶⁹ Under the First Optional Protocol to the ICCPR, the Committee is competent “to receive and consider communications from individuals subject to its jurisdiction who claim to be victims of a violation by that State Party of any of the rights set forth in the Covenant.”²⁷⁰ It is crucial to determine whether your government has acceded to the Optional Protocol, since accession or ratification is a necessary precondition for you to file an individual complaint before the HRC.

General Procedure:

If the communication raises a serious issue under the Covenant, the HRC submits it to the State party concerned, which is given six months to submit a written response. In death penalty cases, the HRC will typically respond within a matter of days to a request for interim measures. The HRC does not conduct oral hearings; all communications are exclusively in writing, and the HRC's deliberations on the communications take place behind closed doors.²⁷¹ After considering a communication, the Committee adopts its “Views,” which it sends to the State and individual parties concerned.²⁷² Due to the large number of cases brought under the Optional Protocol, the HRC might not render a decision for several years.

The HRC's rules of procedure are available online.²⁷³

In Capital Cases:

In cases involving individuals sentenced to death, the Committee has the power to recommend a new trial or sentencing proceeding, and can order financial reparations.

2. Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1984) (CAT)

Requirements:

- **Your country is a party to the CAT**
- **Your state recognizes the CAT's competence to receive individual complaints (by making a declaration to that effect under article 22 of the CAT)**

Competence:

The Committee against Torture is an independent ten-member expert body.²⁷⁴ It is competent to receive and consider individual communications. Individuals do not need to exhaust domestic remedies where “the application of remedies is unreasonably prolonged or is unlikely to bring effective relief to the alleged victim.”²⁷⁵ Although documents and proceedings relating to individual communications are confidential, the Committee's views are not—they are available to the parties concerned, as well as to the public.²⁷⁶

Procedure:

Article 20 of the CAT determines procedure in the case that the Committee receives reliable and apparently well-founded indications of systematic torture.²⁷⁷ The Committee invites the state to participate in an examination of the information and to submit observations.²⁷⁸ However, States

MY NOTES:

may declare that they do *not* recognize this competence of the Committee when signing, ratifying, or acceding to the Convention.²⁷⁹

The Committee against Torture doesn't appear to be as backlogged as the HRC, and its caseload is decreasing. In fact, cases are typically concluded within a year or two after they are registered, and decisions limited to admissibility are concluded even sooner.

D. OTHER UN MECHANISMS

Special procedures are established by the Human Rights Council to address issues specific to certain areas or thematic issues felt across the globe. They are handled either by an individual, such a Special Rapporteur, or a working group. Working groups are typically comprised of five individuals (one from each region).

Most special procedures receive information on specific human rights violations and send communications to the government, such as urgent appeals and letters of allegation. They also visit specific nations and issue reports. More information on special procedures is available from the UN High Commissioner on Human Rights' website.²⁸⁰

1. UN High Commissioner on Human Rights

The High Commissioner on Human Rights has the power to issue statements calling on governments to take certain actions in relation to individual cases or systemic issues relating to the application of the death penalty. In 2007, the High Commissioner filed an *amicus curiae* brief in support of a prisoner in Iraq, arguing that his execution would violate several principles of international law.²⁸¹ In that case, the High Commissioner argued that since Iraq had failed to guarantee the fair trial rights of the petitioner, he could not be executed. In addition, the High

Commissioner argued that hanging—as it was carried out in Iraq—amounted to cruel, inhuman, or degrading treatment or punishment in violation of Article 7 of the ICCPR.

2. Working Group on Arbitrary Detention

The Working Group on Arbitrary Detention is a UN-mandated entity of independent human rights experts that investigates certain types of criminal and administrative detention that may violate international human rights laws, including laws related to fair trial rights. The Working Group considers individual complaints from individuals in any State, and complaints may be filed on an urgent basis. If the Working Group finds violations of applicable law it will send an opinion to the applicable State and may make further appeals to the State through diplomatic channels.

3. Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions

The Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions is a UN expert tasked with investigating and reporting on executions that are conducted without legal procedures or with insufficient legal procedures. The Special Rapporteur provides a model questionnaire for the submission of individual complaints, which may be submitted by an individual in any state. The Special Rapporteur may issue urgent requests to governments regarding a pending case, may request permission to conduct an on-site visit, and can engage in a confidential dialogue with the government about cases or systemic issues relating to the application of the death penalty.

4. Special Rapporteur on Torture and other Cruel, Inhuman or Degrading Treatment

The Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment is a UN

MY NOTES:

expert responsible for investigating and reporting on punishments that constitute torture or otherwise violate applicable international law. The Special Rapporteur provides a model questionnaire for the submission of individual complaints, which may be submitted by an individual in any state. The Rapporteur's powers are similar to those described in relation to the Special Rapporteur on Extrajudicial, Summary and Arbitrary Executions.

E. REGIONAL HUMAN RIGHTS MECHANISMS

1. African Court and Commission of Human and Peoples' Rights (1981)

Competence of the African Court:

The African *Court* on Human and Peoples' Rights has the power to interpret the African Charter as well as other human rights instruments ratified by the state concerned.

The statute of limitations is lenient, and requires that the case be brought within a reasonable amount of time.

Requirements for the African Court:

- Your state has ratified the Protocol on the Establishment of an African Court on Human and Peoples' Rights
- Your state has agreed to be bound by the African Court's decisions (by making the necessary declaration under Article 5(3))
- Note: Individuals and international NGOs may only access the Court as a matter of right if their state has made a declaration allowing individuals and NGOs to have direct access to the court pursuant to Article 34(6) of the Protocol.

- According to Article 5 of the Protocol, the following can file a complaint with the Court as a matter of right:
 1. The African Commission
 2. The State Party that lodged a complaint with the Commission
 3. The State Party against which the complaint has been lodged at the Commission.
 4. The State Party whose citizen is a victim of human rights violation(s)
 5. African Intergovernmental Organizations.

Competence and Procedure of the African Commission:

The African *Commission* on Human and Peoples' Rights consists of 11 members serving in their individual capacity (African Charter of Human and Peoples' Rights art. 31). It is competent to consider communications from sources other than those of State parties, which has been interpreted to apply to individuals.

Most of the Commission's procedure is available on the Internet.²⁸² In *Lawyers of Human Rights v. Swaziland*, the Commission held that even if the local remedy is not exhausted, the complaint will be deemed admissible if "the likelihood of the complaint succeeding in obtaining a remedy that would redress the situation complained . . . is so minimal, [it would] render [the local remedy] unavailable and . . . ineffective."²⁸³ The Commission has also held that Art 56(5) of the AU Charter should be interpreted "in the light of its duty to protect human and people's rights as stipulated in the Charter. The Commission does not believe that the condition that internal remedies must have been exhausted can be applied

MY NOTES:

literally to those cases in which it is “neither practicable nor desirable” for the complainants or the victims to pursue such internal channels of remedy in every case of violation of human rights. Such is the case where there are many victims.”²⁸⁴

2. The Court of Justice of the Economic Community of West African States (ECOWAS)

The Community Court of Justice of the ECOWAS is seated in Abuja, Nigeria, though it may be seated in other countries if needed.²⁸⁵

Following the adoption of the 2005 Supplementary Protocol, private parties and NGOs may file complaints against ECOWAS member states raising human rights violations, regardless of whether the litigant has exhausted domestic remedies.²⁸⁶ The lack of an exhaustion requirement makes the ECOWAS court unique among human rights tribunals. As of September 2012, the ECOWAS court had not yet issued any decisions regarding the application of the death penalty, but a complaint was pending in connection with Gambia’s executions of several death row prisoners.

The Court’s decisions are legally binding on the ECOWAS member states.

3. Inter-American System

Competence:

The Inter-American Commission on Human Rights consists of 7 members elected in their personal capacity.²⁸⁷

Individuals may submit petitions alleging violations of the ACHR or, with regard to those OAS Member States which have not yet ratified the American Convention on Human Rights, the American Declaration on the Rights and Duties of Man.²⁸⁸

Procedure:

For a complete set of rules relating to the submission of complaints, you should refer to the Commission’s website.²⁸⁹ Like other monitoring bodies, the Commission requires that the petition be timely (lodged within six months of a final judgment²⁹⁰), that domestic remedies be exhausted, and that the petition is not duplicative of proceedings before other international human rights bodies. There are several exceptions to the exhaustion requirement, however. Exhaustion may be excused, for example, where the domestic legislation “does not afford due process of law for the protection of the right or rights that have allegedly been violated,” the alleged victim has been denied access to domestic remedies; or there has been “unwarranted delay in rendering a final judgment.”²⁹¹

The Inter-American Court of Human Rights may also hear petitions in cases brought by individuals from states that are party to the ACHR, and have recognized the compulsory jurisdiction of the Inter-American Court of Human Rights under article 62. It can only hear cases after “the procedure before the Commission [is] completed.”²⁹² The Court also has the authority to adopt provisional measures “[i]n cases of extreme gravity and urgency.”²⁹³ Even if it does not have a relevant case pending before it, the Court may adopt such measures at the request of the Commission.²⁹⁴ The Court’s judgments are final and States parties are to comply with the terms of any case to which they are parties.²⁹⁵

III. WEAKNESSES AND STRENGTHS OF THE INTERNATIONAL BODIES’ JURISPRUDENCE

A major difficulty with international human rights law is that it is very difficult to enforce. The decisions of many international human rights

MY NOTES:

bodies are not legally binding and some countries are willing to defy a decision or order of an international body—even one whose competence they have recognized. Even if a decision is not enforceable, however, you can argue that it has *persuasive* force. You can also use international decisions to generate pressure on the executive branch to commute your client’s death sentence.²⁹⁶

Moreover, the extent to which a State complies depends on many factors specific to each country. Some include the political orientation of the government and the status of international law in its jurisdiction. Knowing this can help you to better plan your advocacy strategy. For example, if there will be a change in political leadership within the time that you could file a petition, you may try to file it quickly or wait (although you need to be mindful of time limits applicable to the filing of petitions) if you think that the political transition could affect how the government responds to your petition.

IV. INTERIM REMEDIES

Each committee has authority to act in cases of emergency where the petitioner faces the risk of irreparable harm. In such situations, the committee commonly issues a request to the State party for “interim measures” to prevent irreparable harm and preserve the status quo. These requests are often issued in death penalty cases, and they take the form of a request to the executive to refrain from carrying out the execution of the petitioner.²⁹⁸ You may not be required to exhaust domestic remedies before seeking interim measures; you should check the rules for each body to confirm whether exhaustion is required.

Success Story

- **Pratt & Morgan v. Jamaica²⁹⁷**

- In *Pratt and Morgan v. Jamaica*, the HRC granted interim measures of protection requesting that Jamaica refrain from carrying out a death sentence pending the committee’s examination of the case. Jamaica granted the stay of execution. Subsequently, the HRC granted hundreds of stays of executions in cases from a number of Caribbean Commonwealth countries. In very few cases did the State proceed with the execution.

MY NOTES:

CHAPTER 11: APPENDIX

I. RESOURCES

See what international human rights treaties your country is a party to at the United Nations Treaty Collections, Chapter IV: Human Rights, at <http://treaties.un.org/pages/Treaties.aspx?id=4&subid=A&lang=en>.

See what regional human rights treaties your country is a party to at the following:

- United Nations Office of the High Commissioner for Human Rights, Regional Human Rights Treaties, at <http://www.ohchr.org/EN/Issues/ESCR/Pages/RegionalHRTreaties.aspx>.
- Organization of American States, Inter-American Treaties: Signatories and Ratifications, at http://www.oas.org/DIL/treaties_signatories_ratifications_subject.htm

See also Death Penalty Worldwide, a website and database about the laws and practices relating to the application of the death penalty around the world, at www.deathpenaltyworldwide.org.

II. TEMPLATES

A. MODEL UN COMPLAINT FORMS

Model form under the Optional Protocol to the ICCPR, the CAT, or the ICERD, available at <http://www2.ohchr.org/english/bodies/docs/annex1.pdf>.

List of guidelines for submitting petitions to different human rights bodies, available at <http://www2.ohchr.org/english/bodies/question.htm>.

Anne F. Bayefsky, *How to Complain to the UN Human Rights Treaty System*, Kluwer Law Int'l (2003), available at <http://www.bayefsky.com/tree.php/area/complain>.

Online complaint form for the ICCPR, CAT, CEDAW, and ICERD, available at <http://www.bayefsky.com/unts/login/index.php>.

III. LIST OF ACRONYMS

- ACHR — American Convention on Human Rights
- ACHPR — African Charter on Human and People's Rights
- ACRWC — African Charter on the Rights and the Welfare of the Child
- BPPAPAFDI — UN Body of Principles for the Protection of All Persons under any Form of Detention or Imprisonment
- BPTP — United Nations Basic Principles for the Treatment of Prisoners
- CEAFDW — Convention to Eliminate All Forms of Discrimination Against Women
- CRPD — Convention on the Rights of Persons with Disabilities
- CRC — Convention on the Rights of the Child
- DEAFIDBRB — Declaration on the Elimination of All Forms of Intolerance and Discrimination Based on Religion or Belief
- DHRD — Declaration on Human Rights Defenders
- ECHR — European Convention on Human Rights
- ESC — Economic Social and Cultural Rights
- IACPPEVW — Inter-American Convention on the Prevention, Punishment, and Eradication of Violence against Women
- IACPPT — Inter-American Convention to Prevent and Punish Torture

- ICCPR — International Covenant on Civil and Political Rights
- ICERD — International Convention on the Elimination of all Forms of Racial Discrimination
- ICESCR — International Covenant on Economic, Social, and Cultural Rights

IV. LIST OF NGOS, LAW CLINICS, AND OTHER ORGANIZATIONS THAT MAY BE ABLE TO ASSIST YOU IN PRESENTING COMPLAINTS TO HUMAN RIGHTS BODIES AND PUBLICIZING YOUR CASE

A. HUMAN RIGHTS CLINICS

- Center for International Human Rights, Northwestern University School of Law
 - Contact Sandra Babcock at s-babcock@law.northwestern.edu

B. NGOS

- Amicus
 - http://www.amicus-alj.org/about_amicus/contact.php
 - Telephone: 0207 072 5603 / 31
- Amnesty International
 - <http://www.amnesty.org/en/contact>
 - Telephone: +44-20-74135500
- Anti-Death Penalty Asia Network
 - <http://adpan.net/contact/>
- Death Penalty Project
 - <http://www.deathpenaltyproject.org/contact/>
 - Telephone: +44-203-2062748
- Ensemble Contre la Peine de Mort

- <http://www.abolition.fr/>
- Telephone: +33(0)-1-57-63-03-57
- Federation Internationale Droits de l'Homme
 - <http://www.fidh.org/-Secretariat-international->
 - Telephone: +33-1-43-55-25-18
- Interights
 - <http://www.interights.org/contact-us/index.html>
 - Telephone: + 44(0)-20-7264 3989
- Reprieve
 - <http://www.reprieve.org.uk/about/>
 - Telephone: 020 7553 8140

V. MITIGATION CHECKLIST

Consider interviewing the following life history witnesses: Family members (including mother, father, siblings, aunts, uncles, nieces and nephews), village headman, neighbors, religious leaders, schoolteachers, nurses, policemen, prison guards, prisoner's children.

Note: Depending on the facts of the case, some communities may be disturbed by the thought of the prisoner's release. In some rural African communities, it may be necessary to approach the village headperson and inform him/her of your intentions prior to interviewing any witnesses. Whether the community will be disturbed by your presence depends on many factors, including the length of time that has passed between the crime and your visit, how the offense was committed, and the relationship of your client to his family and the larger community. You should explain that you are trying to ensure that your client receives a fair trial, and that you wanted to be sure that you had correct information about his life and the nature of the offense. If it is appropriate, you can explain that you are focusing on saving his life and

MY NOTES:

preventing the imposition of the death penalty, and that there is little chance he will be released from prison.

Before you start interviewing the witness, identify yourself and explain that you are assisting the prisoner in his defense. If the case is on appeal, explain that you are assisting in the appeal. Ask the witness if she has had any contact with prisoner and when they last spoke/saw each other. Explain that he is still in prison and give them any updates you can on his health, general condition, and the status of the case. Ask them if there is any message they would like you to convey to the prisoner.

Before asking any questions, explain to the witness that you will be asking a lot of questions, some of which may seem strange, and some of which will ask about information that is very private. Assure him/her that even if it seems that you are asking for information that seems harmful, you are only using it to help your client. The most important thing is to be honest. Everything you say is confidential. Explain that you are not there to judge anyone, but only to understand. Explain that it is important to ask about these things as they give you a more complete picture of your client's life and can possibly explain his behavior and thus help prepare a stronger defense.

Questions to map out prisoner's family tree:

- Can you tell me a little about [name of prisoner]? What was he like as a [brother/child/father]?
- Did he have any positions of leadership in the village?
- What was his reputation in the village/community?
- Did he have a job? What did he do? At what age did he start working? What kind of work did he do as a child (assuming he worked as a child).

- Did he go to church/mosque? Any position of leadership? Did you ever notice any change in his religious observance?
- Schooling: Where did he go to school, how far did he get, why did he stop?
- Did he learn to read and write? How was his school performance compared to his siblings/other family members? Did he have any difficulty learning his subjects?

Questions to determine possible mental illness and mental disabilities:

- What was the prisoner's health like as an infant, child, teenager? Did he ever suffer from any serious illnesses? Malaria, tuberculosis, other illnesses?
- Did he ever suffer any head injuries? (details, due to what, age, witnesses, hospitalized?)
- Did he ever lose consciousness, did he ever lose time? (details; what age, how long, how often, witnesses)
- Did he suffer from headaches?
- Did he ever have seizures?
- Did you or anyone in your family ever take him to a traditional healer? Why? (details; what age, how long, how often, witnesses)
- What sort of traditional remedies, if any, did he receive for any mental difficulties? Did he ever go to a doctor?
- Have you ever noticed anything unusual about him, compared to your other [brothers/children/people in your family/people in your community]?
- Did he ever use alcohol? How much, how frequent?
- Was the use of alcohol common in his family?

MY NOTES:

- Did his parents drink? More or less than others in his community?
- How was their behavior when they were drunk?
- What was the relationship like between his parents? Did they ever fight? Did they fight with loud words, or were their fights physical? Can you describe some of those fights? Did the prisoner ever intervene to stop those fights?
- Was your client ever a victim of violence from a family member? How severe was it?
- Was he ever a witness to any other form of violence within his family or in the community?
- How was he punished as a child when he misbehaved? Did he misbehave more or less than his brothers/sisters? What kind of trouble would he get into as a young child?
- Any indications that the prisoner was a victim of sexual abuse or sexual violence by a family member or anyone within the community?
- Did [name] ever suffer from rages, or panic attacks?
- [If the answer is yes]: What sets him off? Does he ever lose it?
- What happens when he gets set off, loses it?
- At what age did this behavior start?
- Have you ever noticed anything else that is unusual about the prisoner's behavior?

Questions about pre- and post-natal health (for mothers in particular, but also elder siblings, aunties, fathers):

- Explain that prenatal and post natal health (problems) can have long term effects on physical growth, cognitive development

and future learning capacity, school performance, educational outcomes, and work performance.

- When you were pregnant with [name], did you ever experience times of severe malnourishment? Times where there was no food at all? Any droughts during the pregnancy? Details, when, how often. How would you get additional food? What was your diet when you were pregnant?
- Are any details known about the pregnancy and the delivery of the client?
- Any complications during the pregnancy? (ask for details)
- Any complications during delivery? (ask for details) How was your delivery of [name] compared to the delivery of your other children? Did you deliver in a hospital or at home? Who was present with you?
- Were there any times when your child [the prisoner] experienced times of severe malnourishment? Times where there was no food at all? Due to drought? Due to unemployment caretaker? Details, when, how often. How would you get additional food?
- How quickly did [name] develop in comparison with your other children? At what age did he learn to walk, talk, use the toilet? Was this earlier or later than your other children?

Closing the interview:

Thank them for their time. Tell them how much you appreciate having had the opportunity to speak to them. Give them a sense for how long you expect the trial/appeal to take. Tell them that you will do your best to help [prisoner], but that you cannot make any promises or even predict what will happen. If you are handling the appeal of a

MY NOTES:

prisoner on death row, explain that you're trying to make sure he is not executed, to get him the physical/mental health care that he needs, and reduce his prison sentence.

MY NOTES:

CHAPTER 12: END NOTES

---- End Notes ----

- ¹ U.N. Basic Principles on the Role of Lawyers adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, 27 August to 7 September 1990, U.N. Doc. A/CONF.144/28/Rev.1 at 118 (1990).
- ² In countries where the mandatory death penalty is applied, the courts may not be able to consider these factors in sentencing offenders convicted of certain crimes. Nonetheless, it is still critical to investigate your client’s background. Even in mandatory death penalty countries, prosecutors may retain significant discretion to charge your client with a lesser offense that does not carry a mandatory penalty of death. Presenting prosecutors with evidence of your client’s mental illness, abusive background, or other factors can help persuade them to use their discretion to avoid capital charges.
- ³ ECOSOC Res. 1989/64, ¶ 1(a).
- ⁴ “The European Court has observed with respect to Article 6(3)(c) of the European Convention that ‘the right of an accused to be given, in certain circumstances, free legal assistance constitutes one aspect of the notion of a fair trial in criminal proceedings.’” *Quaranta v. Switzerland*, App. No. 12744/87, ¶ 27, ECtHR (May 24, 1991). *See also Artico v. Italy*, App. No. 6694/74, ¶ 33, ECtHR (May 13, 1980). ECtHR cases are available at www.echr.coe.int/hudoc.
- ⁵ ICCPR Art. 14; *Taylor v. Jamaica*, ¶ 8.2, Communication No. 707/1996, U.N. Doc. CCPR/C/60/D/707/1996, HRC (June 14, 1996) (“...where a convicted person seeking constitutional review of irregularities in a criminal trial has insufficient means to meet the costs of legal assistance in order to pursue his constitutional remedy and where the interest of justice so requires, legal assistance should be provided by the State.”).
- ⁶ In *Moreno Ramos v. United States*, Case 12.430, Report No. 1/05, OEA/Ser.L./V/II.124, Doc. 5, IACHR (2005), the IACHR found that the United States violated equality, due process, and fair trial protections prescribed under Articles II, XVIII and XXVI of the American Declaration, including the right to competent legal representation, where Mr. Moreno Ramos’ trial counsel failed to present mitigating evidence at the penalty phase of the trial and made no attempt to convince the jury to sentence him to life imprisonment. *See also Medellín, Ramírez Cárdenas & Leal García v. United States*, Case 12.644, Report No. 90/09, OEA/Ser.L./V/II.135, Doc. 37, IACHR (Aug. 7, 2009) (finding that the United States violated petitioners’ rights to due process and to a fair trial under Articles XVIII and XXVI of the American Declaration by providing incompetent defense counsel in a capital case). Moreover, Article 6(3)(c) of the ECHR requires national authorities to intervene (taking positive measures) if a failure to provide effective representation is either manifest or sufficiently brought to their attention in some other way. *See Artico v. Italy*, App. No. 6694/74, ECtHR (May 13, 1980); *Kamasinski v. Austria*, (App. No. 9783/82, ECtHR Dec. 19, 1989); *Imbrioscia v. Switzerland*, App. No. 13972/88, ECtHR (Nov. 24, 1993); *Czekalla v. Portugal*, App. No. 38830/97, ECtHR (Oct. 10, 2002); *Sannino v. Italy*, App. No. 30961/03, ECtHR (Apr. 27, 2006); *Panasenko v. Portugal*, App. No. 10418/03, ECtHR (July 22, 2008). Similar provisions exist in the national laws of many countries, including the United States and Portugal. *See, e.g., Strickland v. Washington*, 466 U.S. 668 (1984); Portugal Estatuto da Ordem dos Advogados, Art. 93 § 2, Art. 95 §§ 1, 2, Act No. 15 (Jan. 26, 2005, last amended in 2010) (describing an lawyer’s duty not to accept a case if he

MY NOTES:

knows he doesn't have the required skills or availability to prepare and engage in zealous representation, and to inform the client on the progress of the case).

- ⁷ U.N. Basic Principles on the Role of Lawyers ¶ 3. "Governments shall ensure the provision of sufficient funding and other resources for legal services to the poor and, as necessary, to other disadvantaged persons. Professional associations of lawyers shall cooperate in the organization and provision of services, facilities and other resources." In *Reid v. Jamaica*, the HRC held that "in cases involving capital punishment, in particular, legal aid should enable counsel to prepare his client's defence [sic] in circumstances that can ensure justice. This does include provision for adequate remuneration for legal aid." ¶ 13, Communication No. 250/1987, U.N. Doc. CCPR/C/39/D/250/1987 (1990).
- ⁸ *Robinson v. Jamaica*, 241, Communication No. 223/1987, U.N. Doc. Supp. No. 40 (A/44/40) at 41, HRC (1989) (State party is under an obligation itself to make provision for effective representation by counsel in a case concerning a capital offence, even where provision of legal assistance would require an adjournment of the proceedings); ECOSOC Res. 1989/64 (calling on member states to afford "special protection to persons facing charges for which the death penalty is provided by allowing time and facilities for the preparation of their defense, including the adequate assistance of counsel at every stage of the proceedings, above and beyond the protection afforded in non-capital cases"); *Kamasinski v. Austria*, App. No. 9783/82, ¶ 65, ECtHR (Dec. 19, 1989) ("Inequality of parties before the courts may easily result in a miscarriage of justice. When defense counsel fails to provide effective representation, authorities must either replace the counsel or otherwise compel the counsel to fulfill mandatory obligations.").
- ⁹ *Artico v. Italy*, App. No. 6694/74, ¶ 33, ECtHR (May 13, 1980).
- ¹⁰ The U.N. Basic Principles on the Role of Lawyers states, "All persons are entitled to call upon the assistance of a lawyer of their choice to protect and establish their rights and to defend them in all stages of criminal proceedings." The U.N. Safeguards Guaranteeing Protection of the Rights of Those Facing the Death Penalty provide: "5. Capital punishment may only be carried out pursuant to a final judgment rendered by a competent court after legal process which gives all possible safeguards to ensure a fair trial, at least equal to those contained in ICCPR Article 14, including the right of anyone suspected of or charged with a crime for which capital punishment may be imposed to adequate legal assistance at all stages of the proceedings." (May 25, 1984) available at <http://www2.ohchr.org/english/law/protection.htm>.
- ¹¹ See ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases, Guideline 10.14, "Duties of Trial Counsel After Conviction" (Feb. 2003), available at http://www.americanbar.org/content/dam/aba/migrated/2011_build/death_penalty_representation/2003guidelines.authcheckdam.pdf ("Trial counsel is responsible for making sure that the client's legal position does not suffer any harm during the period of transition to successor counsel. To avoid prejudice to the client, trial counsel should ... make every effort to ensure that this period is as short as possible. But, in any event, trial counsel may not cease acting on the client's behalf until successor counsel has entered the case.").
- ¹² International Commission of Jurists, *International Principles on the Independence and Accountability of Judges, Lawyers, and Prosecutors*, Practitioners' Guide No. 1, p. 5 (2007), <http://www.icj.org>
- ¹³ ICCPR Art. 14(3)(b); ECHR Art. 6(3)(b); ACHR Art. 8(2)(c); RACHPR ¶ 2(E)(1); ICTY Statute Art. 21(4)(b), ICTR Statute Art. 20(4)(b), ICC Statute Art. 67(1)(d).
- ¹⁴ ICCPR Cmt. 13: "What is "adequate time" depends on the circumstances of each case, but the facilities must include access to documents and other evidence which the accused requires to prepare his case, as

MY NOTES:

- well as the opportunity to engage and communicate with counsel.” *See also Pedersen & Baadsgaard v. Denmark*, App. No. 49017/99, ECtHR (Dec. 17, 2004).
- ¹⁵ *Smith v. Jamaica*, Communication No. 282/1988, U.N. Doc. CCPR/C/47/D/282/1988, HRC (Mar. 31, 1993); *Reid v. Jamaica*, Communication No. 355/1989, U.N. Doc. CCPR/C/51/D/355/1989, HRC (July 8, 1994). (Defendant Reid met his counsel only 10 minutes before trial. This does not constitute adequate time to prepare).
- ¹⁶ *See also Chaparro Álvarez y Lapo Iñiguez v. Ecuador*, IACtHR (Nov. 21, 2007); *Gordillo, Raúl Hilario*, Expte: G.445.XXI, Fallos: 310:1934, CSJN (Sept. 29, 1987) (Argentina Supreme Court); *Goddi v. Italy*, App. No. 8966/80, ECtHR (Apr. 9, 1984); *Daud v. Portugal*, App. No. 22600/93, ECtHR (Apr. 21, 1998); *Bogumil v. Portugal*, App. No. 35228/03, ECtHR (Oct. 7, 2008); *Öcalan v. Turkey*, App. No. 46221/99, ECtHR (Mar. 12, 2003, First Section), (May 5, 2005, Grand Chamber).
- ¹⁷ ECOSOC Res. 1996/15 (adopted July 23, 1996).
- ¹⁸ *See* ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases, Guideline 4.1, “The Defense Team and Supporting Services” (Feb. 2003), http://www.lb9.uscourts.gov/webcites/10documents/Smith_guidelines.pdf.
- ¹⁹ ICCPR Art. 14(3)(f). Article 6(3)(e) of the ECHR, Article 8(2)(a) of the ACHR, and Articles 20(4)(f) and 21(4)(f) of the respective Statutes of the International Criminal Tribunals for Rwanda and the former Yugoslavia provide for the right to free assistance of an interpreter for the accused where he does not understand or speak the language of the court.
- ²⁰ Bradley A. Maclean, *Effective Capital Defense Representation and the Difficult Client*, 76 TENNESSEE LAW REVIEW 661, 674 (2009) (“In a capital case, where the client’s life is on trial, there are additional reasons why a close and trusting lawyer-client relationship is critical.”).
- ²¹ *See* Model Rules of Professional Conduct (2010), available at http://www.abanet.org/cpr/mrpc/mrpc_toc.html.
- ²² Maclean, *Effective Capital Defense Representation*, at 674.
- ²³ Leona D. Jochnowitz, *Missed Mitigation: Counsel’s Evolving Duty to Assess and Present Mitigation at Death Penalty*, 43 No. 1 CRIMINAL LAW BULLETIN Art. 5 (2007).
- ²⁴ Maclean, *Effective Capital Defense Representation*, at 670.
- ²⁵ *Id.* at 676.
- ²⁶ *See* U.N. International Criminal Court Code of Professional Conduct for Counsel (Feb. 2003).
- ²⁷ Most codes of conduct for lawyers include rules on conflicts of interests. *See, e.g.*, Council of Bars and Law Societies of Europe, Code of Conduct for European Lawyers, Art. 3.2, available at http://www.ccbe.eu/fileadmin/user_upload/NTCdocument/EN_Code_of_conductp1_1306748215.pdf (1988, last amended 2006) (“3.2.1. A lawyer may not advise, represent or act on behalf of two or more clients in the same matter if there is a conflict, or a significant risk of a conflict, between the interests of those clients. 3.2.2. A lawyer must cease to act for both or all of the clients concerned when a conflict of interests arises between those clients and also whenever there is a risk of a breach of confidence or where the lawyer’s independence may be impaired. 3.2.3. A lawyer must also refrain from acting for a new client if there is a risk of breach of a confidence entrusted to the lawyer by a former client or if the knowledge which the lawyer possesses of the affairs of the former client would give an undue advantage to the new client.”); Portuguese Statute on Lawyers, Art. 94 (*Estatuto da Ordem dos Advogados*, Act No. 15/2005 of

MY NOTES:

- Jan. 26, last amended in 2010); Argentinian Ethical Code for Lawyers, Art. 19(g) (*Código de Ética de los Abogados, Colegio Público de Abogados de la Capital Federal, 1987*). The Italian Code of Criminal Procedure, Art. 106(§4-bis) (*Codice di Procedura Penale, of 1988*), states that the defense of a plurality of defendants cannot be entrusted to the same counsel if the defendants have made statements about the liability of another defendant in the same case or in a joint case or in a case connected to it. The Commentary to Rule V of the Haitian Code of Professional Ethics for Lawyers (*Code de déontologie des avocats*) provides a practical definition of conflicts of interest, “*Il y a conflit d’intérêts lorsque les intérêts en présence sont tels que le jugement et la loyauté de l’avocat envers son client (ou envers un client éventuel) peuvent en être défavorablement affectés.*” (A conflict of interest arises when the opposing interests are such that the judgment and loyalty of the lawyer towards his client (or towards a prospective client) could be unfavorably affected).
- ²⁸ John Stewart Geer, Representation of Multiple Criminal Defendants: Conflicts of Interest and the Professional Responsibilities of the Defense Attorney, 62 MINNESOTA LAW REVIEW 119, 126-31 (1997-1998).
- ²⁹ Gary T. Lowenthal, Joint Representation in Criminal Cases: A Critical Appraisal, 64 VIRGINIA LAW REVIEW 939, 944 (1978). See also Gary T. Lowenthal, Why Representing Multiple Defendants is a Bad Idea (Almost Always), 3 CRIMINAL JUSTICE 7 (1998-1999).
- ³⁰ ICCPR Art. 14(2); ACHPR Art. (7)(1)(b); ACHR Art. 8(2); ECHR Art. 6(2); Constitution of Peru, Art. 2, ¶ 24(e); Constitution of the Republic of the Philippines, Art. III, § 14(2); Constitution of Uganda, Ch. 4, Art. 28(3)(a).
- ³¹ ACHPR Art. 6; ECHR Art. 5(1); ACHPR, *Constitutional Rights Project and Civil Liberties Organisation v. Nigeria*, Communication No. 102/93, ACommHPR (Oct. 31, 1998).
- ³² Pakistan Constitution, Part II, Ch. 1, § 10(4); Constitution of the Republic of the Philippines, Art. III, § 13; Constitution of Uganda, Ch. 4, Art. 23(6).
- ³³ Oman Constitution Art. 24; Constitution of the Kingdom of Thailand, Part 4, § 40(7).
- ³⁴ ICCPR Art. 9(3); ECHR Art. 5(3); ACHR, Art. 7(5); *Michael & Brian Hill v. Spain*, p. 17, ¶ 12.3, Communication No. 526/1993, U.N. Doc. CCPR/C/59/D/526/1993, HRC (Apr. 2, 1997).
- ³⁵ *Stephens v. Jamaica*, p. 9, ¶ 9.6, Communication No. 373/1989, U.N. Doc. CCPR/C/55/D/373/1989, HRC (Oct. 18, 1995) (explaining that the time between your client’s arrest and his first appearance before the judge “should not exceed a few days”); Constitution of Peru, Art. 2, ¶ 24(f).
- ³⁶ ICCPR Part II, Art. 9(3)-(4); ACHR Art. 7(6); ECHR, Art. 5(3); ACHR, Art. 7(4)-(7).
- ³⁷ Constitution of Uganda, Ch. 4, § 23(4).
- ³⁸ This right is addressed in Chapter 6, II, 1.
- ³⁹ HRC General Cmt. 13 (May 12, 2004), available at [http://www.unhchr.ch/tbs/doc.nsf/0/ca12c3a4ea8d6c53c1256d500056e56f/\\$FILE/G0441302.pdf](http://www.unhchr.ch/tbs/doc.nsf/0/ca12c3a4ea8d6c53c1256d500056e56f/$FILE/G0441302.pdf).
- ⁴⁰ ICCPR Art. 10(1); Constitution of the Republic of the Philippines, Art. III, § 12(2).
- ⁴¹ *Id.*
- ⁴² HRC, General Cmt. 15; U.N. General Assembly Body of Principles for the Protection of All Persons Under Any Form of Detention or Imprisonment, Principle 23 (Dec. 9, 1988), <http://www.un.org/documents/ga/res/43/a43r173.htm>; U.N. General Assembly Code of Conduct for Law

MY NOTES:

- Enforcement Officials, Art. 5 (Dec. 17, 1979), available at <http://www2.ohchr.org/english/law/codeofconduct.htm>; Constitution of Peru, Art. 2, ¶ 24(h).
- ⁴³ European Prison Rules, Rule 18.8(a), Recommendation of the Committee of Ministers to Member States No. 2006(2) (Jan. 11, 2006).
- ⁴⁴ European Prison Rules, Rule 18.8(b).
- ⁴⁵ European Prison Rules, Rule 18.8(c).
- ⁴⁶ European Prison Rules, Rule 18.
- ⁴⁷ European Prison Rules, Rule 26.
- ⁴⁸ U.N. Standard Minimum Rules for the Treatment of Prisoners, Rule 21 (May 13, 1977), available at <http://www2.ohchr.org/english/law/treatmentprisoners.htm>; European Prison Rules, Rule 27.
- ⁴⁹ European Prison Rules, Rules 39-48; Constitution of Peru, Art. 2, ¶ 24(h); Constitution of Uganda, Ch. 4, Art. 23(5)(b)-(c).
- ⁵⁰ European Prison Rules, Rule 22.
- ⁵¹ U.N. Standard Minimum Rules for the Treatment of Prisoners, Rules 6(1), 41, 42; U.N. General Assembly Body of Principles for the Protection of All Persons Under any Form of Detention or Imprisonment, Principle (5)1; European Prison Rules, Rules 13, 29.
- ⁵² U.N. Standard Minimum Rules for the Treatment of Prisoners, Rules 6(1), 41, 42; U.N. General Assembly Body of Principles for the Protection of All Persons Under any Form of Detention or Imprisonment, Principle (5)1; European Prison Rules, Rules 13, 29.
- ⁵³ U.N. Standard Minimum Rules for the Treatment of Prisoners, Rule 93; U.N. General Assembly Body of Principles for the Protection of All Persons Under any Form of Detention or Imprisonment, Principle 18; European Prison Rules, Rule 23.4; Rules of Detention of the Yugoslavia Tribunal, Rule 67(D); Constitution of Uganda, Ch. 4, Art. 23(5)(b).
- ⁵⁴ ICESCR Article 12 affirms each person's right to physical and mental health (Jan. 3, 1976), <http://www2.ohchr.org/english/law/cescr.htm>.
- ⁵⁵ See U.N. Safeguards Guaranteeing Protection of the Rights of Those Facing the Death Penalty, § 3 (May 25, 1984) <http://www2.ohchr.org/english/law/protection.htm>, E.S.C. Res. 1984/50, annex, 1984 U.N. ESCOR Supp. (No. 1) at 33, U.N. Doc. E/1984/84 (1984).
- ⁵⁶ ECOSOC has clarified that Section 3 of the U.N. Safeguards also prohibits the application of the death penalty to "persons suffering from mental retardation or extremely limited mental competence, whether at the stage of sentence or execution." Res. 1989/64, 51 ¶ 1(d), U.N. Doc. E/1989/91 (1989). The UNCHR has similarly called upon countries to avoid executing any person suffering from any form of mental disorder or disability. The Question of the Death Penalty, U.N. Doc. E/CN.4/2005/L.77 (2005). See also Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, ¶ 116, U.N. Doc. E/CN.4/1997/60 (1996) (calling on states that impose the death penalty on the mentally ill to "bring their domestic criminal laws into conformity with international legal standards").
- ⁵⁷ See, e.g., *Reyes v. The Queen*, UKPC, 2 AC 235, 241 (2002) (appeal taken from Belize); *Coard v. Attorney Gen.* [2007] UKPC 7 (appeal taken from Grenada); *Dacosta Cadogan v. Barbados*, IACtHR (Sept. 24, 2009); *Kigula & Others v. Attorney Gen.*, 2006 S. Ct. Const. App. No. 03 (Uganda 2009); *Woodson v. North Carolina*, 428 U.S. 280 (United States 1976); *Mithu v. Punjab*, 2 SCR 690 (India 1983).

MY NOTES:

---- End Notes Continued ----

- ⁵⁸ Leona D. Jochowitz, *Missed Mitigation: Counsel’s Evolving Duty to Assess and Present Mitigation at Death Penalty*, 43 No. 1 CRIMINAL LAW BULLETIN Art. 5 (2007).
- ⁵⁹ Bradley A. Maclean, *Effective Capital Defense Representation and the Difficult Client*, 76 TENNESSEE LAW REVIEW 661, 670 (2009).
- ⁶⁰ *Id.* at 671.
- ⁶¹ *See, e.g.*, Allen P. Wilkinson & Ronald M. Gerughty, *Bite Mark Evidence: Its Admissibility is Hard to Swallow*, 12 WESTERN STATE UNIVERSITY LAW REVIEW 519, 560 (1985).
- ⁶² Interview with Ameir Mohamed Suleiman, African Center for Justice and Peace Studies (Feb. 24, 2010).
- ⁶³ The U.S. Supreme Court, in *Strickland v. Washington*, 466 U.S. 668 (1984), held that in a capital case, defense counsel has a duty to make reasonable investigations into potential defenses or to make a reasonable determination that such investigations are unnecessary.
- ⁶⁴ *See* ICCPR, Art. 6¶5; U.N. Safeguards § 3. Article 37 of the CRC also states, “No child shall be subjected to torture or other cruel, inhuman or degrading treatment or punishment. Neither capital punishment nor life imprisonment without possibility of release shall be imposed for offences committed by persons below eighteen years of age.”
- ⁶⁵ *See, e.g.*, ACHR, Art. 4(5), 1144 U.N.T.S. 146 (Nov. 22, 1969) (“Capital punishment shall not be imposed upon persons who, at the time the crime was committed, were under 18 years of age or over 70 years of age; nor shall it be applied to pregnant women.”).
- ⁶⁶ J.Y. McKee, *Criminal Justice Systems in Europe and North America: France* 6.1.1(b), HEUNI, The European Institute for Crime Prevention and Control, affiliated with the U.N. (2001).
- ⁶⁷ *See* ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases, § 10.7, “Investigation” (Feb. 2003), http://www.americanbar.org/content/dam/aba/migrated/2011_build/death_penalty_representation/2003guidelines.authcheckdam.pdf.
- ⁶⁸ Daniel Payne, *Building the Case for Life: A Mitigation Specialist as a Necessity and a Matter of Right*, 16 CAPITAL DEFENSE JOURNAL 43 (2003).
- ⁶⁹ *Dacosta Cadogan v. Barbados*, ¶¶ 80-88, IACtHR (Sept. 24, 2009). Similarly, the Privy Council has held, and Caribbean courts have acknowledged, that the state is required to provide social enquiry and psychiatric reports for all prisoners considered for the death penalty. *Pipersburgh v. R* [2008] 72 WIR 108 (PC) (“It is the need to consider the personal and individual circumstances of the convicted person and, in particular, the possibility of his reform and social re-adaptation which makes the social inquiry and psychiatric reports necessary for all such sentence hearings.”); see also *DPP v. Che Gregory Spencer* [2009] E Carib Sup Ct, High Ct of Justice, Federation of St. Christopher and Nevis, at para 3 (“It is also now standard practice for the state to provide a Social Enquiry Report and a Psychiatric Report.”).
- ⁷⁰ The *Brasilia Rules on Access to Justice for People in a Vulnerable Condition* indicate the following factors may account for vulnerability: age, incapacity, belonging to minorities or indigenous communities, victimization, migration, poverty, gender or deprivation of liberty. The Brasilia Rules also stress the importance of public policy and of qualified legal assistance for those vulnerable persons. “100 Regras de Brasilia sobre Acceso a la Justicia de las Personas en condición de Vulnerabilidad” approved by the XIV Iberoamerican Judicial Summit (2008), available at www.cumbrejudicial.org/web/guest/110.
- ⁷¹ ICCPR Art. 6 ¶ 5.

MY NOTES:

- ⁷² *Id.*
- ⁷³ ACHR Art. 5 § 4.
- ⁷⁴ African Charter on the Rights and Welfare of the Child, Art. 30(e); Arab Charter on Human Rights, Art. 12.
- ⁷⁵ African Charter on the Rights and Welfare of the Child, Art. 30(e); Arab Charter on Human Rights, Art. 12.
- ⁷⁶ UN Human Rights Council, Report of the Special Rapporteur to the Commission of Human Rights, S. Amos Wako, 6 February, 1989, E/CN.4/1989/25, para 279-283.
- ⁷⁷ *See* Nigel Rodley, *The Treatment of Prisoners Under International Law*, 322, 324 (Oxford Univ. Press 2008).
- ⁷⁸ *Id.* (“The difference in wording between the language relating to persons under 18 years of age (“shall not be imposed”) and that relating to pregnant women (“shall not be carried out”) suggests the distasteful conclusion that once the pregnant women have given birth, she may be executed.”).
- ⁷⁹ *Id.* at 324.
- ⁸⁰ *Id.*
- ⁸¹ CRC Art. 1.1.
- ⁸² Concluding Observations of the Committee on the Rights of the Child, Saudi Arabia, U.N. Doc. CRC/C/SAU/CO/2 (2006).
- ⁸³ Rodley, *The Treatment of Prisoners Under International Law*, p. 322.
- ⁸⁴ *Michael Domingues v. U.S.*, Case 12.285, Report No. 62/02, IACHR (2002). *See also Thomas v. U.S.*, Case 12.240, Report No. 100/03, IACHR (2003) (“The overwhelming evidence of global state practice . . . displays a consistency and generality amongst world states indicating that the world community considers the execution of offenders aged below 18 years at the time of their offence to be inconsistent with prevailing standards of decency. The Commission is therefore of the view that a norm of international customary law has emerged prohibiting the execution of offenders under the age of 18 years at the time of their crime.”).
- ⁸⁵ ACHR Art. 4(5).
- ⁸⁶ Criminal Code of the Republic of Belarus, Art. 59.2(3) (2009).
- ⁸⁷ Rodley, *The Treatment of Prisoners Under International Law*, p. 325.
- ⁸⁸ *See* ICCPR Art. 24(2), CRC Art. 7.
- ⁸⁹ Guidelines of Action on Children in the Criminal Justice System, ECOSOC Res. 1997/30, ¶ 12 (July 23, 1996).
- ⁹⁰ CRC, General Cmt. 10 ¶¶ 31, 39.
- ⁹¹ UNICEF, *Innocenti Insight: Birth Registration and Armed Conflict* (2007), http://www.unicef.at/fileadmin/medien/pdf/birth_registration_and_armed_conflict.pdf
- ⁹² U.N. High Commissioner for Refugees, *Refugee Children: Guidelines on Protection and Care* (1994), available at <http://www.unhcr.org/refworld/docid/3ae6b3470.html>.
- ⁹³ *Id.* at 44.
- ⁹⁴ *Id.*
- ⁹⁵ *Id.*

MY NOTES:

---- End Notes Continued ----

- ⁹⁶ The Special Rapporteur on Health has observed that the term “persons with mental disabilities” encompasses an almost unmanageably broad spectrum of impairments and conditions, ranging from intellectual disabilities to severe psychiatric disorders. Report of the Special Rapporteur on the Right to Health, E/CN.4/2005/51 (Feb. 11, 2005), ¶ 19.
- ⁹⁷ The HRC has also found that the reading of a warrant for execution to a mentally incompetent person violated ICCPR Article 7. In 1984, ECOSOC addressed itself to the issue for the first time and concluded that the death sentence is not to be carried out on persons who are insane. In its resolution on implementation of the Safeguards, ECOSOC proposes non-execution of persons suffering from mental retardation or extremely limited mental competence. RODLEY, *THE TREATMENT OF PRISONERS UNDER INTERNATIONAL LAW*, p. 325.
- ⁹⁸ See, e.g., *Pipersburgh v. R*, 72 WIR 108, ¶ 33 (2008) (“It is the need to consider the personal and individual circumstances of the convicted person and, in particular, the possibility of his reform and social re-adaptation which makes the social inquiry and psychiatric reports necessary for all such sentence hearings.”). See also *DPP Spencer v. Che Gregory*, E. Carib. Sup. Ct., High Ct. of Justice (2009), Federation of St. Christopher & Nevis, ¶ 3 (“It is also now standard practice for the state to provide a Social Enquiry Report and a Psychiatric Report.”).
- ⁹⁹ The next edition of the Diagnostic and Statistical Manual, the DSM V, has been developed and will be published in 2012.
- ¹⁰⁰ *Uganda v. Bwenge*, HCT-03-CR-SC-190/1996 (2009).
- ¹⁰¹ *Id.* at 5.
- ¹⁰² *Id.* at 15.
- ¹⁰³ U.N. Office of Drugs and Crime, Handbook on Prisoners with Special Needs, p. 12 (2009), available at www.unodc.org/documents/justice-and-prison-reform/Prisoners-with-special-needs.pdf.
- ¹⁰⁴ Standard Minimum Rules, ¶ 24, (1977) U.N. Doc. A/CONF/611, annex I.
- ¹⁰⁵ International Centre for Prison Studies, *A Human Rights Approach to Prison Management*, p. 50, available at www.prisonstudies.org.
- ¹⁰⁶ Standard Minimum Rules, ¶ 44.
- ¹⁰⁷ *Id.* ¶ 82.
- ¹⁰⁸ The *Vienna Conventions on Consular Relations and Optional Protocol on Disputes*, available at <http://www.state.gov/documents/organization/17843.pdf>, provide a host of rights that will arise if counsel determines that a client is a foreign national. Article 36 of the Conventions, for instance, provides the right to consular assistance, and as a result, local authorities have the duty to inform foreign nationals that are detained or arrested of their right to communicate with their consulate.
- ¹⁰⁹ The American Bar Association’s Guidelines for the Appointment and Performance of Defense Counsel in Capital Cases (2003) provide, in Guideline 10.6, that attorneys have an obligation to advise foreign national defendants of their rights to contact the consulate and to notify the consulate of their detention if they so wish. See also RODLEY, *THE TREATMENT OF PRISONERS UNDER INTERNATIONAL LAW*, p. 1012.
- ¹¹⁰ See OC-16/99, Inter-Am. Ct. H.R. (Oct. 1, 1999); *Avena and Other Mexican Nationals (Mex. v. U.S.)*, 2004 I.C.J. 128 (Mar. 31).

MY NOTES:

¹¹¹ See *Tan Seng Kiah v. R* [2002] NTCCA 1 (Court of Criminal Appeal of the Northern Territory of Australia) (suppressing statement where defendant was deprived of opportunity to seek consular assistance).

¹¹² In *Avena and Other Mexican Nationals*, the International Court of Justice held that 51 Mexican nationals in the United States who had been sentenced to death without being promptly notified of their consular rights were entitled to have their convictions and sentences reviewed *de novo*, in order to ascertain how they were prejudiced by the violations. 2004 I.C.J. 128 (Mar. 31). The death sentence of one Mexican national was commuted as a direct result of the ICJ's decision. See *Torres v. State*, 120 P.3d 1184, 1188 (Okla. Crim. App. 2005). Courts outside of the United States have applied the ICJ's decision as well. See BVerfG, 2 BvR 2115/01 vom 19.9.2006, Absatz-Nr. (1 - 77), ¶¶60-61 (Germany Federal Constitutional Court), available at http://www.bverfg.de/entscheidungen/rk20060919_2bvr211501.html.

¹¹³ *Id.* at 1014.

¹¹⁴ *Id.*

¹¹⁵ Plea bargaining is an established tool in the United States' system of criminal procedure and elements of plea bargaining are found in many foreign legal systems throughout the world as well as some international criminal tribunals. See generally Dominick R. Vetri, *Guilty Plea Bargaining: Compromises by Prosecutors to Secure Guilty Pleas*, 112 UNIVERSITY OF PENNSYLVANIA LAW REVIEW 865, 866 (1964) (discussing the broad range of plea agreements used by prosecutors in the United States). See also Nancy Amoury Combs, *Copping a Plea to Genocide: The Plea Bargaining of International Crimes*, 151 UNIVERSITY OF PENNSYLVANIA LAW REVIEW 1 (2002) (discussing the use of plea bargaining in Continental Europe, the United Kingdom, Israel, and the International Criminal Tribunals); Penal Reform Int'l, *PRI Research on Gacaca Report IV: The Guilty Plea Procedure, Cornerstone of the Rwandan Justice System*, at 3 (2003), <http://www.penalreform.org/resources/rep-ga4-2003-guilty-plea-en.pdf> (discussing the guilty plea procedure in *Gacaca* courts for those accused of genocide to plead guilty in exchange for a reduced sentence and to finish the second half of the sentence performing community service).

¹¹⁶ Combs, *Copping a Plea to Genocide*, at 142.

¹¹⁷ See *Missouri v. Frye*, 132 S. Ct. 1399 (2012) (duty to convey to client any offers of a plea agreement presented by the prosecution).

¹¹⁸ See e.g., Vetri, *Guilty Plea Bargaining*, at 866.

¹¹⁹ In jurisdictions that do not use the term "discovery," the equivalent may be the right to know the charges and the right to access the prosecution file/case file. In Portugal, for example, once the investigation is concluded (or even before that), the parties may access, read, or copy the prosecution's file. There is no request for "discovery" or "disclosure" of particular evidence because the information held by the prosecution will be in the case file (Portuguese Code of Criminal Procedure, Art. 89 (*Código de Processo Penal* of 1987, as amended through to 2010)). The ECtHR case-law states that ECHR Article 6 encompasses access to the case file to the extent that is necessary to know and refute the charges and prepare the defense. This does not mean unlimited access to the file; it means that defendants must have access to the elements that are necessary to an adequate exercise of their defense (see *Jespers v. Belgium*, 27 DR 61, ECommHR (1981); *Lamy v. Belgium*, App. No. 10444/83, ECtHR (Mar. 30, 1989); *Foucher v. France*, App. No. 22209/93, ECtHR (Mar. 18, 1997); *Nikolova v. Bulgaria*, App. No. 31195/96, ECHR (Mar. 25, 1999); *Rowe & Davis v. United Kingdom*, App. No. 28901/95, ECtHR (Feb. 16, 2000); *Mattoccia v. Italy*, App. No. 23969/94, ECtHR (Jul. 25, 2000); *Garcia Alva v. Germany*, App. No. 23541/94, ECtHR (Feb. 13, 2001); *Lietzow v. Germany*, App. No. 24479/94, ECtHR (Feb. 13, 2001); *Schöps v. Germany*,

MY NOTES:

App. No. 25116/94, ECtHR (Feb. 13, 2001); *Öcalan v. Turkey*, App. No. 46221/99, ECtHR (Mar. 12, 2003) (First Section), May 12, 2005 (Grand Chamber)).

¹²⁰ In some jurisdictions this will not be necessary because the charging instrument/indictment includes the list of evidence and witnesses that support the charges and that are to be produced at trial.

¹²¹ *Prosecutor v. Kabligi*, ¶ 21, ICTR (No. ICTR-98-41-T) (Oct. 19, 2006) (“It is difficult to imagine a statement taken in violation of the fundamental right . . . would not require its exclusion under Rule 95 as being ‘antithetical to, and would seriously damage, the integrity of the proceedings.’”).

¹²² See Annual Report of the IACHR, Case 9850 (Argentina) (Oct. 4 1990).

¹²³ CAT Art. 11.

¹²⁴ CAT Art. 13.

¹²⁵ *Saunders v. United Kingdom*, ¶¶ 68-69, ECtHR (Dec. 17, 1996).

¹²⁶ See ICCPR Arts. 9, 14(3)(c). This provision has been interpreted to signify the right to a trial that produces a final judgment and, if appropriate, a sentence without undue delay. The time limit “begins to run when the suspect (accused, defendant) is informed that the authorities are taking specific steps to prosecute him.” The International Committee of the Red Cross (ICRC) has compiled a lengthy list of provisions in international law and various countries that discuss due process and speedy trial rights. See ICRC, Customary IHL database, available at http://www.icrc.org/customary-ihl/eng/docs/v2_cha_chapter32_rule100_sectionf.

¹²⁷ *Collins v. Jamaica*, Communication No. 240/1987, U.N. Doc. CCPR/C/43/D/240/1987, HRC (Nov. 1, 1991) (the HRC noted that “in all cases, and especially in capital cases, the accused is entitled to trial and appeal proceedings without undue delay, whatever the outcome of the judicial proceedings may turn out to be.”); Frederic Edel, *The Length of Civil and Criminal Proceedings in the case-law of the European Court of Human Rights*, Council of Europe Publishing, Human Rights Files No. 16 (2007). In Portugal and some other countries, there is the possibility to file a “motion”/request to “accelerate” the procedure if the legal deadlines for each stage are exceeded.

¹²⁸ *Pedersen & Baadsgaard v. Denmark*, App. No. 49017/99, ECtHR (Dec. 17, 2004). See also *H. v. France*, ¶¶ 50, 58, ECtHR (Oct. 24, 1989).

¹²⁹ The HRC has held that when a state violates an individual’s due process rights under the ICCPR, it may not carry out his execution. See, e.g., *Johnson v. Jamaica*, ¶ 8.9, Communication No. 588/1994, HRC (1996) (finding delay of 51 months between conviction and dismissal of appeal to be violation of ICCPR Article 14, paragraphs 3(c) and 5, and reiterating that imposition of a death sentence is prohibited where the provisions of the ICCPR have not been observed).

¹³⁰ *Ake v. Oklahoma*, 470 U.S. 68 (1985); see also *Pipersburgh v. R* [2008] 72 WIR 108 (PC) (“It is the need to consider the personal and individual circumstances of the convicted person and, in particular, the possibility of his reform and social re-adaptation which makes the social inquiry and psychiatric reports necessary for all such sentence hearings.”); see also *DPP v. Che Gregory Spencer* [2009] E. Carib. Sup. Ct., High Ct of Justice, Federation of St. Christopher and Nevis, ¶ 3 (“It is also now standard practice for the state to provide a Social Enquiry Report and a Psychiatric Report.”).

¹³¹ For more information on experts see *Fuenzalida v. Ecuador*, Communication No. 480/1991, U.N. Doc. CCPR/C/57/480/1991, ICCPR, ¶ 9.5, No. 480/91 (July 12, 1996) (After considering the court’s refusal to

MY NOTES:

order expert testimony of crucial importance to the case, the HRC concluded that the refusal violated articles 14(3)(e) and 14(5) of the ICCPR).

- ¹³² See, e.g., UDHR Arts. 7, 10; ICCPR, Arts. 2(1), 3, 26; CEDW Arts. 2, 15; ICERD Arts. 2, 5, 7; ACHPR Arts. 2, 3; ACHR, Arts. 1, 8(2), 24; ECHR, Arts. 6,14; ADRDM, Arts. II, XVIII.
- ¹³³ See UDHR, Art. 10; ICCPR, Art. 14(1); ACHR, Arts. 8(1) and 27(2); ADHR Art. XXVI; ECHR Art. 6(1); ACHPR, Arts. 7(1), 26. See also Basic Principles on the Independence of the Judiciary (“BPIJ”), ¶¶ 1-2. The Human Rights Committee has held that “[t]he right to be tried by an independent and impartial tribunal is an absolute right that may suffer no exception.” *Gonzales del Rio v. Peru*, ¶ 5.2, Communication No. 263/1987 (1992). Moreover, in *Richards v. Jamaica*, ¶ 7.2, Communication No. 535/1993 (1997), the Human Rights Committee found a violation of article 14 in a capital case involving extensive pretrial publicity, and ruled that Jamaica could not lawfully carry out the execution. *Id.*
- ¹³⁴ For example, BPIJ ¶ 5 provides that “Everyone shall have the right to be tried by ordinary courts or tribunals using established legal procedures.” At a minimum, the right to a fair hearing, established in ICCPR Article 14(1), encompasses the procedural and other guarantees laid down in paragraphs 2 to 7 of Article 14 and Article 15. But in truth, a defendant’s fair trial rights are even broader in scope, since Article 14(3) refers to the specific rights enumerated as “minimum guarantees.” Therefore, a trial may not meet the fairness standard envisaged in Article 14(1), even where the proceedings are technically in compliance with paragraphs 2-7 of Article 14 and the provisions of Article 15.
- ¹³⁵ Your client’s right to adversarial proceedings, to be informed of these charges against him, and to adequate time and facilities to prepare a defense are discussed at length in Chapter 2.
- ¹³⁶ Lawyers Committee for Human Rights, *WHAT IS A FAIR TRIAL? A Basic Guide to Legal Standards and Practice*, p. 12, March 2000 [hereinafter, LCHR FAIR TRIAL Manual].
- ¹³⁷ LCHR FAIR TRIAL Manual, p. 3.
- ¹³⁸ See BPIJ, principle 2: “The judiciary shall decide matters before them impartially, on the basis of facts and in accordance with the law, without any restrictions, improper influences, inducements, pressures, threats or interferences, direct or indirect, from any quarter or for any reason.” When deciding whether a tribunal is independent, the European Court on Human Rights considers: (1) the manner of appointment of its members; (2) the duration of their office; (3) the existence of guarantees against outside pressures; and (4) the question whether the body presents an appearance of independence. See, e.g., *Campbell and Fell v. the United Kingdom*, App. Nos. 7819/77, 7878/77, ¶ 78, ECtHR (June 28, 1984).
- ¹³⁹ *Ringelsen v. Austria*, App. No. 2614/65, ¶ 95, ECtHR (July 16, 1971).
- ¹⁴⁰ *Le Compte, Van Leuven and De Meyere v. Belgium*, App. Nos. 6878/75, 7238/75, ¶ 57, ECtHR, (June 23, 1981). See also International Commission of Jurists, *International Principles on the Independence and Accountability of Judges, Lawyers, and Prosecutors*, Practitioners’ Guide No. 1, p. 5 (2007).
- ¹⁴¹ LCHR FAIR TRIAL Manual, pp. 13-14.
- ¹⁴² See, e.g., ECHR, Art. 6(2); ICCPR, Art. 14(2). See also ACHR Art. 8(2).
- ¹⁴³ See Draft Third Optional Protocol to the ICCPR, *Aiming at Guaranteeing Under All Circumstances the Right to a Fair Trial and a Remedy*, Annex I, in: “The Administration of Justice and the Human Rights of Detainees, The Right to a Fair Trial: Current Recognition and Measures Necessary for Its Strengthening,” Final Report, Commission on Human Rights, Sub-Commission on Prevention of Discrimination and

MY NOTES:

Protection of Minorities, 46th Session, E/CN.4/Sub.2/1994/24, p. 76, n.10 (June 3, 1994) [hereinafter The Final Report].

¹⁴⁴ *Salabiaku v. France*, App. No. 10519/83, ¶ 28, ECtHR (Oct. 7, 1988).

¹⁴⁵ ECHR Art. 5(2); HRC General Cmt. 13 (Art. 14), ¶ 7 (April 12, 1984).

¹⁴⁶ ICCPR Art. 14(3)(d); ICTY Statute Art. 21(4)(d); ICTR Statute Art. 20(4)(d); ICC Statute Art. 67(1)(d). Although the right to be present at trial is not expressly mentioned in the European Convention, the European Court has stated that the object and the purpose of Article 6 mean that a person charged with a criminal offence is entitled to take part in the trial hearing. *See Colozza and Rubinat*, App. Nos. 9024/80, 9317/81, ¶ 27, ECtHR (February 12, 1985).

¹⁴⁷ *See* Art. 14(3)(f).

¹⁴⁸ For example, the Inter-American Commission considers the right to translation of documents as fundamental to due process. *See* Report on the Situation of Human Rights of a Segment of the Nicaraguan Population of Miskito Origin, OEA/Ser.L/V/11.62, Doc.10, rev. 3, IACHR (1983).

¹⁴⁹ ECHR Art. 6(3)d; ICCPR Art. 14(3)(e). ACHR Art. 8(2)(f) recognizes the right of defendants to examine witnesses against them and those testifying on their behalf, under the same conditions as the State, with the purpose of defending themselves.

¹⁵⁰ *Funke v. France*, App. No. 1/256-A, ¶ 44, ECtHR (Feb. 25, 1993).

¹⁵¹ *Saunders v. United Kingdom*, App. No. 43/1994/490/572, ¶ 68-69, ECtHR (Dec. 17, 1996).

¹⁵² *See, e.g., Case of López-Álvarez v. Honduras*, Case No. 146 I/A, Ser./C/141, ¶ 155, IACHR (Feb. 1, 2006).

¹⁵³ *See, e.g., Hadjianastassiou v. Greece*, App. No. 12945/87, ECtHR (Dec. 16, 1992) (“The national courts must, however, indicate with sufficient clarity the grounds on which they based their decision. It is this, inter alia, which makes it possible for the accused to exercise usefully the rights of appeal available to him”), www.echr.coe.int/hudoc.

¹⁵⁴ Recommendation of the Committee of Ministers of the Council of Europe to Member States, No. (92)17, *Concerning Consistency In Sentencing*, Appendix, ¶ E (Oct. 19, 1992): “Giving reasons for sentences. 1. Courts should, in general, state concrete reasons for imposing sentences. In particular, specific reasons should be given when a custodial sentence is imposed. Where sentencing orientations or starting points exist, it is recommended that courts give reasons when the sentence is outside the indicated range of sentence. 2. What counts as a “reason” is a motivation which relates the particular sentence to the normal range of sentences for the type of crime and to the declared rationales for sentencing.”

¹⁵⁵ In *R. v. Belgium*, App. No. 15957/90, ECtHR (Mar. 30, 1992) and *Planka v. Austria*, App. No. 25852/94, ECtHR (May 15, 1996), the ECtHR rejected the applications, finding no violation of ECHR Art. 6 in cases where the judge provided precise questions for the jury to answer and the parties could request modifications to the questions or otherwise challenge them. For the ECtHR, these features made up for the lack of reasons (“compensate sufficiently for the brevity of the jury’s replies”).

¹⁵⁶ *J. L. García Fuenzalida v. Ecuador*, ¶ 9.5, Communication No. 480/1991, U.N. Doc. GAOR/A/51/40/vol. II, HRC (July 12, 1996) (finding violations of Articles 14(3)(e) & (5) where a court had refused to order such expert testimony).

¹⁵⁷ *See, e.g., Case of López-Álvarez v. Honduras*, Case No. 146 I/A, Ser./C/141, ¶ 155, IACHR (Feb. 1, 2006); ICCPR Art. 14(3)(g); ACHR Art. 8(2)(g); and ICC Statute Art. 55(1)(a).

MY NOTES:

- ¹⁵⁸ *D. Gordon v. Jamaica*, ¶ 6.3, Communication No. 237/1987, U.N. Doc. GAOR/A/48/40 (vol. II), (Nov. 5, 1992).
- ¹⁵⁹ *Delta Case v. France*, ¶ 36, Series A, No. 191-A, ECtHR (Dec. 19, 1990) (analyzing the rights afforded by Article 6(3)(d) of the European Convention on Human Rights). *See also Castillo Petruzzi et al. case v. Peru*, ¶ 154, Series C No. 52, IACtHR (May 30, 1999) (“[O]ne of the prerogatives of the accused must be the opportunity to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf, under the same conditions as witnesses against him . . .”).
- ¹⁶⁰ *Delta Case v. France*, ¶ 37, Series A, No. 191-A, ECtHR (Dec. 19, 1990) (right to a fair trial under ECHR Arts. 6(1) and (3)(d) was violated where a party was convicted based on testimony witnesses provided to investigators and where the accused and his counsel were not afforded the opportunity to challenge the credibility of those witnesses).
- ¹⁶¹ *See generally* American Bar Ass’n, *ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases* (rev. ed. Feb. 2003), 31 HOFSTRA L. REV. 913 (2003), available at <http://www.abanet.org/legalservices/downloads/sclaid/deathpenaltyguidelines2003.pdf>.
- ¹⁶² *Kigula & Others v. Attorney Gen.*, 2006 S. Ct. Const. App. No. 03 (Uganda 2009).
- ¹⁶³ *Id.* at 43.
- ¹⁶⁴ *Mulla & Anr. v. State of U.P.*, Crim. App. No. 396 of 2008, at 53-59 (India 2010).
- ¹⁶⁵ *Id.* at 65.
- ¹⁶⁶ For examples of mitigating circumstances considered relevant by courts when deciding on the imposition of a death sentence, *see Williams v. Taylor*, 529 U.S. 362 (2000); *Wiggins v. Smith*, 539 U.S. 510 (2003); *Porter v. McCollum*, 130 S. Ct. 447 (2009); *Manohar Lal alias Mannu & Another v. State*, 2 SRC 92 (India 2000); *Mulla & Another v. State of Uttar Pradesh*, Crim. App. No. 396 of 2008 (India 2010); *Reyes v. The Queen*, UKPC, 2 AC 235, Judgment on Sentencing (2002) (appeal taken from Belize); *Pipersburgh v. R.*, UKPC, ¶ 33, 72 WIR 108 (2008) (appeal taken from Belize); *DPP v. Wycliffe Liburd*, Suit No. SKBHCR 2009/0007, (Eastern Caribbean Supreme Court, Saint Christopher and Nevis, Crim.Cir. 2009); *George v. The Queen*, Suit No. HCRAP 2009/005 (Eastern Caribbean Supreme Court, Court of Appeal of Saint Lucia 2011).
- ¹⁶⁷ *Atkins v. Virginia*, 536 U.S. 304, 316 n.21 (2002).
- ¹⁶⁸ Concluding Observations of the Human Rights Committee, Islamic Republic of Iran, U.N. Doc. CCPR/C/79/Add.25 (1993); *Lubuto v. Zambia*, ¶ 7.2, Communication No. 390/1990, HRC (Oct. 31, 1995) (imposition of the mandatory death penalty for an armed robbery that did not result in injury violated Article 6(2)). The IACtHR has likewise concluded that crimes that do not result in death are not “most serious crimes” under ACHR Art. 4(2). *See also Raxcacó-Reyes v. Guatemala*, ¶¶ 56, 71, No. 133, IACtHR (Sept. 15, 2005).
- ¹⁶⁹ Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, ¶ 65, U.N. Doc. A/HRC/4/20/2007/18 (Jan. 29, 2007).
- ¹⁷⁰ *Bachan Singh v. State of Punjab*, 2 SCC 684 (India 1980). In February 2010, the Indian Supreme Court reiterated that the death may be imposed only in cases of “extreme culpability.” *Mulla & Anr. v. State of U.P.*, Crim. App. No. 396 of 2008, at 49 (India 2010).

MY NOTES:

---- End Notes Continued ----

- ¹⁷¹ See, e.g., *Manohar Lal alias Mannu & Another v. State*, 2 SCC 92 (India 2000) (death sentence set aside for murder of four youths in front of their mother because the defendants were “on a rampage” triggered by the “murder of Indira Ghandi” and had lost all reason).
- ¹⁷² Press Trust of India, *SC saves man who murdered wife, 3 kids from the gallows*, Times of India, Feb. 29, 2012, <http://timesofindia.indiatimes.com/city/delhi/SC-saves-man-who-murdered-wife-3-kids-from-the-gallows/articleshow/12085626.cms>.
- ¹⁷³ *S. v. Makwanyane*, ¶ 46, 3 SA 391 (South Africa 1995).
- ¹⁷⁴ See, e.g., *Kigula & Others v. Attorney Gen.*, 2006 S. Ct. Const. App. No. 03, at 56-57 (Uganda 2009); *Pratt v. Jamaica*, Communication Nos. 210/1986, 225/1987, U.N. Doc. A/44/40, at 222, HRC (1989); *Pratt & Others v. Attorney Gen. of Jamaica & Others* 2 AC 1 (1994); *Soering v. United Kingdom*, ¶ 111, App. No. 14038/88, 11 ECtHR (1989).
- ¹⁷⁵ *Reyes v. The Queen*, UKPC, 2 AC 235, Judgment on Sentencing (2002) (appeal taken from Belize).
- ¹⁷⁶ ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases Guideline 10.7, “Investigation” (Feb. 2003).
- ¹⁷⁷ See, e.g., ICCPR Art. 14(5); ACHPR Art. 7(1)(a); ACHR Art. 8(2)(h); U.N. Safeguards, ¶ 6, E.S.C. Res. 1984/50, annex, U.N. Doc. E/1984/84 (May 25, 1984); Arab Charter on Human Rights, Art. 16(7) (May 22, 2004) (reprinted in 18 HUMAN RIGHTS LAW JOURNAL 151 (1997)); Protocol No. 7 to the ECPHR Art. 2(1); ACHR N.10(b) (2003), <http://www.pogar.org/publications/arabniaba/hr/rabat/accused-lewis-anthony-e.pdf>
- ¹⁷⁸ HRC General Cmt. 32, ¶ 51, U.N. Doc. CCPR/C/GC/32 (July 26, 2007).
- ¹⁷⁹ *LaVende v. The State*, 30 WIR 460 (Trin. & Tobago) (1979); *LaVende v. Trinidad and Tobago* (No. 554/1993), U.N. Doc. CCPR/C/61/D/554/1993 (Nov. 11 1997).
- ¹⁸⁰ Explanatory Report to the Protocol No. 7 to the European Convention for the Protection of Human Rights and Fundamental Freedoms, Art. 2(18), Nov. 22, 1984, Europ. T.S. No. 117, available at <http://conventions.coe.int/treaty/en/Reports/Html/117.htm> (noting that the procedural law of the member state may limit review in certain cases to questions of law).
- ¹⁸¹ See *Vázquez v. Spain* (No. 701/1996), U.N. Doc. CCPR/C/69/D/701/1996 (Aug. 11 2000) (finding that the author had been denied certain procedural rights guaranteed him under the ICCPR because the review on appeal “was limited to the formal or legal aspects of the convictions”); *Domukovsky et al. v. Georgia* (Nos. 623/1995, 624/1995, 627/1995), U.N. Doc. CCPR/C/62/D/623 (Apr. 6 1998) (finding that a “full evaluation of the evidence and the conduct of the trial” is required).
- ¹⁸² *Benedetto v. The Queen*, Privy Council, [2003] UKPC 27, 1 WLR 1545, 1569-70.
- ¹⁸³ *Isaac, Cannonier, Williams & Gardiner v. The Queen*, Crim Apps No. 2 of 2008, Nos. 19, 20, 21, 22 of 2008, E Carib Ct App (21 March 2012) (appeal from St. Christopher and Nevis).
- ¹⁸⁴ *Id.* at ¶32.
- ¹⁸⁵ *Johnson v. Jamaica*, (No. 588/1994), U.N. Doc. CCPR/C/56/D/588/1994 (Mar. 22 1996) (finding a delay of four years and three months in hearing an appeal in a capital case is, barring exceptional circumstances, unreasonably long and incompatible with the right to a fair trial); *McLawrence v. Jamaica*, (No. 702/1996), U.N. Doc. CCPR/C/60/D/702/1996 (July 18 1997) (finding a delay of 31 months between conviction and appeal violated Article 14 of the ICCPR); *Ashby v. Trinidad and Tobago*, (No. 580/1994), U.N. Doc. CCPR/C/74/D/580/1994 (March 21 2002) (finding a four and a half year delay in the adjudication of the

MY NOTES:

appeal was violated article 14 of the ICCPR and specifically noting that inadequate staffing or general administrative backlog is not sufficient justification for the delay).

¹⁸⁶ See Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Aug. 27–Sept. 7, 1990, *Basic Principles on the Role of Lawyers*, ¶ 21, U.N. Doc. A/CONF.144/28/Rev.1 (“It is the duty of competent authorities to ensure lawyers access to appropriate information, files and documents in their possession or control in sufficient time to enable lawyers to provide effective legal assistance to their clients.”).

¹⁸⁷ See *id.*; Amnesty Int’l, *The International Criminal Court: Making the Right Choices Part II—Organizing the Court and Ensuring a Fair Trial* 53–54 (Position Paper No. 2 IOR 40/011/1997) (“An essential component of the principle of equality of arms is that procedural rights, such as inspection of records or submission of evidence, must be dealt with in a manner equal for both parties.” (internal quotation omitted)).

¹⁸⁸ *Pitman v. The State*, Privy Council, [2008] UKPC 16, paras. 26-32.

¹⁸⁹ *Solomon v. The State*, Privy Council, [1998] 2 LR 50, 54-5.

¹⁹⁰ See *supra*, Chapter 7(I)(e) (Right to Know the Grounds of the Tribunal’s Decision).

¹⁹¹ Cameroon, Law No. 2006/015, 29 December 2006.

¹⁹² Supreme Court of Cameroon, MATIP Etienne C/Société SOSUCAM, 31 January 1980.

¹⁹³ See, e.g., *Collins v. Jamaica* (No. 356/1989), U.N. Doc. CCPR/C/47/D/356/1989 (Mar. 30, 1993); *Hamilton v. Jamaica*, Communication No. 616/1995, U.N. Doc. CCPR/C/66/D/616/1995 (Jul. 18, 1999).

¹⁹⁴ See *Henry v. Jamaica* (No. 230/1987), ¶ 8.3, U.N. Doc. CCPR/C/43/D/1987 (Nov. 1 1991) (finding that “once the author opted for representation by counsel of his choice, any decision by this counsel relating to the conduct of the appeal, including a decision . . . not to arrange for the author to be present . . . lies within the author’s responsibility” and so does not violate ICCPR).

¹⁹⁵ *Woodson v. North Carolina*, 428 U.S. 280 (1976).

¹⁹⁶ *Id.* at 304.

¹⁹⁷ *Mithu v. State of Punjab*, 1983 SCR (2) 690, Supreme Court of India, 1983.

¹⁹⁸ *Id.* at 704.

¹⁹⁹ *Id.* at 704-705.

²⁰⁰ For a general description of this case law see Brian D. Tittmore, *The Mandatory Death Penalty in the Commonwealth Caribbean and the Inter-American Human Rights System: An Evolution in the Development and Implementation of International Human Rights Protections*, 13 WM. & MARY BILL RTS. J. 455 (2004).

²⁰¹ *Kafantayeni v. Malawi*, Constitutional Case No. 12 of 2005, High Court of Malawi, Apr. 27, 2007.

²⁰² *Attorney General v. Kigula*, Criminal Appeal No. 3 of 2006, Supreme Court of Uganda, Jan. 21, 2009 (reviewing and confirming *Kigula v. Attorney General*, Constitutional Petition No. 6 of 2003, Constitutional Court of Uganda, Jun. 10, 2005).

²⁰³ *Id.*

²⁰⁴ *Mutiso v. Republic*, paras. 33-34, 36, Criminal Appeal No. 17 of 2008, Ct. of Appeal of Kenya, Jul. 30, 2010.

MY NOTES:

- ²⁰⁵ *Id.* at para. 32.
- ²⁰⁶ *See Baptiste v. Grenada*, Inter-American Comm. H.R., Report No. 38/00 (2000); *McKenzie v. Jamaica*, Case 12.023, Inter-American Comm. H.R., Report No. 41/00 (2000); *Knights v. Grenada*, Case 12.028, Inter-American Comm. H.R., Report No. 47/01 (2001); *Edwards v. Bahamas*, Case 12.067, Inter-Am. Comm. H.R., Report No. 4801 (2001); *Raxcacó-Reyes v. Guatemala*, Report No. 49/03, Case No. 12.402, Inter-American Comm. H.R., 2005.
- ²⁰⁷ *Boyce v. Barbados*, Ser. C No. 169, paras. 57-63, IACHR, Nov. 20, 2007. Also, in *Raxcacó Reyes v. Guatemala* (judgment of Sep. 15, 2005, Part XIV, Series C, no. 133, IACHR, 2005), the IACHR had ruled that Articles 4.1 and 4.2 of the ACHR were violated because the death penalty for kidnapping was mandatory, and the sentencing court was not allowed to consider the circumstances of the case.
- ²⁰⁸ Communication No. 806/1998, U.N. CCPR Human Rights Committee, U.N. Doc. CCPR/C/70/D/806/1998, Dec. 5, 2000.)
- ²⁰⁹ Communication 240/2001, African Court on Human and Peoples' Rights, Nov. 2003.
- ²¹⁰ *See, e.g., Yong Vui Kong v. Public Prosecutor*, Criminal Appeal No. 13 of 2008, Court of Appeal of Singapore, May 14, 2010. Nigeria's Court of Appeal has similarly held that only the legislature has the power to repeal mandatory death penalty provisions. *Abayomi Joshua v. State*, CA/IL/31c/2006, Court of Appeal Ilorin.
- ²¹¹ ICCPR, art. 6(2).
- ²¹² Human Rights Committee, General Comment 6(16), para. 7.
- ²¹³ *See, e.g., Chisanga v. Zambia*, Communication No. 1132/2002, para. 5.4.
- ²¹⁴ E.S.C. res. 1984/50; GA Res. 39/118.
- ²¹⁵ United Nations, Report of the Special Rapporteur on Extrajudicial, Summary, or Arbitrary Executions, UN Doc. CCPR/C/79/Add.85, 19 Nov. 1997, para. 13.
- ²¹⁶ *See, e.g., Ram Anup Singh & Ors. v. State of Bihar*, 2002(3) RCR Criminal 7856 (Supreme Court of India).
- ²¹⁷ *Haroon Khan v. the State*, (Trinidad and Tobago) Privy Council Appeal No. 28 of 2003, Judgment of 20 November 2003, UKPC (2003)
- ²¹⁸ *Machhi Singh v. State of Punjab* 1983 3 SCC 470 (Supreme Court of India); *see also Vaillancourt v. The Queen* (1987) 47 DLR 399, (4th) 415-417 and *R. v. Martineau* [1990] 2 SCR 633, 646-647 (Canadian felony murder statute not requiring establishment of requisite intent inconsistent with fundamental principles of justice).
- ²¹⁹ *Raxcacó Reyes v. Guatemala*, Part XIV, Series C, No. 133, IACtHR (Sept. 15, 2005).
- ²²⁰ ICCPR, art.7.
- ²²¹ *See, e.g., ECHR*, art. 3; *ACHR*, art. 5; *ACHPR*, art. 5; *CAT*, art. 16.
- ²²² *See, e.g., Pratt and Morgan v. The Attorney General of Jamaica* [1993], 3 SLR 995, 2 AC 1, 4 All ER 769 (P.C.) (en banc); *Soering v. United Kingdom*, 11 Eur. H.R. Rep. (ser. A) 439 (1989).
- ²²³ 2 A.C. at 33.
- ²²⁴ *Id.*
- ²²⁵ *Soering v. United Kingdom*, 11 Eur. H.R. Rep. (ser. A) 439 (1989).
- ²²⁶ 161 Eur. Ct. H.R. (ser. A) at 42 (1989).

MY NOTES:

- ²²⁷ *Minister of Justice v. Burns and Rafay*, 2001 SCC 7 (S.C. Canada, 22 March 2001) (at para. 122)
- ²²⁸ *Id.*
- ²²⁹ *Id.*
- ²³⁰ *Kigula and Others v. Attorney Gen.*, 2006 S. Ct. Const. App. No. 03, at 56-57 (Uganda 2009).
- ²³¹ Catholic Comm'n for Justice & Peace in *Zimbabwe v. Attorney General*, No. S.C. 73/93 (Zimb. June 24, 1993 (reported in 14 Hum. Rts. L. J. 323 (1993)) (available at http://www.unhcr.org/refworld/country,,ZWE_SC,,ZWE,,3ae6b6c0f,0.html). In Cameroon, the law provides that any prisoner who has not been executed within 20 years of the imposition of his death sentence should be freed; this provision has not been implemented in practice, however. Email from Nestor Toko Monkam, President, Association Droits et Paix, Cameroon, 21 March 2013.
- ²³² *Al-Saadoon & Mufdhi v. the United Kingdom*, [2010], No. 61498/08, 51 Eur. H.R. Rep. 9.
- ²³³ See Proclamation of Tehran, Final Act of the International Conference on Human Rights, Teheran, 22 April to 13 May 1968, 23 GAOR, U.N. Doc. A/CONF. 32/41, at 4 (May 13, 1968) (noting status of Universal Declaration of Human Rights, including prohibition against cruel, inhuman or degrading treatment, as customary international law). *Accord. De Sanchez v. Banco Central de Nicaragua*, 770 F.2d 1385, 1397 (5th Cir. 1985) (noting that the right not to be subjected to cruel, inhuman, and degrading treatment constitutes universally accepted international law).
- ²³⁴ United Nations Safeguards Guaranteeing Protection of the Rights of Those Facing the Death Penalty, ¶ 3 (available at <http://www2.ohchr.org/english/law/protection.htm>).
- ²³⁵ U.N. ECOSOC, Implementation of the Safeguards Guaranteeing Protection of Rights of those Facing the Death Penalty, p. 51, para. 1(d), U.N. Doc. E/1989/91, May 24, 1989.
- ²³⁶ See, e.g., U.N. Office of the High Commissioner for Human Rights, The Question of the Death Penalty, E/CN.4/RES/2003/67, Apr. 25, 2003.
- ²³⁷ EU Memorandum on the Death Penalty (Feb. 25, 2000).
- ²³⁸ *Francis v. Jamaica* (No. 606/1994), U.N. Doc. CCPR/C/54/D/606/1994 (Aug. 3, 1995).
- ²³⁹ See, e.g., *Williams v. Taylor*, 529 U.S. 362 (2000); *Wiggins v. Smith*, 539 U.S. 510 (2003); *Rompilla v. Beard*, 545 U.S. 374 (2005); *Porter v. McCollum*, 130 S. Ct. 447 (2009); *Sears v. Upton*, 130 S. Ct. 3259 (2010).
- ²⁴⁰ Article 36(1)(b) of the Vienna Convention on Consular Relations
- ²⁴¹ (OC-16/99, October 1, 1999)
- ²⁴² 2004 I.C.J. 12 (2004)
- ²⁴³ UDHR, art. 11 ¶ 2.
- ²⁴⁴ ICCPR, art. 15(1); ACHRPR, art. 7(2); ECHR, art. 7(1); Charter of Fundamental Rights of the European Union, art. 49(1); Arab Charter on Human Rights, art. 6.
- ²⁴⁵ ICCPR, art. 15(1) (“If, subsequent to the commission of the offense, provision is made by law for the imposition of [a] lighter penalty, the offender shall benefit thereby.”). The same provision can be found in the Charter of Fundamental Rights of the European Union, art. 49(1).
- ²⁴⁶ Another international legal argument that might be raised—at least in a country party to the ACHR—is that Article 4.2 of the ACHR prohibits the extension of capital punishment to crimes to which it did not apply at the time of the country’s accession to the Convention. In *Raxcacó Reyes v. Guatemala*, where the

MY NOTES:

defendants had been sentenced to death for kidnapping not resulting in death, the IACtHR found a violation of Article 4.2 ACHR because, at the time Guatemala ratified the Convention, kidnapping not resulting in death was not punishable by capital punishment (only kidnapping resulting in death was). Part XIV, Series C, No. 133, IACtHR (Sept. 15, 2005). The legislation increasing the number of crimes punished by death had been amended after Guatemala's ratification of the ACHR. The Court ruled that Guatemala should ensure that no crime is death-eligible if it was not so at the time of the country's accession to the Convention. So, if a crime was not punished with death by the time the Convention was ratified by the state party, sentencing a defendant to death would violate international law (the ACHR).

²⁴⁷ See, e.g., *Johnson v. Jamaica*, No. 588/1994, H.R. Comm. para. 8.9 (1996) (finding delay of 51 months between conviction and dismissal of appeal to be violation of ICCPR art. 14, para. 3(c) and 5, and reiterating that imposition of a death sentence is prohibited where the provisions of the ICCPR have not been observed); *Reid v. Jamaica*, No. 250/1987, H.R. Comm. para. 11.5 (“[T]he imposition of a sentence of death upon the conclusion of a trial in which the provisions of the Covenant have not been respected constitutes [. . .] a violation of article 6 of the Covenant.”); *McLawrence v. Jamaica*, No. 702/1996, H.R. Comm. para. 5.13 (1997) (same); OC-16/99, para. 135, Inter-Am. Ct. H.R. (October 1, 1999) (“[s]tates that still have the death penalty must, without exception, exercise the most rigorous control for observance of judicial guarantees in these cases; Report of the Human Rights Committee, GAOR, 45th Session, Supplement No. 40, Vol. II (1990), Annex IX, J, para. 12.2, reprinted in 11 Hum. Rts. L.J. 321 (1990) (“in capital punishment cases, the duty of States parties to observe rigorously all the guarantees for a fair trial. . . is even more imperative”); G.A. Res. 35/172, Dec. 15, 1980 (member states must “review their legal rules and practices so as to guarantee the most careful legal procedures and the greatest possible safeguards for the accused in capital cases”). See also William Schabas, *The Abolition of the Death Penalty in International Law* 108-09 (1997); *Öcalan v. Turkey*, Application no. 46221/99, Eur. Ct. H.R. (2003), §IIA, available at <http://hudoc.echr.coe.int>.

²⁴⁸ *Herrera v. Collins*, 605 U.S. 390, 417 (1993).

²⁴⁹ Criminal Appeal Act, 1968, c. 19, § 23(1) (U.K.).

²⁵⁰ See Isaac, Cannonier, *Williams & Gardiner v. The Queen*, Crim Apps No. 2 of 2008, Nos. 19, 20, 21, 22 of 2008, E Carib Ct App (21 March 2012) (appeal from St. Christopher and Nevis) (allowing the introduction of new evidence related to the accused's mental condition).

²⁵¹ See, e.g., Welsh S. White, *Litigating in the Shadow of Death: Defense Attorneys in Capital Cases* (Univ. Mich. Press, 2006). James S. Liebman, et al., *A Broken System: Error Rates in Capital Cases, 1973-1995*, Part II (1995).

²⁵² *Brady v. Maryland*, 373 U.S. 83 (1963); *Giglio v. United States*, 405 U.S. 150 (1972)

²⁵³ ACHR, art. 4(6); ICCPR, art. 6(4); U.N. ECOSOC, Safeguards guaranteeing protection of the rights of those facing the death penalty, principle 7, Resolution 1996/15, July 23, 1996 available at <http://www2.ohchr.org/english/law/protection.htm>; Arab Charter on Human Rights, art. 6, 18 Hum. Rts. L.J. 151, September 15, 1994.

²⁵⁴ *Rudolph Baptiste v. Grenada*, Case 11.743, Report N° 38/00 (April 13, 2000), ANNUAL REPORT OF THE IACHR 1999, para. 120.

²⁵⁵ *Id.* at paras. 118, 121.

²⁵⁶ In Concluding Observations about Yemen, the HRC Committee noted that the offences liable to the death penalty under Yemeni law were not consistent with the requirements of the ICCPR and that the right to

MY NOTES:

- seek a pardon was not guaranteed for all on an equal footing. The HRC decided that “the preponderant role of the victim's family in whether or not the penalty is carried out on the basis of financial compensation is also contrary to articles 6, 14 and 26” of the ICCPR. UN Human Rights Committee (HRC), UN Human Rights Committee: Concluding Observations: Yemen, CCPR/CO/75/YEM (Aug. 12, 2002)
- ²⁵⁷ I/A Ct. H.R., *Hilaire, Constantine and Benjamin et al. v. Trinidad and Tobago*, (Judgment of June 21, 2002), paras. 186-188.
- ²⁵⁸ *Fermín Ramírez v. Guatemala*, Part X, Series C, No. 126, IACtHR (2005); *Raxcacó Reyes v. Guatemala*, Part XIV, Series C, No. 133, IACtHR (Sept. 15, 2005).
- ²⁵⁹ ACHR, art. 4(6); U.N. ECOSOC, Safeguards guaranteeing protection of the rights of those facing the death penalty, principle 8, Resolution 1996/15, July 23, 1996, available at <http://www2.ohchr.org/english/law/protection.htm>.
- ²⁶⁰ U.N.G.A. Resolution 2393, 1(a)(ii), Nov. 26, 1968: “A death sentence shall not be carried out until the procedures of appeal or, as the case may be, of petition for pardon or reprieve have been terminated.” *Ashby v. Trinidad and Tobago*, (580/1994), HRC, 2002, available at http://www.bayefsky.com/pdf/trinidad_t5_iccpr_580_1994.pdf.
- ²⁶¹ *Ashby v. Trinidad and Tobago*, (580/1994), HRC, 2002, available at http://www.bayefsky.com/pdf/trinidad_t5_iccpr_580_1994.pdf.
- ²⁶² Roger Hood, *The Death Penalty: Beyond Abolition*, Council of Europe, p. 147.
- ²⁶³ This manual is available at <http://www.amnesty.org/en/library/asset/POL30/002/1998/en/81bf7626-d9b1-11dd-af2b-b1f6023af0c5/pol300021998en.pdf>.
- ²⁶⁴ A simple-to-use resource is available at http://www.mineaction.org/hr_treaties_form.asp.
- ²⁶⁵ *Hamilton v. Jamaica*, Communication No. 616/1995, U.N. Doc. CCPR/C/66/D/616/1995 (Jul. 18, 1999).
- ²⁶⁶ *Medellin, Ramirez Cardenaz & Leal Garcia v. United States*, ¶ 68, Case 12.644, Report No. 90/09, IACHR (Aug. 7, 2009).
- ²⁶⁷ CAT Art. 22(5)(b).
- ²⁶⁸ *See De Wilde, Ooms & Versyp v. Belgium*, 1 E.H.R.R. 373, ECHR (June 18, 1971).
- ²⁶⁹ ICCPR Art. 28.
- ²⁷⁰ Optional Protocol to the International Covenant on Civil and Political Rights, Art. 1 (1966).
- ²⁷¹ *Id.* Arts. 4-5.
- ²⁷² *Id.* Art. 5(4). *See also Chapter 2: The Major Universal Human Rights Instruments and the Mechanisms for Their Implementation, in A MANUAL ON HUMAN RIGHTS IN THE ADMINISTRATION OF JUSTICE: A MANUAL ON HUMAN RIGHTS FOR JUDGES, PROSECUTORS AND LAWYERS (“U.N. MANUAL”), 38 (2003),* <http://www.ohchr.org/Documents/Publications/training9chapter2en.pdf>.
- ²⁷³ The HRC’s rules of procedure are available, from the left column, at <http://www2.ohchr.org/english/bodies/hrc/index.htm>.
- ²⁷⁴ CAT Art. 17(1).
- ²⁷⁵ *Id.* Art. 22(5)(b).
- ²⁷⁶ U.N. MANUAL CH. 2, at 53.
- ²⁷⁷ CAT Art. 20(1).

MY NOTES:

- ²⁷⁸ *Id.*
- ²⁷⁹ *Id.* Art. 28(1). *See also* U.N. MANUAL CH. 2, at 56-57.
- ²⁸⁰ The website of the UN High Commissioner on Human Rights is available at <http://www2.ohchr.org/english/bodies/chr/special/index.htm>.
- ²⁸¹ Amicus Brief filed by Louise Arbour, UN High Commissioner on Human Rights, In the Matter of Sentencing of Taha Yassin Ramadan, 8 Feb. 2007.
- ²⁸² For rules of proceedings, beginning with article 102, *see* http://www.achpr.org/english/info/rules_en.html. For communications procedure and guidelines, *see* http://www.achpr.org/english/info/communications_procedure_en.html; http://www.achpr.org/english/info/guidelines_communications_en.html.
- ²⁸³ *Lawyers for Human Rights v. Swaziland*, African Commission on Human and People's Rights, Comm. No. 251/2002- 18th Annual Activity Report (200) ¶ 27.
- ²⁸⁴ *Malawi African Association and Others v. Mauritania*, African Commission on Human and Peoples' Rights, Comm. Nos. 54/91, 61/91, 98/93, 164/97 à 196/97 and 210/98 (2000) ¶ 85.
- ²⁸⁵ African International Courts and Tribunals, Court of Justice of the Economic Community of West African States, http://www.aict-ctia.org/courts_subreg/ecowas/ecowas_home.html (last visited September 26, 2012).
- ²⁸⁶ Supplementary Protocol A/SP.1/01/05 Amending the Preamble and Articles 1,2, 9, and 30 of Protocol A/P.1/7/91 Relating to the Community Court of Justice and Article 4 Paragraph 1 of the English Version of said Protocol (available at http://www.aict-ctia.org/courts_subreg/ecowas/documents/ECOWASsupplementary_protocol.pdf).
- ²⁸⁷ ACHR Arts. 34, 36(1).
- ²⁸⁸ *Id.* Art. 44. *See also* U.N. MANUAL CH. 2, at 88 (“The **right of individual petition** to the Commission is **mandatory** under the Convention, according to which ‘any person or group of persons, or any non-governmental entity legally recognized in one or more member States of the Organization [of American States] may lodge petitions . . . containing denunciations or complaints of violation of this Convention by a State Party.’”).
- ²⁸⁹ The Commission’s website is available at <http://www.cidh.oas.org/DefaultE.htm>. It includes, among other things, decisions on merits and admissibility, as well as the Commission’s reports.
- ²⁹⁰ Organization of American States, What is the IACHR?, <http://www.cidh.oas.org/what.htm> (“If domestic remedies were exhausted, the petition must be presented within six months after the final decision in the domestic proceedings. If domestic remedies have not been exhausted, the petition must be presented within a reasonable time after the occurrence of the events complained of.”) (last visited October 4, 2012).
- ²⁹¹ Inter-American Commission on Human Rights, Art. 31 (2), Rules of Procedure; ACHR Art. 46(2).
- ²⁹² *Id.* Art. 61(2).
- ²⁹³ *Id.* Art. 63(2).
- ²⁹⁴ *Id.*
- ²⁹⁵ *Id.* Arts. 67, 68(1). *See also* U.N. MANUAL CH. 2, at 89.
- ²⁹⁶ *See* Anne F. Bayefsky, *How to Complain to the UN Human Rights Treaty System*, p. 33., Kluwer Law Int’l (2003).

MY NOTES:

---- End Notes Continued ----

²⁹⁷ *Pratt and Morgan v. The Attorney General of Jamaica*, UKPC, Appeal No. 10 of 1993, 3 SLR 995, 2 AC 1 (1993) (en banc) (appeal taken from Jamaica).

²⁹⁸ Office of the U.N. High Commissioner for Human Rights, *Procedure for Complaints by Individuals Under the Human Rights Treaties*, available at <http://www2.ohchr.org/english/bodies/petitions/individual.htm>.

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MY NOTES: