

**REPRESENTING
INDIVIDUALS FACING
THE DEATH PENALTY
IN INDONESIA
A BEST PRACTICES
MANUAL**



REPRESENTING INDIVIDUALS FACING THE DEATH PENALTY IN INDONESIA

A BEST PRACTICES MANUAL

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In 2017, the Cornell Center on the Death Penalty Worldwide, directed by Professor Sandra Babcock, published the second edition of a unique manual: a best practices manual for lawyers representing individuals facing the death penalty. Written in English by an international group of lawyers, the manual is intended to provide practical and detailed advice for lawyers around the world who take on the heavy responsibility of these cases, for which they often lack specialized training. Since the launch of the first edition in 2012, the manual has been translated into French, Mandarin, Arabic and Swahili.

This edition of the manual is an update to support its application to the unique features of the Indonesian legal system. The manual has been adapted and completed by author Zainab Malik, under the supervision of ECPM (Together Against the Death Penalty) to serve as a resource for lawyers, activists and civil society professionals working to represent individuals facing the death penalty in Indonesia. The Manual provides key domestic and international legal safeguards and limitations at each stage of the criminal justice process, while highlighting best practice examples and strategies from comparable jurisdictions.

The Manual would not have been possible without the insights and existing work from the Anti-Death Penalty Asia Network (ADPAN), KontraS, ECPM, The Institute for Criminal Justice Reform, Amnesty International, LBH (Legal Aid Institute) Masyarakat, Harm Reduction International, LBH Jakarta, National Commission on Human Rights (Komnas HAM), Capital Punishment Justice Project (CRJP), Project 39A and Justice Project Pakistan (JPP).

Much of the original manual, *Representing Individuals Facing the Death Penalty: A Best Practices Manual*, remains relevant, particularly in relation to the rights of the accused, the relationship between the lawyer and the individual they are defending, and international law.

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THE DEATH PENALTY IN INDONESIA



OVERVIEW

The death penalty has been a part of Indonesia's penal system since the Dutch colonial period, with the introduction of the Criminal Code (Kitab Undang-Undang Hukum Pidana – KUHP). Article 10 of the Criminal Code stipulates 'basic punishments' and 'additional punishments'. Basic punishments consist of the death penalty, imprisonment, detention (such as 'city' detention or house arrest) and fines. Additional punishments include the deprivation of certain rights, the confiscation of assets and the public announcement of court verdicts. Existing domestic laws that provide for the death penalty include: the 1997/2009 Narcotics Law; the 2001 Anticorruption Law; the 2003 Terrorism Law; the 2011 Law on Corruption Eradication; and the Law on the Human Rights Court. However, it is usually imposed for murder with deliberate intent and premeditation; drug-related crimes (producing, processing, extracting, converting or making available narcotics); and 'terrorism'.

Between 2009 and 2012, no executions were carried out and the authorities allegedly established what they referred to as a "de facto moratorium on executions"¹. However, in 2014, Indonesian President Joko Widodo, known as Jokowi, made the executions of convicted drug traffickers a prominent issue of his presidency. Jokowi sought to justify the use of the death penalty on the basis that drug traffickers had "destroyed the future of the nation"². The President also stated publicly that the government would deny any application for clemency made by people sentenced to death for drug-related crimes, saying that "[t]his crime warrants no forgiveness"³. Statistics show that since the moratorium was lifted executions are particularly targeted at drug offenders, most of whom are foreign nationals.⁴ The 18 people executed in 2015 and 2016 were all convicted of drug trafficking; 15 of them were foreign nationals.

COMPOSITION OF DEATH ROW

No executions have taken place since 2016. Since 2014, Indonesia has increased its efforts in the war on drugs after President Widodo described it as a "national emergency"⁵. Over the last five years, the number of death sentences has soared, with the majority of

those sentenced to death for drug-related offences being women and foreign nationals. Currently, approximately 483 people are awaiting executions, with death sentences continuing to rise—from 165 people in 2017 to 483 in 2022⁶. Some 266 inmates have been sentenced on the basis of drugs-related convictions.⁷ There are 12 female death row inmates currently awaiting execution.⁸ Civil society organisations have reported that 58 prisoners sentenced to death had been detained for more than 10 years, and five of them for more than 20 years.

THE NEW CRIMINAL CODE

The Indonesian House of Representatives (Dewan Perwakilan Rakyat or "DPR") passed the revised Criminal Code at its plenary session on December 6, 2022. It was subsequently legislated by the Government as Law No. 1 of 2023 regarding the Criminal Code, dated January 2, 2023 (the "New Criminal Code"). The enforcement of the New Criminal Code is set to take effect three years from its enactment, i.e., in January 2026. The Criminal Code outlines a new sentencing approach. Part 2 of chapter III: lists the principal punishments that may be used in order of severity (article 65), including supervision and community work, as well as imprisonment; lists additional punishments that can be imposed where the principal sentence is not sufficient to achieve the sentencing goals, such as the revocation of certain rights, confiscation of goods, and payment of compensation (article 66); and establishes categories for levels of fines, with updated values able to be stipulated by government regulation (article 79).

The new law retains the death penalty as an available sentence. Article 100 authorises judges to impose a death sentence with a probationary period of 10 years, taking into account the defendant's role in the act and his or her remorse and hope for self-improvement. If the person then displays commendable attitudes and actions during that probation period, the sentence can be changed to life imprisonment by presidential decree following consideration by the Supreme Court. Article 101 provides that, where a request for clemency by a death row convict is rejected but the death penalty is not carried out within 10 years of that refusal, the sentence can be changed to life imprisonment by presidential decree. The new provisions on the death penalty place considerable discretion in

the hands of the judiciary, leaving room for arbitrariness, bias and discriminatory judgments. Furthermore, a ten-year probationary sentence could lead to destructive psychological effects of living on death row without knowing one's fate. How the "reformed death penalty" is implemented in practice will need to be closely monitored and supported through the formulation of guidelines.

Indonesia's War on Drugs

The Government of Indonesia claims that enforcing Law No. 35 of 2009 concerning Narcotics will curb drug addiction through the imposition of harsh penalties on traffickers and drug users. All operations involving the illegal trade of category I Drugs (raw opium, coca plant, coca leaf, raw cocaine, heroine, methamphetamine and cannabis) weighing more than 5 grams are punishable by death. The application of a minimum limit to all drugs falling within the broad category makes it easier for public prosecutors to seek the death penalty. For example, carrying 100 kg or 5.1 grams of category I drugs will make a defendant eligible for the death penalty—regardless of their role in the crime. A significant number of death sentences are meted out to indigent people who are coerced into becoming couriers or drug mules. And yet Article 18 of Law Number 21 of 2007 concerning the Elimination of Human Trafficking Crimes states that victims that perform criminal acts under the pressure of a human trafficker may not be convicted.

The UN International Drug Control Conventions provide that regulating and managing drug supply is a matter of public health, which is echoed in Indonesia's domestic law. Indonesia's approach towards drugs in all forms—illicit or not—has developed a punitive culture that serves as an obstacle to achieving more positive health outcomes. Indonesia treats drug issues as a security threat and not as a public health issue, meaning the policy and regulations around it become a question of law enforcement.

It is worth noting that the decline in the number of drug users has coincided with the focus on rehabilitation. In 2009, judges were granted discretion to impose rehabilitation on suffering drug users. In November 2021, Attorney General ST Burhanuddin issued new guidelines that encourage prosecutors to prioritize rehabilitation, instead of imprisonment, for people arrested for drug offenses.

INTRODUCTION

HOW TO USE THIS MANUAL

A STEP-BY-STEP GUIDE TO DEFENDING INDIVIDUALS FACING THE DEATH PENALTY

This manual covers the representation of individuals facing the death penalty, from the moment of arrest to the final clemency application. The manual will guide you through all stages of a case, including police custody, pre-trial detention, investigation, trial, sentencing and appeals to national and international bodies. This manual is not intended to provide an overview of the laws or standards applicable to individual cases, but rather to serve as a step-by-step guide to best practices in capital case representation.

THE LAW AND AVAILABLE RESOURCES IN YOUR JURISDICTION

This manual is intended to be used by lawyers in Indonesia. Although many of the principles and methods outlined in the following chapters are of universal application, you may find it difficult to persuade your colleagues and the courts to adhere to the principles set out here if they do not conform to local practices. If these practices are not yet followed in your jurisdiction, courts and lawyers alike may benefit from training programmes where they can discuss the relevance of international standards regarding the application of the death penalty.

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 litigators in death penalty cases. Wherever possible, we suggest creative strategies to overcome these resource constraints, so that you can provide the best quality legal representation under the circumstances.

WHAT IS INTERNATIONAL LAW AND INTERNATIONAL HUMAN RIGHTS LAW?

This manual relies upon international law standards. 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**, which lays down obligations for States.

TREATY STANDARDS

Treaties are primary sources of international law. Treaties may be either bilateral (between two countries) or multilateral (between three or more countries). **International agreements and treaties are binding only for the countries that ratify them.** Through ratification of international human rights treaties, governments agree to implement domestic measures and legislation compatible with their treaty obligations and duties. A protocol is a treaty attached to another treaty. It generally adds extra provisions to the original treaty, extends its scope of application or establishes a complaints mechanism. A protocol may also amend a treaty. Most protocols are open to ratification or accession only by parties to the treaty it supplements. Comments, recommendations, findings, decisions and judgments of treaty monitoring bodies⁹ and human rights courts provide authoritative guidance on the interpretation of treaties.

NON-TREATY STANDARDS

Non-treaty instruments are usually called Declarations, Principles, Rules, Guidelines and so on. The Universal Declaration of Human

Rights (UDHR), the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment and the Standard Minimum Rules for the Treatment of Prisoners are examples of non-treaty instruments which set out important fair trial guarantees. States do not formally become parties to non-treaty standards. Although non-treaty standards do not have the legal power of treaties, they have the persuasive force of having been negotiated by states and having been adopted by political bodies such as the UN General Assembly, usually by consensus¹⁰. Because of this political force, they are considered authoritative and are cited and referred to in rulings of regional human rights courts and national courts.

THE ROLE OF INTERNATIONAL LAW UNDER THE INDONESIAN LEGAL SYSTEM

Indonesia’s Constitution is silent on the status of international law within the Indonesian legal system. Article 11 lays out the processes for negotiating and entering into treaties. Indonesia’s Law on International Agreements, enacted in 2000, similarly determines who can negotiate and sign treaties on Indonesia’s behalf, and how treaties are ratified under Indonesian law. There is a lack of consensus about the status of international law under Indonesia’s legal system, i.e., whether it follows “**monism**” where international law automatically forms part of domestic law, or “**dualism**”, where international law does not form part of domestic law until it is transformed or implemented in domestic law, such as by passage of legislation or another type of regulation.

JUDICIAL APPLICATION OF INTERNATIONAL LAW

Courts in Indonesia regularly reference international treaties, especially international human rights treaties, in their reasoning. The Constitutional Court has used international law to interpret the Indonesian Constitution and laws. For example, in a case involving employment rights, it was stated that, “[I]n order to understand the right to work” in the Constitution, “it is best to carefully study” various rights in international labour conventions.¹¹ The Constitutional Court has used international law as a reference point in several discrimination cases.

The Court has also cited various international agreements, such as the UDHR, ICCPR, and the International Covenant on Economic, Social and Cultural Rights, to support the argument that constitutional rights can be limited in some circumstances—such as to maintain public order, or the dignity or honour of an individual.¹² For example, the Court cites Article 19(3) of the ICCPR, noting its similarity to Article 28J(2) of the Constitution, which permits constitutional rights being limited by legislation directed at:

*protecting the rights and freedoms of others and which accords with moral considerations, religious values, security and public order in a democratic society.*¹³

Furthermore, the Constitutional Court has also used international treaties to add fundamental rights not explicitly provided under the Constitution. For example, in granting the status of constitutional rights to the right of presumption of innocence, in the review of Law on the Corruption Eradication Commission (Law No. 30 of 2002), the Constitutional Court held that

*“...due process of law and presumption of innocence is a central principle of a democratic constitutional state... The principle is recognized as a fundamental human right that must be protected. Implicitly, these rights are recognized and can be constructed as part of human rights and constitutional rights guaranteed and protected by the 1945 Constitution...”*¹⁴

The Supreme Court has also referenced international law in some key decisions such as the *Landslide Case*. The applicants were victims of a landslide in West Java. They filed a class action against Perhutani (a state-owned forestry company) arguing that the forest area had been mismanaged, causing the landslide, and against the government, arguing that the government failed to monitor Perhutani's activities. The lower court found that there was scientific uncertainty about the landslide's exact cause. To resolve the case, the court resorted to the precautionary principle adopted in Principle 15 of the Rio Declaration, which had not yet been incorporated into Indonesian domestic law.¹⁵ The court found the defendants strictly liable and ordered them to pay compensation. The government appealed to the Supreme Court in Jakarta on the ground that the lower courts had been wrong to apply the precautionary principle because the Indonesian government had not ratified the Rio Declaration, and the precautionary principle had not been adopted in Indonesian law.¹⁶


The Supreme Court rejected this argument, holding that:

*“The application of the precautionary principle in environmental law was to fill a legal vacuum... the view of the cassation applicant that Article 1365 of the Civil Code could be applied in this case cannot be justified because the enforcement of environmental law is to be performed by the standards of international law. National judges can use rules of international law if they view it as *ius cogens*.”*¹⁷

CHAPTER 1



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



In death penalty cases, the accused has rights, and this gives rise to duties for the lawyer representing them. This chapter describes the scope of your duties to those you represent and provides practical guidelines on the effective use of your resources to provide the best possible defence. This chapter also outlines the legal duty to provide effective legal representation in order to equip you with arguments you can use in court to obtain more time and resources to defend individuals facing the death penalty.

THE RIGHT TO EFFECTIVE REPRESENTATION

WHAT IS EFFECTIVE REPRESENTATION?

Whether you are a court-appointed legal aid lawyer¹⁸ or a private lawyer, you have a duty to provide the individual you are defending with effective legal representation.¹⁹ Under the Indonesian legal system, the duties for advocates are outlined under the Advocates law and the Indonesian Advocates Code of Ethics (Kode Etik Advokat Indonesia). The term “effective” refers to high-quality representation, which involves several prerequisites. You must be independent. You must have “experience and competence commensurate with the nature of the offence”.²⁰ You should limit caseloads to a level that allows you to provide high-quality representation. Finally, you should ensure that you have adequate resources to provide an effective defence. The duties of effective legal representation extend to both legal aid cases and those where you receive fees. The Code of Ethics states that “Advocates in the care of the case free of charge should give the same attention to the case for which he received fees”.²¹

In order to perform your role diligently and to respect your code of conduct, you have the following duties:²²

- inform your client of the progress of the case and communicate this information clearly and regularly;
- respect professional secrecy: it is essential that you make it clear that you are their representative and that you underline the confidentiality of your exchanges;
- demonstrate loyalty and do not accept other cases that could give rise to a conflict of interest.

International law recognises the right of every accused person to obtain effective legal assistance. It is “an essential element of a fair,

humane and efficient criminal justice system that is based on the rule of law. Legal aid is a foundation for the enjoyment of other rights, including the right to a fair trial”.²³ States must therefore ensure “that effective legal aid is provided promptly at all stages of the criminal justice process”.²⁴ According to the UN *Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems*, “Effective legal aid includes, but is not limited to, unhindered access to legal aid providers for detained persons, confidentiality of communications, access to case files and adequate time and facilities to prepare their defence.”²⁵

WHAT EXACTLY DOES THE RIGHT TO A LAWYER INCLUDE?

The right to legal assistance is essential to ensure the right to a fair trial.²⁶ Articles 54 and 55 of the Indonesian Criminal Procedure Code (KUHP) guarantee that an accused person has the right to legal counsel of his/her choice during all criminal proceedings.²⁷ Article 56 additionally provides that “if a suspect or an accused is charged with a criminal offence punishable by the death penalty, 15 years’ imprisonment or more, or cannot afford to pay for counsel and is charged with a criminal offence punishable by five years’ imprisonment or more, all relevant officials at all criminal proceedings should appoint counsel for them.”

Not everyone can afford to pay a lawyer for their services, and it is therefore essential that legal aid is available to ensure a fair trial.²⁸ International law establishes that every person accused of a criminal offence, even if indigent, is entitled to legal aid.²⁹ Article 56(1) and 2 and Article 57(2) of Law No. 48/2009 on the Judicial Authority also stipulate that anyone facing a criminal charge is entitled to legal aid and the state should cover all legal fees for those who cannot afford them until a “permanent legal force” (kekuatan hukum tetap) has been reached.³⁰ Under Law No. 16 of 2011, legal aid can be provided via legal aid providers accredited by the National Law Development Agency (BPHN).³¹ Lawyers and legal aid organisations have a duty to cooperate in the provision of these services. In order to be eligible for state-funded legal aid, indigent people are required to prove their low-income status through a “certificate of low-income status” (or Surat Keterangan Tidak Mampu (STKM)) usually issued by a village head or local government official.

Legal authorities have a duty to ensure effective legal assistance. A state may be held responsible for the conduct of a lawyer if, in

the opinion of the judges, his or her conduct or level of competence was manifestly incompatible with the interests of justice.

Finally, the duty to provide effective legal representation is not limited to the trial phase.³² You must start providing legal assistance to the person you are representing as soon as you agree to take on their defence. Your presence is required at the earliest stage of proceedings possible, and you must provide assistance from the preliminary investigation stage. This includes police custody, pre-trial detention, and the investigation of the case (see Chapters 4 and 5). You have a duty to ensure the right of any accused to be informed of the charges against them in a language they understand by requesting the assistance of interpreters if necessary.³³ Furthermore, you must handle the various procedural stages in the case, such as for bail applications, challenges to detention conditions and limitations on communication.

SETTING STANDARDS TO ENSURE THE QUALITY OF THE DEFENCE OF PERSONS SENTENCED TO DEATH 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. The bar associations have taken steps to ensure that the representation guidelines are implemented effectively in order to improve the quality of criminal defence 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 defence 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 organisation in 1989 and revised in 2003. The ABA Guidelines currently represent the standard framework for criminal defence in death penalty cases in the United States.
- Lawyer associations in China are now using professional practice standards to standardise and elevate the quality of criminal defence provided in death penalty cases.

Robin Maher, Director,

American Bar Association Death Penalty Representation Project

Your client has the right to be assisted by a lawyer to appeal a decision or to seek other relief, including the right to legal aid on appeal.³⁴ Even if you do not represent the person after conviction, you have a duty to inform them of the time limits for appeal and must immediately inform any successor counsel of the history of the case, including whether an appeal has been filed. Furthermore, it is your responsibility to monitor the implementation of the sentence and to intervene in the event of breaches of the rights of the person you are representing or have represented, or to support their requests (request for transfer, etc.). An accused person should also be assisted by a lawyer to file an application for clemency or to submit a communication to regional courts and international bodies (see Chapter 8).³⁵

HOW ARE MY DUTIES DIFFERENT IN DEATH PENALTY CASES?

In general, in a death penalty case, where the life of your client is at stake, it is your responsibility to: (1) ensure that the investigating judge conducts a thorough investigation into both exculpatory and incriminating evidence, and (2) develop thorough knowledge of your client’s family and psychosocial history in order to try to convince the judges that your client does not deserve the death penalty (even if convicted).³⁶ The United Nations Economic and Social Council (ECOSOC) has called on governments to provide “special protection to persons facing charges for which the death penalty is provided by allowing time and facilities for the preparation of their defence, including the adequate assistance of counsel at every stage of the proceedings, above and beyond the protection afforded in non-capital cases”.³⁷ Moreover, international law provides that in any case where the accused faces the death penalty, that person’s due process rights must be rigorously observed.³⁸ It is your responsibility to ensure that the courts respect their rights at every stage of the proceedings.

When defending those facing the death penalty, it is essential that you do not take on a case if you are unable to deal with it promptly and diligently in view of your other obligations, or if you know that you are not competent to do so.

LEGAL REPRESENTATION AND DUE PROCESS

RIGHT TO A FAIR TRIAL

Everyone is entitled to a fair trial, conducted with due respect for the rights of the defence and within a reasonable time. It is your duty to ensure, to the best of your ability and with the available resources, that this right is upheld. You can draw on many domestic laws and instruments of international law to defend the right to a fair trial.

Article 11(1) of the Universal Declaration of Human Rights (UDHR) states that “Everyone charged with a penal offence has the right to be presumed innocent until proved guilty according to law in a public trial at which he has had all the guarantees necessary for his defence”.³⁹ Article 14(1) of the International Covenant on Civil and Political Rights (ICCPR) provides that everyone is entitled to “...a fair and public hearing by a competent, independent and impartial tribunal established by law”.⁴⁰

In capital cases, lawyers (regardless of whether they have been appointed by the court) often face many obstacles to fulfilling the duty to provide effective representation. In this manual we discuss many of these obstacles and urge you to challenge the failings of your legal system where these affect the right of your client to a fair trial. For example, if you are systematically appointed on the same day as the first trial hearing, you should not hesitate to challenge these late appointments and argue that they violate the right of the accused to have adequate time to prepare their defence, based in particular on international law and the decisions of international bodies. These obstacles can sometimes become opportunities to raise awareness among key actors in your jurisdiction and to advance system-wide change.

HOW CAN I MAKE SURE I HAVE ADEQUATE “TIME AND FACILITIES” TO PREPARE A DEFENCE?

Article 14(3)(b) of the ICCPR states that, “In the determination of any criminal charge against him, everyone shall be entitled to... adequate time and facilities for the preparation of his defence”.⁴¹ Your client’s right to have adequate time to prepare a defence also applies to you as counsel. In other words, *you*, as your client’s

advocate, are entitled to sufficient time and facilities to defend them, not only during the trial but also during the investigation of the case and post-trial appeals. It is your duty to vigorously assert these rights.

For example, if you are appointed to defend a person facing the death penalty only a few weeks or days before the case is due to come before the court, or even on the day itself, you will likely need to request a postponement so that you can meet with your client, develop a defence strategy and prepare for trial. If the court denies this request, then you should do everything possible to document this violation of the client’s right to have the time and facilities to prepare their defence. 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 of 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” varies according to the facts of each case, the complexity of the issues involved and the availability of evidence.⁴² The UN Human Rights Committee has found violations of the rights of the accused as set out in the ICCPR in several cases where the lawyer was given only a few minutes or hours to prepare a defence.⁴³ In these cases, the Committee held that preparation time was “inadequate” when the lawyer was only able to meet briefly with their client before trial.⁴⁴

OVERCOMING BARRIERS

I was appointed to represent my client at the time of the trial and had no opportunity to meet with them 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 their defence 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 lack of time. This practice serves a dual purpose: it educates the court, and it may serve as a basis for a successful appeal. Some lawyers even go so far as to cause an incident during the trial by refusing to defend the accused when postponement of the case is refused. In such cases, the hearing is often automatically postponed, as most laws require that the accused be represented by counsel.

PRACTICE TIP

Meeting your client on the day of trial

- *In some countries, lawyers only meet their clients on the day of trial. The UN Human Rights Committee has found this to be a violation of the rights of the accused to adequate time and facilities to prepare their defence.*
- *For example, in Little v. Jamaica, the applicant was given only 30 minutes to consult with counsel before trial, and a similar amount of time during the trial. The Committee held that this time for consultation was insufficient to ensure adequate preparation of the defence with respect to both trial and appeal. The Committee stated that, “The right of an accused to have adequate time and facilities for the preparation of [their] defence 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 [their] counsel to prepare the defence for the trial; this requirement applies to all the stages of the judicial proceedings”.⁴⁵*

In order to enforce the right to be tried within a reasonable time,⁴⁶ some national laws impose limits on the maximum time that can elapse before a trial. However, the right to be tried within a reasonable time must be balanced against the right to an effective defence. Thus, if the investigation is incomplete, you should insist on further investigation by the court if it is essential in the interests of the rights of the defence. Similarly, if you do not request further

investigation but you have not had adequate time to prepare for the trial, you should ask for the case to be postponed to a later trial date, within a reasonable time, in the interests of the rights of the defence.

The right to adequate time to prepare a defence also applies to appeals and other remedies. In a death penalty case, you have the right, between the date of conviction and the date of execution, to have adequate time to prepare and file appeals, including to obtain a pardon or commutation of sentence.⁴⁷

OVERCOMING BARRIERS

What if a prison guard, courthouse employee, or any other person refuses to let me see my client?

- *Try to stay calm and maintain an even tone. It is usually a poor strategy to get angry with someone who has the discretion to help you. First, try to reason with them. Rather than blaming them (“Why won’t you let me see my client?”), try to distinguish between the person and the problem (“I know it’s not your fault, but I’m having a hard time seeing my client”).*
- *If this does not work, ask to speak to their supervisor. If a supervisor is not available, write down their name and contact details and leave calmly. Make a note of the date and time of your visit and to whom you spoke. Wait for the next person to come on duty if you can. You may have better luck with someone else. If you are still unable to see your client, apply to the relevant judicial authority for a “visiting permit” or ask for help from a legal services organisation. As a last resort, you may be able to file a complaint with the national courts and, if that fails, with international bodies.*

WHAT CAN I DO TO OBTAIN THE NECESSARY PERSONNEL AND RESOURCES TO PREPARE A DEFENCE?

States have a duty to provide legal aid and “should allocate the necessary human and financial resources to the legal aid system”.⁴⁸ You are entitled to request the necessary human and financial resources to defend your client. However, the state may not accept your requests, in which case you will need to be creative and resourceful in order to overcome these obstacles.

SURROUND YOURSELF WITH COMPETENT PROFESSIONALS

To ensure that the investigation respects the rights of your client and in particular takes account of mitigating circumstances, you will need to gather evidence, including in relation to mitigating circumstances (the accused's character, the circumstances of the crime, etc.) and submit them to the investigating judge, or request further investigation (for example, questioning witnesses or conducting a medical and psychological assessment). It is therefore important to involve other professionals such as psychologists and psychiatrists, criminologists, etc. It is essential, particularly in death penalty cases, that you use all the resources at your disposal and that you are creative when the resources made available to you by the justice system are limited. For example, legal assistants (called "paralegals" in some jurisdictions) and law students can help you gather evidence, interview family members to understand your client's background, etc. If the court does not grant your request for a psychological assessment, try to find a psychiatrist, psychologist, nurse or other person with mental health knowledge who can assess your client's mental health and present this assessment to the investigating judge or trial judge.

Interpreters: The importance of ascertaining a client's native language and level of fluency in the language used by the courts, police, etc. cannot be underestimated. Your client may appear to be fluent in a language that is not their native tongue when in fact they cannot fully comprehend nor fully express themselves in that language. You have a duty to uphold the principle that everyone has a right to be assisted by an interpreter during the trial.⁴⁹ If your client was not provided with an interpreter during questioning by the police or by the investigating judge, or during trial, you should note this violation of the right to be assisted by an interpreter, the impact this had on the quality of the defence and the prejudice it caused to the defendant. If a witness or the accused gives evidence in a foreign language, interpretation is particularly important. There are international standards for interpreters, but certified and/or qualified interpreters are not always available. If interpreters are available but not qualified, you should either make a record of this in the minutes of the hearing before the investigating judge (the lawyer is usually asked if they have any observations to make at the end of questioning), or make a note of it in observations to be given to the court clerk if the case is at the trial stage.

OVERCOMING BARRIERS

What can I do if I don't speak the same language as my client?

- Try to find an interpreter who speaks the language with which your client is most comfortable, not just a language they know. Much of the information you need may be difficult enough for your client to express in their native tongue. The language barrier will make it more difficult for them to express themselves and understand your advice and can lead to misunderstandings with harmful consequences.
- If an official interpreter is not available, try to find someone who is fluent in your client's language. Never use a family member or witness as an interpreter, as they have an intrinsic bias that may affect the quality and objectivity of their interpretation.

DEFENDING AN ACCUSED IN A CASE INVOLVING TERRORISM

In countries facing a terrorist threat, the right to a fair trial and the rights of the defence (both pre-trial and during trial) are sometimes flouted by the authorities.⁵⁰ Some states have adopted emergency laws to facilitate the prosecution of suspected terrorists. These laws often violate standards of fairness and undermine procedural safeguards protecting defendants from miscarriages of justice.⁵¹ Similarly in Indonesia, Law No. 5 of 2018 governs the prosecution and sentencing of those accused of terrorism offences. Several stipulations under the Law on Terrorism have been criticised by Civil Society Organisations (CSOs) as violating the right to fair trial under international law⁵². For instance, the law provides longer periods of arrest (14 days, extendable by 7 days)⁵³, and detention for purposes of investigation (120 days, extendable by 60 days and another 20 days)⁵⁴.

In the face of these constraints, it is all the more important to ensure that your client is aware of your determination to represent them regardless of the charge. You must assert all the rights of the defence and the right to a fair trial, as guaranteed by national law and international law, without distinction as to the nature of the offence. The principles set out on your duties as a lawyer apply equally to terrorism cases, and you will need to be determined to provide effective legal assistance, despite the obstacles you encounter.

Furthermore, the conditions in which you carry out your work in such contexts are very complicated and you should be very careful. The support of other lawyers and the bar association, and/or the organisation of self-help networks between members of the

profession can help you to avoid being targeted because of your work. Depending on the context in which you practice, contact the bar association, the prosecutor, the Ministry of Justice or another state authority to alert them of any human rights violations and serious procedural flaws that you witness. If you are unable to get a response from them and the situation of your client does not improve, you will need to consider a media strategy and possibly an international strategy (see Chapter 8).

OVERCOMING BARRIERS

What can I do if my client is publicly portrayed by the media as the perpetrator of terrorist attacks?

- *This is a violation of the right to the presumption of innocence, which applies to any person suspected of having committed a crime.⁵⁵ The presumption of innocence implies the right not to be portrayed as guilty before a conviction. This right applies to the investigation, prosecution and trial phases. You must ensure that this fundamental right is respected. You can do this by:*
 - * *Obtaining a prohibition on the publication of images of your client in handcuffs, or of damning comments (as part of a defamation argument);*
 - * *Issuing press releases and, at the request of your client, exercising a right of reply in the media;*
 - * *Bringing a case for slander or defamation.*

DEVELOPING A GOOD LAWYER-CLIENT RELATIONSHIP

In order to provide high-quality legal representation, it is essential that you develop and maintain a good relationship with your client. In death penalty cases, the quality of this relationship could save your client's life.⁵⁶ Effective communication will help you to prepare a defence, as it will give you guidance in developing a strategy that is consistent and takes into account mitigating circumstances (see Chapter 5).

Developing and maintaining a good relationship with your client can be particularly difficult in a capital case. Many governments keep those facing the death penalty isolated from other prisoners and their families, so you may be their only link to the outside

world. In these circumstances, gaining your client's trust can be a real challenge. But if you communicate regularly with them, treat them with respect and professionalism, and zealously advocate for their rights, you will develop a better and more productive working relationship.

SUCCESS STORY

The Ahmed Khan case⁵⁷ (Pakistan)

- *Ahmed was accused of blasphemy, a charge carrying the death penalty, in Pakistan. When we were assigned to his case, the first thing we did was to arrange a prison visit to meet him. Although this should be the normal and standard practice for lawyers, it is uncommon in Pakistan for a lawyer to visit their client. This simple visit brought us into contact with the superintendent of the prison, who became an important ally. We now have free access to our client and can meet him unmonitored, on any given day, for any length of time, which is unusual in Pakistan.*
- *Our regular meetings with our client in prison helped us a great deal in preparing his defence:*
 - *We discovered that he had a long-standing mental disorder that had never been diagnosed and would not have been noticeable to someone who had only seen him once or twice.*
 - *We obtained permission for our medical expert to come to the prison to examine him. The results of this examination were presented to the court and endorsed by local doctors.*
 - *Through our research into Ahmed's family, we were able to reconstruct his social history and trace the origins of his mental disorder.*
- *This case taught us how effective simple practices can be. There are now several regional and international experts who attest to the fact that our client is mentally ill, which will go a long way towards proving that he is not guilty of the charges.*

Sarah Belal,

Director, Justice Project Pakistan

HOW CAN I DEVELOP A TRUSTING RELATIONSHIP WITH MY CLIENT?

To develop a good relationship with your client, it is important that you are in regular contact with them and that you keep them informed of the progress of the case and the stage of the proceedings. Visit your client regularly. It is particularly important to respect their right to confidentiality.⁵⁸ Assure your client that all your exchanges will be kept confidential, unless they give you permission to disclose certain information as part of your trial strategy.

It is also your responsibility to respond in a timely manner to their letters and calls and communicate with their relatives when necessary. As the case progresses, your client may become increasingly frustrated. This is a normal reaction to the delays inherent in any legal process. If you are unable to meet with your client as often as you would like, you may need to appoint another qualified person (someone from your firm or the defence team, or a paralegal) to maintain regular contact with them.

Your discussions with your client will be more productive if you have developed a trusting relationship with them. They will only disclose personal, sometimes painful information that is essential to build an effective defence (such as their role in the crime), if they trust you. They will be more likely to confide in you and, for example, to admit that they killed the “victim” in self-defence, which in some cases can be a viable defence. Conversely, if you only meet with your client 10 minutes before the trial, they will be much less likely to reveal what happened and may be inclined to tell you that they simply were not at the scene and do not know what happened.

OVERCOMING BARRIERS

What can I do if there is a significant class difference between my client and myself?

- *It is common for there to be class differences between lawyers and defendants, especially in death penalty cases. The best approach will depend on local culture, but some general principles are always applicable.*
- *Try to put your client at ease. Start by making small talk about their daily life to get to know them. Adopt a relaxed attitude and a friendly tone. Make sure they are comfortable and at ease. Where possible, bring something to eat and drink and share it with them. In accordance with the cultural context, use simple language, dress appropriately, and show empathy for your client's situation.*
- *Ask your client to explain their understanding of the situation, fill in the blanks, and don't forget to ask them if they have any questions.*
- *Do not ignore important issues just because they require you to acknowledge the class difference. If you act respectfully and are direct and honest, this will help you build trust.*

What can I do if it's not feasible to meet with my client?

- *It is important to identify the reason you are unable to meet with your client. Transport or workload problems are obstacles that you can usually overcome. It is important to distinguish between real barriers that are beyond your control and practical barriers that create an additional workload.*
- *If it is genuinely impossible to meet with your client in person, try to communicate with them by telephone or mail. These means of communication are far from ideal, as they may be monitored by prison staff. If communication with your client is not feasible, try to meet with their relatives who may be able to provide you with vital information to prepare your defence.*

Establishing a relationship of trust with your client is of paramount importance in uncovering facts that may constitute mitigating circumstances. This information is crucial to humanising your client and eliciting the court's compassion and will have an impact on sentencing.⁵⁹ Examples include information about impulsivity, diminished capacity, youth and impressionability, mental and developmental impairment, history of childhood sexual and physical abuse, substance addiction, and manageability in prison.⁶⁰ Defendants are often reluctant to share this information with their lawyer, even though it has the potential to be used as mitigating evidence. Your client is likely to be defensive at first if you ask about possible sexual, physical or psychological abuse, as they may feel ashamed or want to protect family members.⁶¹ Similarly, in some cultures, mental disorders are a taboo subject and are sometimes linked to beliefs such as witchcraft or other supernatural powers. It therefore takes time, perseverance and cultural sensitivity to uncover this information. Chapter 2 provides an overview of the research required to gather evidence of mitigating circumstances that will be decisive in sentencing, and Chapter 5 provides tips for presenting this evidence at sentencing.

You may have more difficulty developing a trusting 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” are often related to elements of their life and/or character that may constitute mitigating factors. For example, if your client has a mental illness, they will find it more difficult to communicate with you. 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 their conduct at the time of the crime – even if they were not legally “insane” at the time of the offence. 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 that those disabilities result in a lack of criminal responsibility or should serve as grounds for a lesser penalty.

PRACTICAL TIP

Common mitigating circumstances:

(Chapters 2, 3 and 5 provide a more detailed analysis of mitigating circumstances)

- Age at the time of the offence
- Minor role in the offence
- Lack of premeditation
- Provocation that led to commission of the offence
- Remorse
- Acting under a threat, fear of harm to themselves or their family, or a strong influence by someone who has power over them
- Intoxication
- Mental condition
- History of physical or sexual abuse
- Extreme poverty
- Evidence of good moral character
- Lack of prior criminal history
- Good conduct in prison
- Cooperation with the authorities
- Family ties
- Stable employment history
- After the crime, repairing (or making serious efforts to repair) the consequences of the offence, or somehow compensating the victim or the victim's family
- Significant rehabilitation after the commission of the crime (especially if the crime was committed a long time ago)

Finally, building a trusting relationship with your client can have an impact on how the court perceives them. When a judge determines the appropriate sentence for a convicted person, 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 “humanising” 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 defence lawyer.⁶²

OVERCOMING BARRIERS

What can I do if prison staff don't want to leave me alone with my client?

You have the right to talk to your client alone and in private. The presence of prison staff will affect the quality of the meeting, as your client will not feel at ease to confide in you. It is therefore sometimes necessary to insist on being able to talk with them alone. It is your role to ensure that the right to confidentiality of your interviews is respected and to protest when this is not the case.

SUCCESS STORY (MALAWI)

In Malawi, during meetings in prison, detainees were not given chairs, while prison staff provided a chair for lawyers. This created distance and highlighted power relations between clients and lawyers, with the former on the floor while the latter sat on a chair. On one occasion a group of lawyers asked for chairs for detainees. When they were refused, the lawyers began peaceful resistance, refusing to sit on the chairs provided and sitting on the floor. This show of solidarity made it easier for them to gain the trust of their clients. Moreover, the following day, the prison staff, embarrassed by the situation, brought chairs for everyone. Since then, it is the standard practice for detainees to be given chairs when they meet with their lawyers.

OVERCOMING BARRIERS

What should I do if my client no longer wants my services?

- *It is not uncommon for defendants to say that they do not want a lawyer. Often they have no control over anything in their lives: what they eat, who they talk to, when they sleep, and so on. Dismissing you is therefore a rare opportunity for them to exercise some form of control over their lives. In addition, many people in prisons suffer from depression, which can lead to an urge to give up their rights. It is important not to take your client's decisions as a personal attack.*
- *It should be noted that this decision is often the result of a breakdown in your relationship. Spending time with your client in order to establish a relationship of trust should be your first instinct so that you will be able to present the most effective defence possible. Open communication can be beneficial beyond their relationship with you and can improve their overall well-being.*
- *If possible, try to address the fears behind the decision to dismiss you. It is important that you make it clear that they are your partner in their defence and that you will listen to their concerns and choices. Take the time to explain recent developments in the case or to address their concerns about the lack of progress in the case.*

HOW CAN I PROTECT MYSELF AGAINST POSSIBLE CONFLICTS OF INTEREST?

You must always put your client's interests before your own.⁶³ Advocates cannot hold any other position that may conflict with the interest of their duties or the dignity of their profession (Article 20(1), Advocates Law). As a general rule, an advocate must withdraw from dealing with issues between two or more clients where there is a conflict of interest between them (Article 4(j), Advocates Code of Ethics). Conflicts of interest commonly arise when a lawyer is asked to defend several co-defendants in the same criminal case. One defendant may decide to plead guilty or testify against a co-defendant in order to benefit from mitigating circumstances and thus incur a lesser sentence. In addition, co-defendants may have different, or even contradictory, defences and they may not be equally culpable. It will therefore be impossible for you to defend them effectively at the same time.⁶⁴

Practical problems are likely to arise in preparing a defence strategy if the same lawyer represents several co-defendants. 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 that of your client.⁶⁵ If you represent multiple defendants, however, you are constrained by competing obligations to represent each client aggressively and competently.

In some criminal cases, the co-defendants may have consistent defences that would allow you to effectively represent both. This is rarely true in capital cases. Even if the accused have consistent defences to the crime, the circumstances of the crime may differ in relation to each co-defendant, and mitigating circumstances for one may conflict with the interests of another.

If you are appointed to represent more than one co-defendant, you should immediately request the appointment of additional lawyers. If this request is refused, you should file a motion, to document your objection, as this may serve as a basis to overturn the 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 same 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 legal representation.

CHAPTER 2

POLICE CUSTODY AND PRE-TRIAL DETENTION

You must be involved in all stages of criminal proceedings to represent your client.⁶⁶ Investigations usually start with the arrest and detention in police custody of individuals suspected of having committed a crime, followed by their remand in detention pending trial. Your work begins at this stage. Indeed, international human rights instruments recognise a number of rights of individuals suspected of having committed a crime, and you should ensure that these rights are respected.

Law enforcement officials, judges, and even your colleagues may feel that it is not your role to intervene in the police investigation, or if you do intervene, that your role should be “passive”. Despite this unfavourable context, your role remains to defend your client’s rights, including at the investigation stage. Indeed, many international human rights texts recognise the right of private individuals to the assistance of a lawyer, even if they are unable to pay for it.⁶⁷

The investigation is crucial for the rest of the case. Most people suspected of having committed a crime have no knowledge of legal procedure or their rights and may not speak the language used by the police. They are therefore particularly vulnerable and, unless you intervene, their rights may be violated. Investigators sometimes use their position of power and the vulnerability of suspects in order to extract confessions by coercion, violence or other unlawful means. Unfortunately, cases of torture and inhuman or degrading treatment during the investigation phase remain common in most jurisdictions, including Indonesia. It is therefore essential that you represent your client at every stage of the investigation and ensure that their rights in detention are respected.

RIGHTS, HEALTH AND WELFARE OF INDIVIDUALS IN POLICE CUSTODY AND PRE-TRIAL DETENTION

WHAT ARE MY CLIENT’S RIGHTS IN CUSTODY?

Police custody takes place under the authority of the police and is one of the stages at which your involvement is essential, as you must ensure that the rights of defence of the person deprived of liberty for the purposes of the investigation are respected. Indeed,

it is during police custody that those in charge of the investigation start to gather evidence against the individual(s) suspected of an offence. This is therefore an extremely sensitive stage in which you can play a key role. Despite the existence in national legislation of regulations governing police custody, aimed at avoiding abuses and guaranteeing respect for the rights of the defence, these rights are often violated.

Under international law and the laws of Indonesia, individuals who are arrested or deprived of their liberty have the right to a lawyer at all stages of their engagement with the criminal process.⁶⁸ As discussed above, the right to legal assistance has been provided under Articles 54, 55 and 114 of the Criminal Procedure Code. If they cannot afford one, the suspect has the right to legal counsel provided by the authorities concerned or the investigator (Article 56, paragraph 1 of the Criminal Code). If you present yourself at the police station but are refused access to your client, you can invoke the latter’s right to legal representation under national and international law. Lawyers should always be present when a client is interviewed to prevent coercion or torture (Articles 52, 115(1) and 117(1), KUHP). If you are unable to convince the police to let you see your client, document the refusal, and inform the relevant court or prosecutor of the violation. Article 60 gives a suspect or accused the right to have visits from “others he has relationships with in order to attempt to obtain release on bail or to obtain legal assistance.” This would include paralegals or others employed by legal counsel.

There is no constitutional or other legal right to remain silent under Indonesian law. However, individuals suspected of having committed a crime are not obliged to cooperate in the gathering of evidence: they have the right not to incriminate themselves and are therefore not obliged to answer questions put to them. You should advise your client against making an admission at this stage of the proceedings because at that point you have usually not even had the opportunity to assess the case, which may be weak or highly defensible. You should also inform your client of their right to be assisted by a lawyer (even if they cannot afford one), to freely provide information (Article 52, KUHP), and to not be coerced or pressured into providing testimony (Article 115 (1), KUHP). Listen to them, ask them questions about the circumstances of their arrest, and ask them to tell you what has happened to them since being taken into police custody

(How were they treated by the police? Have they been informed of their rights? etc.). This may provide you with information concerning irregularities in the arrest procedure.

You should ensure that custody has been ordered by the competent authority and that the conditions for imposing detention are met. Check that the competent authority has informed your client of the accusations against them and of the fact that they are suspected of having committed a capital offence. During the interview, those in charge of the investigation must inform the suspect of their rights in a language they understand (Article 51 KUHP). The times that custody started and ended must be noted in the report. Make sure that those in charge of the investigation respect the legal time limits on custody and that any extension is granted in accordance with the laws in force.⁶⁹

Inform your client of the possible outcome of custody (referral to a judge, opening of an investigation, no further action, etc.) and explain the procedure to them in a language they understand. This will allow your client to prepare psychologically and will help you to develop a trusting relationship with them.

OVERCOMING BARRIERS

What can I do if the person conducting the investigation appears to demonstrate bias?

After meeting the person in charge of the investigation, if you consider that they lack objectivity and impartiality, ask the prosecutor to replace them, explaining the grounds for considering that this person may be biased. For example, a person who has links with the victim or their family or who comes from the same village as the victim may lack objectivity. It is also possible that, on racial or ethnic grounds, they favour one group and discriminate against your client.

WHAT CAN I DO IF I DID NOT HAVE ACCESS TO MY CLIENT IN POLICE CUSTODY?

What can be done if you have been appointed to represent someone after the investigation has ended, or if the police refused to let you see your client while they were in police custody? . It is important to note that under Articles 77, 79, and 124 (KUHP), a suspect or accused,

his family, or his counsel may request that the court determine the legality of his detention. If the government, through investigators, prosecutors, or jailers, are not allowing counsel or family to have access to the accused, it is arguable that the detention is illegal.⁷⁰

Even if you were not able to provide legal assistance during the investigation, you should not rely on what is written in the investigation dossier. You must check a posteriori the legality of the investigation and custody and, if necessary, challenge the dossier. In principle, the investigation dossier only has information value, but can be crucial for the subsequent proceedings. Therefore, if the rules of procedure have not been respected or if the information contained in the dossier does not reflect reality, you should raise the issue of their nullity and request the exclusion of the evidence obtained, including any confessions. To do this, you will need to talk to your client to understand how the investigation was conducted and to examine the transcripts to identify any irregularities. For example, suspects are often tortured or coerced into signing the investigation dossier containing false statements.

You must refuse to pay bribes or “special fees” to obtain cases, gain access to clients in jail or affect the outcome of a case. Unfortunately, in Indonesia, as in other countries, lawyers indicate that they continue to need to pay bribes or unofficial “fees”. Some have had success in meeting with relevant officials to explain the nature of legal aid and the lack of resources on the part of clients to pay bribes.

ZAINAL ABIDIN, RUBEN PATA SAMBO AND MARKUS PATA SAMBO

Zainal Abidin was arrested and charged with possession of 58,7 kg of cannabis on 21 December 2000. The police investigation dossier (*Berita Acara Pemeriksaan, BAP*) records that he had access to legal counsel upon his arrest. However, Zainal Abidin’s lawyer claimed his client had only received assistance from a lawyer two days after his arrest and that the police dossier was compiled after the police investigator had beaten up Zainal Abidin.

Ruben Pata Sambo and **Markus Pata Sambo** told their lawyer that they were forced by the police investigator to sign the investigation dossier declaring that they had ordered another man to murder four members of the same family. They were kept in police detention for 18 days and told their lawyer that during this time they were stripped naked, beaten and kicked by the investigators during interrogation.

Check compliance with procedures

Your role is to check whether the rules of procedure have been respected. This includes examining the police reports, which contain important information about the arrest, custody and interview of the person suspected of having committed an offence. You should therefore be aware of the rules governing the form and procedure for drafting such reports.

It is also important to check compliance with the rules on arrests and searches, as failure to do so can lead to the invalidation of such investigative acts, as well as subsequent acts. For example, under the KUHP, the investigator must prepare minutes of various investigative acts including: examination of the accused, arrest, detention, house entry, searches and seizures, examinations of witnesses, documents and crime scenes, and any other acts according to law.⁷¹ These minutes must be prepared by the official taking these actions and signed by “all parties involved in the act.”⁷²

You should bear in mind that formalities may have been complied with “on paper” but not in practice. It is your responsibility to check what actually happened, beyond what is contained in the police reports.

Check the veracity of the content of the police reports

Even if a report does not appear to indicate procedural irregularities, it may be fabricated or contain incorrect information about the statements made by the interviewee. It is therefore essential to discuss the conduct of the police investigation with your client, to examine the report in detail and to compare your client’s version of events with that contained in the report.

It may be that certain violations of the rights of your client do not appear in the report. Even if your client has signed a report stating that they have been informed of their rights and that they have waived them, it is necessary to check that they have indeed been informed and have been able to understand their rights. In many cases individuals interviewed by the police are not informed of their rights or do not comprehend their scope due to a lack of understanding of the language used, because they have not received an adequate level of education, cannot read and/or have not been informed orally, etc. The statement of a suspect and/or a witness

shall be recorded in a report which shall be signed by the investigator and by the suspect and/or witness after they have approved the content. If the suspect and/or witness is not willing to attach their signature, the investigator shall record this in a report and include the reason (Article 118 (1), KUHP). If you have doubts about the reliability of the report or signature, ask your client if they remember signing it and ask them to sign in your presence, so that you can compare the two signatures.

OVERCOMING BARRIERS

What should I do if I think that my client has literacy difficulties?

- *It is important to ascertain early in your relationship whether your client is literate. In some countries where illiteracy is common, your client may readily admit that they cannot read or write. However, in countries with high literacy rates, your client may be ashamed of their difficulties.*
- *Approach the subject gently, and if you suspect that your client is overstating their reading and writing skills, take measures to determine their ability to understand written material. 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 in documents they claim to have read, in order to assess their level of understanding. Consider whether their comprehension difficulties may raise issues of legal capacity or intellectual disability (see Chapter 3).*

It is also important to consider that police reports can be falsified. For example, they may not state the actual length of time a person was detained, or they may state that the suspect was given food when this was not the case, etc. Many abuses can take place during police custody and the report is unlikely to mention them. Ask your client to give you a detailed account of the duration and conditions in custody in order to establish whether the rules were respected.

Request the exclusion of confessions and evidence

Under KUHP, information by a suspect and/or witness shall be given to an investigator in any form and without pressure. If a suspect gives a statement in connection with the criminal act they are suspected of, the investigator shall report it in minute detail, in the exact

words used by the suspect (Art. 117 (1)). Ask your client questions to determine whether the statements in the report are accurate and truthful, and whether they were obtained without violence, trickery or threat. If you find that your client has been subjected to violence, physical or psychological torture, inhuman and degrading treatment, or deprivation of food, sleep or other necessities, you should bring these violations to light and request that any confession and evidence thereby obtained be excluded.

THE RIGHTS OF DETAINEES AND APPLICATIONS ON DETENTION CONDITIONS

Every person, even if accused of a crime, has the right to be “treated with humanity and with respect for the inherent dignity of the human person”.⁷³ If your client is in pre-trial detention, as a matter of principle they should not face hardships beyond those that directly result from the fact that they have been deprived of their liberty before conviction.⁷⁴ However, in practice, their mental and physical health may be at risk in detention. They will be isolated from their family and may be subject to abuse by prison staff or other detainees. You are likely to be the only person who is in a position to act on their behalf to prevent abuse.

Your client has several rights in detention that you must try to protect:

- the right to physical integrity and to be free from torture or cruel, inhuman or degrading treatment, including prolonged solitary confinement;⁷⁵
- the right to be held separately from convicted persons;⁷⁶
- the right to be held separately from detainees of the opposite sex;⁷⁷
- if a minor, the right to be held separately from adults;⁷⁸
- the right to proper living quarters, including sleeping and sanitation facilities;⁷⁹
- the right to proper working conditions;⁸⁰
- the right to adequate recreational facilities;⁸¹
- the right to necessary medical care;⁸²
- the right to food of sufficient nutritional value to enable the detainee to maintain mental and physical health;⁸³
- the right to be free from discrimination of all types, including the freedom to practice religion;⁸⁴
- the right to have contact with family members and/or friends;⁸⁵
- the right to have confidential contact with legal counsel.⁸⁶

Each of these rights is important. If your client is detained pending trial, you should seek to ensure that they are held in conditions that respect these rights. Unfortunately, you may have little control over conditions of detention. In many countries, prisons are overcrowded, outdated and underfunded. Detention conditions are often much worse in police stations, where individuals may be held for days, weeks or even months before being transferred to prisons. Police or prison staff may be hostile to your client and make life for detainees unpleasant or even unbearable for various reasons.

Your role is not just to represent your client at trial, but to assist them throughout the proceedings, including when they are detained pending trial. If their rights are violated in detention (whether by the police, prison staff or other detainees, through active abuse or unacceptable neglect), you must take action. If, for example, you are concerned for the health of your client in detention, you should ask for a medical examination. Insufficient medication or food may affect your client’s competence and their ability to communicate with you. You should make a record of this situation with the court and, if necessary, make a complaint about the conditions of detention facilities on the basis of national rules on detention conditions (where they exist), as well as international law, in particular the UN Standard Minimum Rules for the Treatment of Prisoners (Nelson Mandela Rules), the Luanda Guidelines of the African Commission on Human and Peoples’ Rights, and the UN Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders (Bangkok Rules).

ZULFIQAR ALI: PAKISTANI NATIONAL SENTENCED TO DEATH IN INDONESIA

Zulfiqar Ali was charged with possession of 300 grams of heroin and sentenced to death in Indonesia. Zulfiqar was arrested in Indonesia after another person identified him as the supplier of 300 grams of heroin. Zulfiqar told the court that in the three days following his arrest he was assaulted repeatedly and threatened with death by police officers until he “confessed”. Nevertheless, the trial court upheld the validity of Zulfiqar’s “confession”. A month after Zulfiqar’s trial, the man who had previously identified Zulfiqar as a heroin supplier gave evidence in court that he had only done so under duress, and signed an affidavit corroborating Zulfiqar’s evidence that the 300 grams of heroin did not belong to Zulfiqar. The affidavit was dismissed, and Zulfiqar’s death sentence remained in place. Crucially, an internal investigation carried out by the Indonesian government found that Zulfiqar was innocent, but the decision was never acted upon.

Zulfiqar’s medical records showed that he was in extremely poor health and had life-threatening medical conditions following abuse and mistreatment from state authorities. Several years after his arrest and while Zulfiqar was still suffering from more than one severe medical condition, he was listed for execution. Although Zulfiqar was eventually spared from execution, his health continued to deteriorate in prison without access to adequate medical care. Zulfiqar untimely died in prison from liver cancer after more than a decade on death row.

WHAT CAN I DO IF MY CLIENT HAS SUFFERED CRUEL, INHUMAN OR DEGRADING TREATMENT OR TORTURE?

Article 421, KUHP states that, “Any official who in a criminal case makes use of means of coercion either to force/compel a confession or to provoke a statement shall be punished by a maximum imprisonment of four years.” If your client is being subjected to inhuman treatment or torture, your first step is to quickly document it and prevent it from continuing. To document the torture, you can:

- have pictures taken of any injuries;
- request an examination by a doctor (under Article 58, KUHP);
- make a complaint to a superior police officer;
- request the assistance of ward and township administrators.

There are certain legal remedies available for torture or cruel, inhuman or degrading treatment in police custody.

- Clients have the right to request that a judge rule on the legality of their detention (Article 124). It is arguable that any detention during which abuse takes place is illegal and you should consider requesting a determination of its legality (Article 79).

- Even if the detention is not found to be illegal, the client still may be entitled to compensation for “the harm of having been arrested, detained, prosecuted and adjudicated, or subjected to other acts without reason founded on law” (Article 95 KUHP).
- A criminal complaint can be filed against the officer for “Maltreatment or Serious Maltreatment” under the Penal Code.⁸⁷
- You can file a complaint with the Indonesian national human rights commission (Komnas HAM). Komnas HAM has a statutory mandate to carry out investigations into human rights violations, including torture. In accordance with its governing laws, during an investigation Komnas HAM has wide powers including: to call on complainants, victims and the accused to hear their statements; to survey incident locations and other locations as deemed necessary; and on approval of the Head of Court, to provide input into ongoing cases.
- A complaint can be submitted to the National Police Commission.⁸⁸ However, the commission does not have jurisdiction over criminal allegations. It can only receive suggestions and complaints with regard to police performance and, based on the information, provide strategic recommendations for reform to the President⁸⁹. If the victim exercises this procedure (under Law No. 2 Year 2002 on the National Police), the case will be referred to the Commission of the Code of Ethics, which has no jurisdiction over criminal proceedings but can investigate the case and apply administrative sanctions, such as dismissal of the suspect from the National Police.

In very serious and urgent cases, you may be able to petition international human rights bodies to intervene to prevent further mistreatment (see Chapter 7). You could appeal to the UN Special Rapporteur on Torture to issue a statement calling on your government to protect your client’s rights. You could also consider a strategy to raise public awareness and inform the media with a view to preventing further mistreatment.

RIGHT TO RELEASE / BAIL

One of the main issues at the investigation stage, prior to the trial, is whether your client will be remanded in custody (also known as pre-trial detention) or whether they will be released pending trial. Your client is presumed innocent until proven guilty;⁹⁰ and should not be punished unless convicted by a competent court. However, they may be detained pending trial on the grounds that they may harm someone if released, flee to avoid prosecution, communicate with accomplices, or destroy incriminating evidence.⁹¹ Whether or not you eventually succeed in obtaining an acquittal, if they are remanded in custody until trial, they are at risk of being subjected to unwarranted punishment and to the physical and psychological hardship of detention. They will also have less access to you as you try to prepare a defence. Those that depend on your client for support may experience hardships as well. Your role at this stage is therefore crucial: you must protect the rights of your client by resisting pre-trial detention and advocating for their release with the least restrictive conditions possible. However, if pre-trial detention is unavoidable, you should try to lessen the impact of detention on your client and their defence.

RIGHT TO PRE-TRIAL DETENTION HEARING

In some cases, your client may be detained by the police or other government authorities without a court hearing to determine whether their pretrial detention is appropriate. Such detention violates their right to be presumed innocent until proven guilty.⁹² Once arrested, Article 19(1) KUHP prohibits detention for more than one day without a warrant of detention, which can be applied only to a suspect or accused who has committed, attempted or abetted an offense which is liable to imprisonment of five years or more, or is an offense enumerated in Article 21(4)(b). Therefore, you should take action and request for the immediate release of your client if:

- no warrant has been issued within 24 hours of arrest;
- the warrant or detention order fails to meet procedural requirements (including those under Article 21(2)) (See Directive No. J.C.5/19/18 of 1964),⁹³
- the offence under examination is not a qualifying offence;
- evidence is not sufficient to warrant a strong presumption that the client has committed, attempted to commit, or abetted a qualifying offence;

- circumstances do not give rise to a concern that the suspect or accused will escape, damage or destroy evidence, and/or repeat the offence.

In order to make the assessment for the last two points, you should request access to the case file.

Under the Indonesian criminal code, initial detentions can be extended for different periods of time to conclude the investigation. The time periods depend on who issued the phase of the criminal procedure. The following table provides an overview of how long your client can be expected to stay under detention at each phase.

Phase of criminal procedure	Initial Detention Period	Extension	Total Detention	Relevant Legislation
Arrest and preliminary investigation	24 hours		24 hours	Article 19 (1), KUHP
Primary investigation	20 days	40 days	60 days	Articles 20(1), 24, KUHP
Indictment	20 days	30 days	50 days	Articles 20(2), 25, KUHP
Trial	30 days	60 days	90 days	Articles 20(3), 27, KUHP
Appeal	30 days	60 days	90 days	Articles 20(3), 27, KUHP
Cassation	50 days	60 days	110 days	Articles 20(3), 28, KUHP

RIGHT TO BE RELEASED WITH THE LEAST RESTRICTIVE CONDITIONS

In all cases, the court is required to take the decision that least penalises the defendant while preserving public order. Thus, the judge may order release, but place the defendant under judicial supervision by imposing certain conditions on release that make it possible to accommodate the right to freedom and the public interest.

You must challenge the requests for continued detention. The following are some factors that the judge may consider whilst assessing whether detention should be extended:

- Is the offence a qualifying offence?

- Why has the investigation not been completed? Was the delay avoidable? Ask the judge to review the police investigation reports to see if due diligence is being exercised by the investigator.
- Is there sufficient evidence in place to warrant a strong presumption that your client has committed, attempted to commit, or abetted a qualifying offense?
- Is detention necessary to ensure the accused's attendance during the inquiry stage and trial?
- Are there any special circumstances, such as support of a family or the client's health, that warrant release?

You need to be ready to argue for your client's release with the least restrictive conditions possible. To do this, you must present evidence to show the court that your client is not a flight risk, that they will appear when summoned by the investigating judge and at trial, that they do not pose a threat to others, that they are not likely to destroy evidence, and that their continued detention is not necessary for the determination of the truth. You meet these conditions by showing that:

- your client has links to the community (and is therefore unlikely to flee);
- your client has a family;
- your client has a job;
- your client has a place of residence;
- your client is of good character (relatives, colleagues, etc. can attest to good character by presenting testimony or affidavits).

If your client suffers from an illness that requires medical care, you can argue that detention could be harmful to their health. If appropriate, you may also ask the court to enrol your client in a drug treatment programme, a medical and psychological monitoring programme, a vocational integration programme or other scheme.

Accused persons can be released with or without bail money or a personal guarantee, with stipulated conditions (Article 31, KUHAP). If appropriate, argue for the accused be released with personal undertakings to return to court. House or city arrest are two forms of detention provided under KUHAP.

RIGHT TO A RENEWED APPLICATION FOR RELEASE

If your application for release is rejected, you have the right to appeal against the rejection. If you decide to appeal, you will have to convince the judge that the legal conditions for pre-trial detention are not or are no longer fulfilled or that your client's case and their character now require release.

SUCCESS STORY (TUNISIA)

In Tunisia, in the case of Lajili,⁹⁴ the lawyers referred the case to the UN Working Group on Arbitrary Detention because their client was being held illegally pending trial. Although the client was not facing the death penalty, the same principles applied as in a capital case. The Working Group found violations of several rights of the defence, including the right of the accused to legal counsel during interrogation, protected under Article 14(3) (d) of the ICCPR. The Tunisian government had not provided any evidence to show that the accused had waived this right. Furthermore, the state did not justify the reasons for Mr Lajili's arrest and thus violated Article 9 of the ICCPR, which requires the state to produce an arrest warrant to justify the arrest and subsequent detention of an individual. The duration of Mr Lajili's pre-trial detention had also exceeded the prescribed time limits. The Working Group further denounced the violation of the Nelson Mandela Rules on the grounds of the ill-treatment suffered by Mr Lajili, and in particular the failure to provide care for his poor health. The Working Group concluded that Mr Lajili's continued deprivation of liberty was arbitrary in that it was contrary to Articles 9 and 10 of the Universal Declaration of Human Rights and Articles 9 and 14 of the ICCPR, and called on the government to release him immediately. The government initially failed to cooperate, but Mr Lajili was eventually released.

Nédra Ben Hamida,
Tunisian lawyer

CHAPTER 3

LAWYERS' DUTIES DURING INVESTIGATION

YOUR ACTIVE ROLE IN THE INVESTIGATION

DEVELOPING A STRATEGY

For each new case, you need to develop a tailor-made strategy at the pre-trial stage, depending on the circumstances of the case, the evidence and the character of the accused (see also Chapter 5). Conducting research helps to identify gaps in the prosecution's case and to prepare an effective defence strategy. In order to persuade the judge not to sentence the accused to death, you should try to gather evidence of innocence, but also evidence of diminishing responsibility, or evidence of mitigating circumstances. Finally, you need to conduct research on your client to determine whether they are "eligible" for the death penalty, i.e., whether they fall within the categories of protected individuals and therefore cannot be executed. Even when a person does not fall within one of the protected categories, courts in many countries have recognised that judges must look carefully at the personal circumstances of the accused before deciding whether their guilt is sufficient to deserve the death penalty.⁹⁵

These legal and jurisprudential developments provide an opportunity to argue that a death sentence is unlawful or unjustified depending on the circumstances of the accused and to urge the court to show leniency and compassion to the accused. However, in order to make the most of these opportunities, you will need to carry out extensive research on your client and their social environment, to submit requests for action by the investigating judge, etc.

At this stage, you should also think about a possible international strategy and a media strategy. Bear in mind that, at the investigation stage, the confidentiality of the investigation applies to you and that you cannot reveal the details of the case to the media.

PROVIDING ASSISTANCE DURING QUESTIONING AND CONFRONTATION

You must provide legal assistance to the accused during questioning and confrontation by the investigating judge. If they wish to answer questions or make statements, help them to prepare by reminding them of their previous statements and those of witnesses.

In order to be in a position to defend the accused, you will need to see the case file. Once you have been mandated as your client's

lawyer, you are entitled to have access to their file before they are questioned. If possible, ask for a copy of the file to take with you. The file may be very long, and you may not have time to read and analyse all the documents in the time you have to consult it.

SUBMITTING REQUESTS FOR THE PERFORMANCE OF INVESTIGATIVE ACTS

In order to help establish the truth and defend the interests of your client, you can make requests for the performance of investigative acts to the investigator. The defense lawyer has the right to all minutes that are required by law (CrPC, Articles 72, 75) which include, among others, witness statements, arrest, detention, and search and seizure minutes, and minutes on the examination of documents. Under Article 17, Advocates Law, the advocate has the right to obtain information, data and other documents, either from government agencies or from any other party as necessary for the defense of the client's interests. This allows you to steer the course of the investigation should the judge fail to investigate certain aspects.

What types of requests for action can you make?

- Requests to hear witnesses.
- Requests for confrontation.
- Requests for transport to the site.
- Requests for medical, psychological and psychiatric examinations.
- Requests for the appointment of an expert.
- Requests for a second or additional expert opinion.
- Requests to carry out a character or social history investigation;
- Requests to obtain telephone invoices from operators.
- Requests for any other material which is relevant to the investigation (e.g., video surveillance).

You must study the files and/or investigation records throughout the preliminary investigation and request that an issue be examined if you consider that it is in the interest of your client. Your request must be in writing and reasoned in order to oblige the investigating judge to respond with a reasoned decision. Be precise about the purpose of your request. For example, if you are asking for witnesses to be heard, you must state their identity.

HOW SHOULD I COLLABORATE WITH THE INVESTIGATION?

Sometimes the investigator fails to look for exculpatory evidence during the investigation. You must therefore help to gather information and ensure that exculpatory evidence is taken into account. In addition to asking the investigating judge to carry out acts such as interviewing witnesses who can confirm the alibi of the accused or ordering an expert opinion that may show that they are suffering from a mental disorder, you can conduct your own research and present evidence to the investigating judge, who may decide to add it to the case file.

Be careful! You cannot assume the powers of the investigator or supplant the police; you cannot carry out searches, seizures, interviews, questioning, etc. You can, however, carry out research with ordinary means, like any other person, by carefully asking questions to gather information on the circumstances of the crime, or by talking to the family and those close to the accused, in order, for example, to find out about their character. This information will help you define your strategy. It is important that you document your actions to protect yourself against possible allegations of witness tampering or obstruction of the investigation, or to have people available to testify against such allegations.

WHEN SHOULD I START MY RESEARCH?

You should start your research as soon as possible, ideally shortly after the arrest of your client. Valuable evidence may no longer be available if research is delayed.

You should also start gathering evidence of mitigating circumstances at an early stage of the proceedings, for example by researching your client's family situation and socio-economic and medical background. Even if the accused is found guilty, such evidence can help persuade the court that the death penalty is not warranted.

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 break-in at her home by a criminal gang (known as "dacoity" in Pakistan). The robbers entered their home, 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 of his property.*
- *By actively researching the circumstances of the case and meeting each and every person connected to it, we were able to uncover the truth. As we travelled around the village, word spread that Shabbir's defence team was asking questions. Soon, the prosecution's witnesses became so nervous about the truth coming out and being found guilty of perjury that they opted to withdraw their statements accusing Shabbir of murder and to settle the case under Shariah law.*
- *This case demonstrates how rigorous research can reverse the power dynamics in favour of an accused and ultimately lead to an acquittal.*

Sarah Belal, Director,
Justice Project Pakistan

WHICH ASPECTS OF THE INVESTIGATION SHOULD I CHECK?

You need to investigate not only the facts relating to the culpability of your client, but also the factors that may be relevant to sentencing if they are convicted. Researching exculpatory evidence and mitigating circumstances is a crucial part of your work in a trial where your client faces the death penalty. It enables you to provide the court with evidence that may tip the balance in your favour when faced with aggravating circumstances.

Developing a trusting relationship with your client will make it easier for you to gather this information. Mitigating circumstances refer to any information about the defendant's character or background that could be used to persuade the court that the defendant should not be sentenced to death. This includes evidence of impulsiveness, diminished capacity, intellectual disability or psychomotor developmental delay, history of sexual or physical abuse, substance

dependence, youth, poverty, susceptibility to influence, and ability to cope in a prison environment (see Chapter 6).⁹⁶

Elements of the crime

You should research the principal crime as well as other offences or facts related to that crime. In some cases, a conviction for a predicate offence, such as rape or robbery, could lead to a death sentence.

Prosecution witnesses

In the course of your research into the facts of the case, you should scrutinise prosecution witnesses. You can request that the investigating officer ask specific questions of them. Inquire into their backgrounds and their relationship to the defendant. Your research should focus on the following:

- Did they actually witness the offence 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 offence may have a particularly strong motive to cast blame on others to avoid responsibility.
- Were their statements truthful? Did the police or other individuals pressure them to give a particular statement?
- Did they have a motive to fabricate their testimony? For example, if they were themselves suspected or accused, 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?

Defence witnesses

You should also try to find witnesses to challenge the prosecution’s version of events, corroborate your client’s account, or shed useful light on the case. For example, if your client claims that they acted in self-defence, determine whether there are witnesses who could testify to the aggressive behaviour of the “victim”. If your client claims to have an alibi (i.e., that they were in another location at the

time of the alleged offence), it is critical that you locate individuals who can confirm this (Fact Witnesses).

Try to identify and locate individuals who can testify to the good character of your client (Character Witnesses). Bear 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.

Use of scientific and forensic evidence

If the investigating officer has not used scientific or forensic evidence, and you think it is in the interest of your client to do so, ask the court to order blood or DNA tests, an autopsy, etc. which could confirm the defendant’s case.

However, you must be vigilant, because all too often defendants are convicted on the basis of flawed scientific and forensic evidence or questionable “expert” testimony. In the United States, for example, convictions have been overturned due to the unreliability of key evidence, such as hair and bite mark comparisons, or predictions by “experts” about the likelihood that a defendant would kill again, based solely on a review of a case file or brief interview with the accused. In Sudan⁹⁷, convictions have been obtained based on little more than footprints that supposedly match those of the accused.⁹⁸

To avoid convictions based on flimsy or uncertain evidence, you must check the reliability of the prosecution evidence. If the prosecution seeks to present forensic evidence, find out the qualifications of the appointed “expert” witnesses. Do they have the necessary qualifications to assess the evidence? In addition, you must determine whether the evidence has been properly tested using the best available technology or whether additional forensic testing is possible. You may be able to argue that deficiencies in the preservation or testing of the evidence make it unreliable.

Causes of death

In homicide cases, you must attempt to obtain the post-mortem (or autopsy) report on the victim, so that the cause of death can be analysed. If a post-mortem examination has not been carried out, ask the judge to appoint someone with expertise in this area to carry out an examination of the cause of death. This report may reveal

crucial information; for example, the victim may actually have died of natural causes! Pay careful attention to the details of the report, such as the locations of injuries. When prosecution witnesses give their accounts of events leading up to the victim's death, you may be able to challenge their account by pointing out inconsistencies between their version of events and the post-mortem report. This information may also help you to prepare your case. Finally, you should find out about the qualifications of the person who carried out the post-mortem examination, as there may be grounds upon which to challenge the reliability of their findings.

Events surrounding the arrest

Review the legality of the procedure and the veracity of the content of the police report

It is common for individuals suspected of having committed a crime to make statements to the police upon their arrest. It is your job to determine whether your client's statements were given freely, voluntarily and in accordance with the law, the constitution and international human rights law.

You should be particularly alert to the possibility that your client's statements were obtained under physical or psychological duress. If your client signed a statement, make sure that they actually knew what it said. Were they given time to read the statement? Did they have sufficient education to genuinely understand it? Was it written in their native language?

If a defendant has a mental disorder or other disability, they may be susceptible to the influence of others and may be more likely to confess to a crime. Studies show that individuals with intellectual disabilities are particularly prone to giving false confessions. They may not understand that they have the right to remain silent and to seek legal advice. Police can easily lead them in their account of events and suggest answers that would inculpate them. Reviewing the transcripts of the police interviews may reveal that your client was simply repeating information given to them by the police.

A confession may also have been extracted under duress, including physical abuse, heavy pressure or threats. In some countries, such as Niger, the law requires that a person who has been in police custody

be examined by a doctor and given a medical certificate stating that they have not been subjected to ill-treatment. If you suspect that your client was mistreated in police custody, you should ask for a medical examination to document any abuse, ill-treatment or torture, regardless of the law in your country. Your client may have made statements when they were in a weakened state, because they had been denied food or needed medication, and were therefore unable to resist police pressure. They may also have feared for the safety of their family. Statements taken under such conditions are not voluntary and must be challenged.

Request the exclusion of confessions and evidence

In criminal law, all types of evidence are admissible. However, be prepared to ask for the exclusion of "tainted" evidence that has been obtained in violation of the rights of the defence or through torture or inhuman or degrading treatment. In such cases, the exclusionary rule applies. Such evidence is inadmissible in the courts of countries that have ratified the UN Convention against Torture, or the International Covenant on Civil and Political Rights⁹⁹. Although torture is implicitly prohibited by Indonesian law, evidence obtained by torture is neither expressly nor implicitly excluded¹⁰⁰. Similarly, at the moment, there is no explicit legislation/rule governing the treatment of evidence obtained through illegal means (other than torture). The issue was raised before the Constitutional Court by former chief legislative, Setya Novanto, who claimed that evidence obtained through illegal recordings was a violation of his Constitutional Rights¹⁰¹. The Court Decision Number: No.20/PUU-XIV/2016 stated that interception carried out without thorough legal procedures cannot be justified.

Defences and grounds for reduced liability

You must consider any defences your client may have to the crime charged¹⁰². Defences that may absolve your client of liability or reduce criminal liability include self-defence and diminished or lack of mental capacity.

Self-defence

Generally, a person who fears for their own safety or the safety of another person is entitled to use force against an assailant. Article 49(1) of the Criminal Code reads that whoever is forced to take action to defend himself because of an attack or threat

of attack against himself or others, against the honor of decency (eerbaarheid), or against his own property or that of others, shall not be punished. Article 49(1) of the Criminal Code uses the term element “forced to defend”, which entails three conditions:

1. There must be an attack or threat of attack.
2. There must be no other way to prevent the attack or threat of attack at that time.
3. The act of defense must be proportional to the nature of the attack or threat.¹⁰³

If your client claims to have killed in self-defence, you must try to prove that their fear of the victim was reasonable. Carefully review the reasons why your client believed they were in danger. Try to find witnesses to the encounter who can verify their account. You may be allowed to present evidence that the victim was known to be violent, which will help you to show that your client’s fear was justified.

SUCCESS STORY

Winning the case through research (Malawi)

- *In a murder case in Malawi, a team of lawyers were able to corroborate their client’s claim that he had acted in self-defence through their research. None of the police reports indicated that the defendant had acted in self-defence 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 on the back of his head and the back of his arm and 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. The lawyers spoke to the police officer who confirmed that at the time of his arrest the defendant had serious, deep wounds.*
- *At the trial, the police officer was compelled to tell the truth about the defendant’s injuries and the defendant also testified in his own defence. After hearing all the evidence, the court acquitted the defendant of all charges.*

Lack of mental capacity to be culpable

Indonesian Law Number 18 Year 2014 Regarding Mental Health (UUKJ) provides a legislative framework for mental health issues

within Indonesia that seeks to protect and rehabilitate mentally ill people. Article 71(2)(a) of the UUKJ provides that if a person who commits an offence is suspected of having a mental disorder, they must undergo a psychiatric examination to determine their capacity to be culpable for the charged offence. Mental disorders which lead to incapacitation of a certain criminal act are regulated under Article 44(1) KUHP, which dictates that “a judge cannot convict an individual for an act committed by reason of the defective development or sickly disorder”. The Judge has the discretion to decide, on the basis of a psychiatric report, whether a person is accountable for their actions or not based on their mental capacity.

Generally, you must prove not only that your client suffers from a mental disorder, but also that at the time of the crime they were incapable of distinguishing between right and wrong or of controlling their behaviour, and that their mental disorder caused them to lack mental capacity. Even if the accused does not suffer from a permanent mental disorder, they may have had a psychotic episode that caused them to become disconnected from reality or may have acted under the influence of an intoxicating substance administered involuntarily that caused them to lack mental capacity. Individuals found to lack mental capacity must be diverted away from the punitive sanctions, as appropriate and effective rehabilitation would be better attained in a psychiatric hospital rather than a prison.

Intellectual disability and impaired mental capacity

Mental illness can also be a mitigating factor for a sentence lesser than the death penalty. You should consider 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 behaviour, even where they do not meet the legal definition of “insanity”. Finally, you may be able to argue that your client was less responsible for their actions because they were provoked or were under extreme stress or experiencing a strong emotion or despair at the time of the crime.

Criminal history

If your client has a criminal record, the prosecution may seek to use this in support of a death sentence. You should study previous convictions and be prepared to explain your client’s conduct and rebut the prosecution’s arguments that they are incapable of reform.

Eligibility for the death penalty

Legal developments in many countries over the last decade make research into the personal circumstances of the defendant and their eligibility for capital punishment more important than ever. The use of capital punishment is decreasing worldwide. Various categories of individuals have become ineligible for the death penalty, including individuals with mental disorders, pregnant women and those under the age of 18 at the time of the crime¹⁰⁴. International bodies call on states that retain the death penalty not to execute people with any form of mental or intellectual disability¹⁰⁵. You must ensure that your client does not fall into any of the categories that would make them ineligible for the death penalty.

Mitigating circumstances

Mitigating circumstances are presented to humanise the defendant and explain their behaviour to the jury or judge. By presenting such evidence, your aim is not to excuse your client's crime, but rather to elicit sympathy, to show that they are less culpable and deserve a reduced sentence. Mitigating circumstances may include any aspects of the defendant's character, background, family, socio-economic and medical history that may call for a lighter sentence than capital punishment, such as mental frailty, capacity for redemption, lack of future dangerousness, and positive acts or qualities. As mitigating circumstances are an essential aspect of the defence in a capital case, Chapter 5 addresses the use and presentation of such evidence in greater detail.

SOURCES OF INFORMATION

To conduct your research, you will need to draw on various sources of information, starting with your client. You will have to approach various individuals close to your client, potential witnesses, experts, etc. During your exchanges, you are free to gather information, but be careful not to divulge information that is subject to the confidentiality of the investigation and make sure that the person you are interviewing is not already a witness in the investigation conducted by the investigating judge. You will also need to be careful not to be accused of witness tampering. It may be useful to document your interviews so that you have evidence that you have not tried to influence potential witnesses.

The role of the defendant in the investigation

Your client is likely to be the starting point for your research and may be able to help you identify additional witnesses and sources of exculpatory or mitigating evidence.

Developing a trusting relationship with your client in a capital case can be difficult. Defendants are often reluctant to make certain disclosures to their lawyer, even when these could be used as mitigating evidence. Many defendants facing the death penalty suffer from anxiety, depression, mental disorders, personality disorders or intellectual disabilities that affect their communication skills. This may make it difficult or impossible to develop a trusting relationship. Psychiatric disorders may, for example, seem embarrassing. An accused may be reluctant to share information that makes them seem "crazy". Similarly, clients may feel ashamed and reluctant to talk about childhood or spousal abuse.¹⁰⁶

Nevertheless, many defendants will share painful information in response to your continued efforts to build a strong bond with them. You may need to talk to them multiple times before they are comfortable enough to share information that may constitute critical mitigating evidence. Your client may be reluctant to disclose details of abuse they have suffered, and you should not expect them to volunteer such information. You should ask factual questions that will help you to determine which themes to build on in your strategy on mitigating evidence. Pay attention to signs of mental disabilities, such as when a client seems to have difficulty understanding their situation or communicating details.

PRACTICE TIP

How can I tell if my client has a mental disorder?

The questions you ask will vary, depending on the cultural context and your client's level of education. Here are some examples of questions to ask:

- Has your client ever suffered a head injury?
- Has your client ever been in an accident?
- Has your client ever lost consciousness?
- Has your client ever been admitted to hospital?
- Has your client ever used a traditional healer for any reason?
- Has your client ever been prescribed traditional remedies for any illness?
- Has your client ever suffered from seizures?
- Has your client ever experienced periods when they lost track of time and "woke up" later?
- Has your client ever had inexplicable rages?
- Has your client ever felt possessed or "bewitched"?
- Are there members of your client's family who suffer from mental health problems?
- Has your client ever been prescribed medication for any mental health problem?

Be careful not to rely solely on the 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 they are competent and able to make an informed decision about their case.¹⁰⁷

Furthermore, you should not rely exclusively on your client to reveal facts relevant to a defence or mitigating evidence. Your client may not understand why certain aspects of their personal history would have an impact on sentencing. They may not remember or may be unable to explain certain things that are crucial to their defence. Individuals who have suffered a serious head injury may have little memory of the injury. A client with limited intellectual capacity may not be able to communicate their life story to counsel. You should also bear in mind that a client may pretend to understand things when they do not. Because of these difficulties, 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.

OVERCOMING BARRIERS

How do I know who to approach if the police reports do not identify any eyewitnesses?

- First of all, you need to talk to the defendant. They may know if someone witnessed the incident that led to their arrest.
- Your client can also provide you with critical information about a lack of objectivity of witnesses who may be called by the prosecution.
- If at all possible, try to visit the scene of the crime and find someone who may have been to this place.
- Ask for help from influential people in the community, such as village leaders, representatives of religious communities, etc., to locate potential witnesses. Family and friends of the defendant can also provide valuable information about potential supporting evidence, defences and mitigating circumstances that could call into question the defendant's liability or enable them to obtain a lighter sentence.

The defendant's family

To research mitigating evidence concerning the commission of the crime, but also your client's character, it is essential to talk to their family, provided that they are not already witnesses in the investigation conducted by the investigating judge. You may need to visit family members several times to reassure them that revealing private family history will not shift the blame to them, but rather may help to save the defendant's life¹⁰⁸. For example, the defendant's mother may be reluctant to admit to drinking alcohol during pregnancy, but this evidence could be valuable in arguing that foetal alcohol syndrome caused the defendant lasting brain damage. It is essential that you ask questions about the defendant's mental health and any family medical history during your visits.

Finally, you should ask family members to explain how the execution of your client would adversely affect them, which is evidence that might lead the court to show compassion.

SUCCESS STORIES

Creative investigation wins cases

- Navrikan Singh, an Indian lawyer, represented a client who was accused of killing his wife. Through his investigation, Navrikan discovered that several of the wife's relatives had committed suicide, which confirmed 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 defence 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.
- In a 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.

Other acquaintances and professionals

You should also interview friends, neighbours, village leaders, teachers, clergy, sports coaches, co-workers, physicians, social workers, therapists, etc. (again, provided that they are not already witnesses in the investigation conducted by the investigating judge). 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.

OVERCOMING BARRIERS

What can I do if my client's friends or family do not want me to interview the witness alone?

- Conducting one-to-one interviews with witnesses is the best way to ensure that their statements are not influenced by the opinions of other members of their family or community. This is particularly important when the alleged victim and witnesses reside in the same community, or in a rural area or village where rumours about the crime may not coincide with the facts.
- Sometimes witnesses may not want to talk to you face-to-face without the support of their family or friends. In this situation, show that you understand their fears and reassure them. In some cultures, for example, it may seem inappropriate for a man to be alone with a woman if she is not his wife or a close relative. In such cases, it would be helpful to ensure that your investigative team includes members of both sexes.

- If you cannot conduct the interview without a third party's presence, try to limit the number of people, especially if their presence makes the person interviewed uncomfortable or more reluctant to speak. Also ask those present not to answer questions addressed to the interviewee or make comments that might affect their statements.
- Be careful when talking to your client's relatives and acquaintances; you may be accused of trying to influence them if they are called as witnesses in the investigation. If you think this is a risk, ask to have them called before the investigating judge, but remember that this means you will not know the content of their testimony.

Prison staff

Interviews with prison staff can provide you with valuable information about the behaviour of your client in prison, including any courses, activities or training sessions in which they may have participated, as well as any medical treatment they may have undergone.

Expert assessments

In most capital cases, it is essential to identify and retain experts during the pre-trial phase of the case. Expert assessments are aimed at evaluating technical issues¹⁰⁹ and are entrusted to individuals with the required knowledge to carry out physical examinations or to give a professional opinion based on their field of expertise.

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. If physical evidence appears to be decisive in the case, an expert assessment of this evidence should be carried out. Examples of such assessments include determining the nature of a substance to establish whether it is poisonous, DNA evidence, ballistic analysis, blood group analysis, etc. Similarly, in a case where the defendant has made a confession that you suspect is false, it is important to retain an expert who can carry out a mental health examination. You can ask the same person to assess the state of mind of the accused at the time of the crime, as well as the impact of their personal history (e.g., a turbulent childhood) on their mental health.

Experts may express an opinion that goes against the interests of your client. This could have disastrous consequences if this opinion is used by the court. You should therefore be vigilant in your choice of experts, even if it means requesting their recusal if you have doubts

about their competence and impartiality and asking for others, or, if necessary, requesting a second expert opinion.

An expert appointed by the judge carries out their mission under the latter's supervision: the judge defines the scope of the expert assessment and the questions asked of the expert. However, you can ask the judge to ask specific questions and thus extend the scope of the assessment. The expert, who acts under oath, then submits a report to the investigating judge. Expert reports, like the testimonies, are subject to the adversarial principle, which means that you can challenge them or ask for additional expertise or a counter-opinion.¹¹⁰

Medical, psychological and psychiatric expertise

In all capital cases, you must apply for an assessment of your client's mental health by a qualified expert through testing and a clinical interview. In Indonesia, under the UUKJ, a team led by a psychiatrist assesses each case (civil and criminal) on its own merits to determine the mental capacity or incapacity of an individual. The purpose of this assessment is to determine whether, at the time of the crime, the defendant was suffering from a disorder that diminished or removed their mental capacity. The need for medical, psychological or psychiatric expertise goes beyond the question of criminal responsibility, however. Indeed, these initial assessments often do not take into account the defendant's family and social background, medical history (pathologies, addictions, depressions, etc.), professional and educational history, relationships with others, character and environment. This information is necessary in order to detect mental disorders and intellectual disabilities that may arouse the compassion of the court and play a crucial role in sentencing, even when such disorders do not reach the level of insanity and therefore do not result in a lack of criminal responsibility.

However, you should not rely on the court to determine whether a mental health assessment of the accused is necessary. Even if a preliminary assessment has been carried out to determine criminal responsibility, it is essential that you ask for a further examination to assess your client's overall mental health. If your client has a condition that is not immediately obvious, such as depression or an intellectual disability, it may not be detected by the initial examination. If you spend time with the accused, you may be the only person in a position to identify the potential disorder and request a thorough examination. The importance of conducting mental health assessments is discussed in more detail in Chapter 3.

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

It is not always possible to detect mental disabilities simply by speaking with your 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 it. 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 that may be signs of mental health problems or intellectual disabilities.

Medical records

The defendant's medical records or birth certificate may show, for example, that their mother was malnourished or 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 can, for example, help to portray your client in a positive light and bolster evidence of their good moral character.

OVERCOMING BARRIERS

What should I do if I think my client is lying to me?

- *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, they may not have had malicious intent. They 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 their case, ask for clarification without making it sound like an accusation. Before posing your question, explain that it is important to their case, and reassure them that you will continue to fight for them regardless of what they tell you. Express empathy for their situation (for example, tell them that you know it's not easy to be completely forthcoming with information that causes them pain and sadness).*
- *This underlines the importance of building a relationship before asking your client about the facts of their case. Ideally, you should meet with your client several times before you ask sensitive questions about their potential role in any offence they are accused of committing. Build a relationship by getting to know your client and chatting with them about their family, work and hobbies. Build trust by taking the time to explain what they can expect regarding the proceedings in their case.*

From Investigation to Prosecution

Once the police have completed their investigation, they hand over the case, including all dossiers of evidence (berkas) to the prosecutors. Prosecutors then have seven days to determine whether to send it back for further investigation along with instructions. If returned, investigators have 14 days to complete the investigation and return the dossier to the prosecutor. In most cases, the dossiers are sent back and forth several times. The police may also decide to drop the returned case in this process.

The prosecutor can decide to not proceed to prosecution if there is insufficient evidence, or if the alleged offence is not a crime under law or closed by law (eg., if the accused has died) (Article 140(2)). If satisfied with the dossier, the prosecutor prepares a formal indictment and delivers it to the relevant district court to set a trial date (Articles 140 (1) and 152). At this stage, the case file contains:

- An arrest warrant
- A detention order
- Provisions under which the suspect is charged
- A crime scene report
- A list of exhibits for trial
- Names of witnesses and a summary of their interview records
- Legal analysis
- A conclusion

CHAPTER 4

DEFENDING VULNERABLE POPULATIONS

PROTECTION OF VULNERABLE PERSONS UNDER INTERNATIONAL LAW

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.¹¹¹

International law prohibits the execution of certain categories of defendants. For example, international mechanisms have excluded the following categories from eligibility for the death penalty: individuals under 18 years of age at the time of the crime,¹¹² pregnant women,¹¹³ elderly persons,¹¹⁴ mothers with dependent infants,¹¹⁵ mothers of young children,¹¹⁶ and individuals with a mental disorder or intellectual disability.¹¹⁷ In other cases, international law provides for specific procedures for certain categories of persons, for example foreign nationals who receive consular assistance.¹¹⁸ In still other situations, certain categories of defendants possess characteristics, such as mental disabilities, that are widely recognised as critical mitigating evidence during the sentencing process.

This chapter deals with each of these categories of defendant. It is designed to help you understand the criteria that define these categories, to inform you about the rights available to them if they meet these criteria, and to suggest ways in which you can best protect their rights.

These international standards might make your client ineligible for the death penalty, require the state to act with extra precautions, or provide you with evidence to justify a lighter sentence. Your knowledge of these categories and their implications will make a critical difference to your client.

IDENTIFYING VULNERABLE INDIVIDUALS

PREGNANT WOMEN OR MOTHERS OF YOUNG CHILDREN

What are the legal consequences of my client's pregnancy?

When your client is a woman, it is important to check whether she is expecting a child. The international community has nearly universally condemned the execution of pregnant women and the International Covenant on Civil and Political Rights (ICCPR) explicitly rejects this practice.¹¹⁹ Therefore, if your client is pregnant, you should notify the court and demand that she 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.¹²⁰ Under Indonesia law, the execution of pregnant women is prohibited until 40 days after they give birth.¹²¹

MINORS AND THE ELDERLY

Why does the age of my client matter?

The age of your client (at the time the crime was committed) may disqualify them from eligibility for the death penalty. If this is not the case, you may still want to consider using youth or advanced age as a mitigating factor in sentencing determinations.

Minors

If your client is a minor or was a minor at the time of the crime, there are a range of international standards to guide you in representing them.

Under international law, the age of majority, or the age below which a person is considered a minor, is 18.¹²² Courts cannot deviate from this norm of international law, even on a case-by-case basis. In 2006, for example, the Committee for the Convention on the Rights of the Child reprimanded Saudi Arabia for allowing its judges to determine whether a defendant had reached the age of majority before they reached the age of 18.¹²³ In Indonesia, the definition of a child is set forth in the Child Protection Law (No. 23/2002) i.e., any person under the age of 18 years.

In Indonesia, juveniles are excluded by law from capital punishment (Act No. 39 of 1999 concerning Human Rights; Juvenile Court Act (Law No. 3 of 1997)). If your client was a minor at the time the crime was committed, they cannot be sentenced to death. In addition, under Article 26 (2) of the Juvenile Court Act, juveniles who commit a crime punishable by the death penalty or a life sentence have their sentence reduced to a maximum of ten years. Therefore, if you know that your client was a minor at the time of the crime, you must bring their age to the attention of the court.

International law and the Indonesian legal framework (especially the Human Rights Act, 1999 and the Juvenile Justice Act, 2012) also provides special protections for minors at all stages of criminal proceedings. You must recognise the unique vulnerabilities that your client's youth creates and refer to international and national guidelines to protect them from the dangers that may ensue.

Minors may not understand their rights as clearly as adults. You should take care to explain the procedures and the protection offered to them by law. As minors may not understand their right to communicate with counsel, you should make regular efforts to contact them by scheduling regular and frequent meetings.

SUCCESS STORIES - INDONESIA

Challenging police record: Yusman Telaumbanua was arrested and detained in 2012 for the murder of three men in the North Nias district, North Sumatra province. In a court document, the police investigator considered Yusman Telaumbanua to be 19 years old at the time of the crime in 2012, although he did not have a birth certificate as births are not usually registered in his village of origin. Yusman was sentenced to death by the Gunungsitoli District Court in May 2013, but did not appeal to a higher court. His new lawyers managed to gather information from his family and village neighbours, who confirmed that Yusman was born in 1996, indicating that he was only 16 years old when the murder was committed. On 17 November 2015, the Ministry of Law and Human Rights requested that Yusman Telaumbanua be examined by a group of forensic radiology experts to determine his age. The experts established that Yusman Telaumbanua was under 18 years old when the crime was committed in 2012. In 2017, the Supreme Court of Indonesia commuted his death sentence to five years' imprisonment after considering a submission of his case review.

OVERCOMING BARRIERS

What should I do if it is difficult to establish the exact age of my client?

- Typically, the age of your client at the time of the crime is easily determined. Countries are obligated under international law to provide effective birth registration systems,¹²⁴ and the production of a birth certificate should provide adequate documentation of your client's age.
- However, some countries may not be able to provide adequate birth registration systems. Birth registration remains low in Indonesia. More than 24 million Indonesian children are undocumented.¹²⁵ Without a birth certificate, determining a child's age, and hence eligibility for juvenile justice safeguards, is difficult. An example of such difficulty is found in the case of Raju, a young boy who was taken to court for assaulting another boy. Raju was found guilty of assault, but it was difficult to determine his age because the records provided by the school differed from his mother's account. The courts were thus unable to determine if Raju was seven or eight years old. As criminal culpability was set at eight at the time of Raju's trial, he ended up spending several months in an adult prison because no juvenile detention centre was available.¹²⁶
- In situations where the age of a child involved in the justice system is unknown, the UN Economic and Social Council obliges states to take measures to ensure that the "true age of the child is ascertained by an independent and objective assessment".¹²⁷ Furthermore, international standards suggest that once there is a possibility that a person is a minor, the burden of proof is on the state to show that they are not before they can be treated as an adult in the criminal justice system.¹²⁸
- Nevertheless, you should make every effort to prove that your client is a minor if you believe or even suspect that they are. Some local community birth registration mechanisms can be useful in providing documentation of your client's age. For example, in Ethiopia, UNICEF has contacted religious communities to obtain certificates issued at the time of baptism or acceptance into a Muslim community in order to establish the age of unregistered individuals. In Sierra Leone, it has reached out to local tribes that maintain similar records.¹²⁹ You should begin by interviewing the family to determine whether similar local community traditions exist in the case of your client.
- Sometimes the court orders a medical examination to establish an approximate age through dental or wrist bone X-rays. However, these methods can only provide an estimate of the age of the person being examined. You should therefore be careful about the speculative nature of such procedures and ensure that a vague approximation does not disqualify your client from protections they might otherwise receive as a minor.
- Finally, you may be able to estimate the age of your client on your own by talking to family members. Indeed, many families are able to link the birth of a child to a significant historical event, such as an earthquake, a conflict or an election, even if they cannot remember the exact date.

COMPARATIVE CONTEXTS

Establishing your client's age with evidence (Democratic Republic of Congo):

In 2002, a law came into force in DRC prohibiting the imposition of death sentences on minors. A child soldier whose age was unknown and who had neither an identity card nor a birth certificate was facing the death penalty. His legal team called his teacher and his pastor to testify that he was a minor. It was then up to the military prosecutor to disprove this. The court accepted that he was a minor, so he was not sentenced to death.

Liévin Ngondji Ongombe Taluhata,
President of the NGO "Culture pour la Paix et la Justice"

The elderly

If you determine that your client is of advanced age, this may also have consequences for their criminal responsibility. In contrast to the unanimity on the issue of minors, the international community is only just beginning to address the situation of the elderly in the criminal justice system. As a result, it does not provide as much guidance for older persons as it does for minors.

The upper age limit may become more widespread in the future: in a resolution on implementation of the safeguards guaranteeing the protection of the rights of those facing the death penalty, the United Nations Economic and Social Council (ECOSOC) recommended that states establish a "maximum age beyond which a person may not be sentenced to death or executed".¹³⁰

INDIVIDUALS WITH MENTAL DISABILITIES

What are the legal consequences of my client's mental disability?

Depending on the type of mental disability your client possesses, your client's mental disability may relieve them of criminal liability, disqualify them from death penalty eligibility, or serve as a mitigating factor in sentencing determinations. The Constitutional Court has ruled that a person suffering from mental illness may only be executed once he has recovered. 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 emphasised elsewhere in this manual, spending time with your client is essential to develop trust, identify potential mitigating evidence and present an effective defence.

OVERCOMING BARRIERS

There are very few qualified psychiatrists in the region where I practise. How can I get 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 them to a psychiatric hospital or clinic where the assessment will be conducted.
- In areas where qualified mental health professionals are scarce, forensic assessments can be of low quality. Indeed, the framework for such assessments is almost always limited to questions concerning the accused's capacity and mental state at the time of the crime. Assessments do not always address, as they should, the issue of intellectual disability, or the influence of mental disorder on the accused's behaviour, beyond the legal definition of insanity. Your role is therefore to ensure that the mental health assessment of your client is not limited to the issue of competency.
- As your client's mental health is highly relevant to culpability and sentencing, you should apply to the court that ordered the expert assessment to direct the experts to carry out certain research that you consider necessary.¹³¹ 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 they do not suffer from a mental disability. (For more information, see Chapter 5 on the use of mitigating evidence in sentencing determinations.)

What kinds of mental disabilities are legally relevant?

The term "mental disability" refers to a broad range of conditions.¹³² As a result, the mental health of your client can have many implications for the outcome of the 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 altogether: in most legal systems, insanity is grounds to eliminate criminal responsibility entirely. If your client is mentally incompetent, you may be able to argue that they are ineligible for the application of the death penalty, as international law prohibits the execution of individuals with such conditions.¹³³ Even if your client's mental disability is not severe or is not significant enough to make them ineligible for the death penalty, it may mitigate their criminal responsibility or serve as a critical piece of mitigating evidence in sentencing procedures.

The importance of a mental health assessment

The most important form of evidence you can produce to support your client's claim of mental disability is an official assessment by a mental health expert. Many courts have held that defendants are entitled to a mental health assessment before they are sentenced to death.¹³⁴ You should make every effort to ensure that any assessment is conducted in accordance with the highest professional standards. According to Amnesty International, defendants and prisoners are not routinely subjected to mental health assessments in Indonesia, suggesting that these disabilities remain undiagnosed, with prisoners not being afforded the care and treatment they might need. Furthermore, and in cases where such individuals are facing the death penalty, they may be executed in violation of international standards prohibiting the sentencing to death or the execution of people with mental or intellectual disabilities or disorders.¹³⁵

RODRIGO GULARTE: MENTALLY ILL PRISONER EXECUTED IN INDONESIA

Rodrigo, a Brazilian national, was sentenced to death by the Tangerang District Court in February 2005 for smuggling six kilograms of cocaine into Indonesia at the Cengkareng airport, Banten province. According to his lawyer, a psychiatrist from a local state hospital had diagnosed him with paranoid schizophrenia and bipolar disorder with psychotic characteristics. It was recommended that Ricardo Gularte be admitted to a mental health facility. Medical records showed that Rodrigo had had a mental disability since he was young and had been treated at psychiatric hospitals before he came to Indonesia.

He was executed in April 2015. According to Father Charlie Burrows, a local priest who accompanied Gularte in his final hours, due to the 42-year-old's mental illness, he did not know he was about to be killed.

Who should conduct the assessment?

Although it is strongly recommended that you ask for a psychiatrist or psychologist to carry out this assessment, if one is not available, medical experts with training in psychology or social workers can assist in determining whether your client has a mental disability.

What standards should be used in the assessment?

There are no universal standards guiding mental health assessments for legal purposes, but the *Diagnostic and Statistical Manual of Mental Disorders* (DSM-5) is a widely respected resource.¹³⁶ Published

by the *American Psychiatric Association*, it catalogues mental health disorders in children and adults and is used in many countries outside the US. However, bear in mind that the DSM-5 is largely a product of research conducted in the US, and its diagnostic criteria may not be relevant in all countries. Your client's mental health assessment should not be limited to the disorders contained in the DSM-5, nor to those that may absolve the defendant of criminal responsibility or make them ineligible for capital punishment.

PRACTICE TIPS

How can I contribute to the mental health assessment of my client?

- Learn about the signs and symptoms of mental disorders.
- The diagnosis, where possible, should be based on information gathered from the family and friends of the person being assessed. You can ask the investigating judge to order the experts to carry out certain research and to hear from certain people who could provide them with technical information.
- Obtain your client's medical and mental health records and ask the investigator to communicate them to the person conducting the medical assessment.
- Ensure that the person conducting the assessment uses words and phrases that your client can understand, not medical jargon. For example, in Mauritania, the expression "avoir la tête chaude" is commonly used to refer to a mental disorder. A person asked about the defendant's mental disorder may not understand what this means, but may be more likely to understand if a local expression is used.
- Similarly, if the person carrying out the assessment is called to give a statement of their findings, make sure that they do not use medical jargon, and that they explain their findings clearly so that the judges can understand.

How can the mental health assessment be used?

A mental health assessment can be used at different stages of proceedings in a death penalty case. Even if your client is not found to be insane or to have a mental disorder that renders them legally irresponsible, other mental disorders may act as mitigating factors and contribute to a lighter sentence.

The case of *Uganda v. Bwenge Patrick* is a good example of the use of mental disorder as a mitigating factor in sentencing.¹³⁷ In this case, the Ugandan High Court re-sentenced a former death row inmate who had been imprisoned for seventeen years. The High Court gave

particular weight to evidence of the defendant's diminished mental capacity at the time of the crime, 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 many years he had already spent in prison.¹³⁸ Based on these mitigating factors, the High Court ruled that the defendant did not deserve the death penalty and re-sentenced him to the 17 years he had already served, along with an additional year in prison followed by a year of probation.¹³⁹

In Malawi, the courts have stated that signs of mental or emotional disturbance that do not amount to dementia may nonetheless contribute to a reduction in the guilt of a person accused of murder and should be taken into account as a mitigating factor in sentencing.¹⁴⁰

OVERCOMING BARRIERS

What can I do if I don't have the funds to hire an expert to conduct a mental health examination?

- *If no funds are available, consider reaching out to universities that teach psychology and forensic assessment. You may be able to find qualified individuals to conduct the assessment on a pro bono basis.*
- *Alternatively, 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 met your client before arrest and can testify about their mental state, their statements will be relevant to the court's assessment of culpability as well as its sentencing determination.*
- *As a last resort, many books, articles and some websites¹⁴¹ offer information on mental health that you may not be able to use in court, but which can give you some guidance.*

What other duties do I have to a client with mental disabilities?

Your client's mental disability may make them more vulnerable to the complications of the justice system and the dangers of imprisonment. As a result, you have special responsibilities to ensure that they understand their rights at all times and are treated appropriately while in prison.

Ensuring your client understands their rights

Individuals with mental disabilities may not understand their rights within the criminal justice system.¹⁴² You need to ensure that your client understands their rights and the procedures they are facing,

taking care to explain the process at every stage. You may need to take the lead in meeting with them regularly, as they may not be able to express their desire to meet with you when needed or may not understand how to request a meeting.

Ensuring your client receives adequate treatment

Your client has the right to receive adequate treatment while in prison and you must ensure that they receive it.¹⁴³ Most international human rights mechanisms guarantee the right to an adequate standard of living and health care. The UN *Standard Minimum Rules for the Treatment of Prisoners* mandates that the standards set by these mechanisms should be applied unwaveringly in prison settings.¹⁴⁴

You should ensure that your client is examined by qualified persons to assess their mental health upon admission to prison.¹⁴⁵ This allows medical staff to identify any pre-existing conditions so that they can be treated appropriately, to identify any disabilities or injuries that may be developing or have been sustained in custody, to analyse the psychological state of the detainee, and to provide appropriate support to those at potential risk of self-harm.¹⁴⁶ You should also ensure your client receives periodic examinations, including daily check-ups if they complain of illness.

OVERCOMING BARRIERS

What should I do if I think my client won't consent to a mental health assessment?

- *Address your client directly and let them 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 giving the impression that you think there is something "wrong" with them. Again, being honest, open, courteous 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 their 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 their trust in you. You must carefully weigh a number of competing factors: the extent of your client's disability, the likelihood that they will be sentenced to death if evidence of their disability is not presented, and the availability of alternative defence strategies. 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 mental disability while in prison, you must raise the issue in all appeals and clemency proceedings, as international law prohibits the execution of people with severe mental disabilities. You should also take care to inform their family members of any significant changes in their mental health.¹⁴⁷ If they have been declared legally incompetent on account of mental disability, you must ensure your client is released from prison and has access to appropriate treatment.¹⁴⁸

FOREIGN NATIONALS

What are the specific rights of foreign nationals?

If your client is a foreign national, they are entitled to legal procedures that may provide them with additional legal, diplomatic and expert assistance throughout the proceedings. Under article 36(1) (b) of the Vienna Convention on Consular Relations, the authorities must inform detained foreign nationals without delay of their right to have their consular representatives notified of their detention.¹⁴⁹ They also have the right to communicate freely with the consulate staff. Therefore, you should always try to determine whether any foreign country would consider your client as a citizen of that country, even if your client is also a citizen of Indonesia. They could have dual nationality. If you discover that this is the case, you should immediately inform them of their right to communicate with their consulate and, if they so wish, you should contact the office of the consulate immediately to inform them of your client's situation.¹⁵⁰

What can my client's consulate do?

Consulates can provide a wide range of services, including financial or legal assistance, depending on the case. Consulates can also facilitate crucial elements of the pre-trial investigation, such as contacting family members or researching the social background of the defendant. They can defend the rights of their nationals, offering diplomatic assistance and access to international tribunals. For example, the Mexican government sought and obtained rulings from the Inter-American Court of Human Rights and the International Court of Justice to vindicate the rights of its nationals who had been sentenced to death without being informed of their right to notify and access their consulate.¹⁵¹

If the prison authorities fail to advise your client of their consular rights, or prevent them from communicating with their consulate, you should apply to the court for an adequate remedy. If your client is in pre-trial detention, you should consider applying for a court order to compel the prison authorities to grant consular access. If the authorities took your client's statement without first informing them of their consular rights, consider applying for the exclusion of their statements and the invalidation of the record on that basis.¹⁵² If your client was sentenced to death without having had the opportunity to contact their consulate, you should ask that their conviction and sentence be vacated.¹⁵³

It is essential that you obtain the consent of your client before contacting their consulate. There are different contexts in which your client may prefer not to contact the consulate. For example, if they are a political dissident, informing their consulate may only have adverse consequences for them or their family.

Other considerations for foreign nationals

There are a range of unique barriers that a foreign national may face throughout the criminal justice process. In some cases, racial prejudice towards certain groups have undermined fair trials for foreign nationals in Indonesia. Nigerian national Humphrey Jefferson was executed in 2016 over drug-related offences, after his request for judicial review was refused by an Indonesian court. In an investigation afterwards, the Ombudsman of the Republic of Indonesia found maladministration, citing discrimination from the Jakarta District Court as amongst the reasons for the denial of his request.

Foreign nationals may also have difficulty understanding the complex vocabulary used in the court system if they do not have sufficient command of the language. Therefore, it is crucial to provide them with interpretation services, despite the linguistic capacity they may appear to have. If they accept interpretation services, make sure that the interpreter is present and assists them during all stages of the proceedings.

Similarly, a client may not understand the legal conventions of the country in which they are detained. You should take the time to explain their rights, and the procedures to which they will be subject. Some consulates may even provide culturally appropriate resources to explain how foreign legal systems work to their nationals.

Mary Jane Veloso: Filipina woman on death row in Indonesia

Mary Jane Veloso is a Filipina woman incarcerated on death row in Indonesia for drug trafficking. In April 2015, she was due to be executed along with eight other prisoners. However, she was spared at the last minute. Veloso still remains on death row.

Born to an impoverished family in the northern city of Cabanatuan, Veloso married at 17 but later separated from her husband. She moved to the United Arab Emirates in 2009 to earn money for her two young sons in the Philippines. Veloso says that a woman called Maria Kristina Sergio, the daughter of one of her godparents, told her to move to Indonesia for a maid's job in 2010. The woman gave her new clothes and a bag that she says she was unaware had heroin sewn into it. Upon Mary Jane's arrival in Yogyakarta Airport on April 25, 2010, security personnel detected something suspicious in her suitcase. They emptied its contents, ripped open the seams and found 2,6 kg of heroin—with a street value of about US\$500,000—hidden inside. The police immediately arrested Mary Jane.


During the investigation, Mary Jane received neither legal advice nor an interpreter. No-one from the Philippines embassy contacted her to offer her assistance. Because she could not afford to hire a lawyer, she was represented at trial by a state-funded attorney with little experience in capital cases. Her court-appointed interpreter was not only an unlicensed student, she also translated proceedings from Bahasa into English, a language which Mary Jane only partially understood. When Mary Jane's trial ended in October 2010, the prosecution requested a sentence of life imprisonment. In a marked departure from usual practice, the court in fact exceeded the prosecutor's recommendation and sentenced her to death.

In 2015, President Joko Widodo announced that nine prisoners (including Mary Jane) would be executed as part of his war on drugs. A coalition of advocacy groups, led by the Filipino organization Migrante International, organized a vigorous campaign on her behalf. Once publicized, Mary Jane's case elicited a lot of sympathy in the Philippines. Over 200,000 people from 127 different countries signed the #SaveMaryJane petition, and activists organized protests in the Philippines and Indonesia. Nonetheless Mary Jane's execution was scheduled to go forward until, shortly before the execution was to take place, Maria Cristina Sergio and her boyfriend, Julius Lacanilao—the recruiters who had sent Mary Jane to Indonesia—handed themselves in to the police in the Philippines. Filipino president Benigno Aquino III requested that Indonesia keep Mary Jane alive so that she could testify against Maria Cristina and Julius, who were charged with trafficking, illegal recruitment and fraud. The Indonesian government complied. Of the nine people scheduled to be executed on April 29, 2015, Mary Jane was the only person who survived.

CHAPTER 5



RIGHTS OF DEFENDANTS DURING TRIAL PROCEEDINGS AND DEFENCE STRATEGIES



IN LIMINE LITIS PLEAS OR CLAIMS

In limine litis (a Latin phrase meaning “at the threshold of trial proceedings”) pleas, applications or claims, must be raised at the outset of the proceedings, before any arguments on the merits, or they will be inadmissible.¹⁵⁴ If you do not raise certain pleas, applications or claims at the beginning of the proceedings, you will not be able to do so afterwards. These are mainly preliminary procedural objections, such as applications for a judicial act to be struck out on the ground of nullity, which must be submitted before any defence on the merits.¹⁵⁵ The form, timing and procedure by which these issues can be raised depends on your jurisdiction’s criminal procedure rules.

Some of the most common issues that should be raised before the beginning of the trial include:

- Access to adequate time, resources and facilities to prepare your client’s defence (see Introduction).
- Effective legal assistance in a capital case.
- Request for more time to prepare adequately for trial (see Introduction).
- The right of the defendant to legal advice and representation by counsel of their choosing.
- Your right as defence counsel to have your fees paid by the court or by the state if your client is indigent.
- The right to private and confidential communication with counsel.
- The right to release with the least restrictive conditions pending trial (see Chapter 1).
- The right to an adversarial procedure, including the right to challenge the charges.
- The right to object to evidence introduced by the prosecution.
- Calling and questioning witnesses at trial, i.e., your client’s right to present evidence in their defence, including calling witnesses and questioning prosecution witnesses.
- Change of venue.
- Constitutionality of the governing laws.
- Matters arising during the investigation process.
- The prosecutor’s discovery obligations or request to access to the case file.
- The right to access the case file, including newly discovered evidence if the investigation is still ongoing.
- Exclusion of coerced confessions.
- Exclusion of unlawfully obtained evidence.

- Exclusion of hearsay evidence.
- Free interpretation and translation services.
- The right of the defendant to be notified of charges in a language they understand.
- The right to humane treatment.
- Procedural matters governing the trial, including the courtroom procedure.
- Prohibition of double jeopardy (*ne bis in idem* or being tried twice for the same offence);
- Severance or joinder of charges.
- Public judgment, i.e., the right to a trial in public, rather than before a secret tribunal.
- Right to reasoned decisions on pre-trial issues.
- Removal of judge for bias or conflict of interest.
- The right to a prompt trial.
- The right of the defendant to be present at the trial.
- Sufficiency of the charging document.
- The right to trial by ordinary courts according to established legal procedures.
- The right to trial by an independent and impartial tribunal.

The decision to raise any or all of these claims will depend on the unique circumstances of your client’s case and strategic considerations. Some of these applications are discussed in more detail below.

SUCCESS STORY (CAMEROON)

When **Nestor Toko**, a lawyer from Cameroon, asked to have access to his client’s file before the opening of the trial, the public prosecutor categorically refused to give him a copy. The prosecution claimed that the case file contained its strategy and that it wanted to keep it secret. After several unsuccessful attempts, Nestor Toko wrote a letter in which he described the difficulties he was facing and sent it to the prosecutor and the president of the court. The prosecution reiterated its refusal to provide him with a copy. At the beginning of the trial, when the president of the court gave the floor to Nestor Toko to share his observations on the exhibits produced by the prosecution, the lawyer argued that it was impossible for him to do so since he had not had the opportunity to view the contents of the file prior to the hearing. He presented the written request he had sent before the hearing and asked permission to obtain a copy of the case file in order to prepare his observations. Recognising it as a right of the defence, the President ordered that the file be copied and sent to Nestor Toko, giving him 30 days to examine it.

RIGHT TO A FAIR TRIAL

Under international law, all individuals are entitled to due process and equality before the law.¹⁵⁶ These fundamental rights are multi-faceted. They include 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 physically present at trial and to participate in a meaningful way, the right to the presumption of innocence, and the right not to incriminate oneself.

RIGHT TO A FAIR HEARING BEFORE AN IMPARTIAL TRIBUNAL

Everyone charged with an offence is entitled to a fair hearing before an independent and impartial tribunal within a reasonable time of being charged or taken into custody. This right is fundamental and well-documented in international law.¹⁵⁷

What are the elements of the right to a fair trial?

All international and regional human rights instruments, as well as laws in many countries,¹⁵⁸ guarantee the right to a fair trial.¹⁵⁹ Some of the basic guarantees from these sources include:

- the principle of “equality of arms” between prosecution and defence;
- the right to adversarial proceedings;
- the right to prompt, intelligible and detailed information about the charges; and
- the right to adequate time and facilities to prepare the defence (see Introduction).

According to the Lawyers Committee for Human Rights, “The single most important criterion in evaluating the fairness of a trial is the observance of the principle of equality of arms between the defence and the prosecution.¹⁶⁰ 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”.

Equality of arms “means the obligation to give each party a reasonable opportunity to present its case under conditions which do not place it at a distinct disadvantage in relation to its opponent”.¹⁶¹

It is impossible to identify all of the situations that could violate this principle. Examples include the exclusion of the accused and/or counsel from a hearing where the prosecutor is present, or the denial of sufficient time to prepare a defence. This principle encompasses the defence counsel’s access to the case file to the extent that it is necessary to refute the charges and prepare your client’s defence.

The right to a fair trial also includes the right to a public hearing. As a matter of principle, hearings must be public, but there are some circumstances under which the public can be excluded from judicial proceedings. However, any judgment in criminal cases must be public.¹⁶²

SUCCESS STORY (BURUNDI)

In Avocats sans frontières (on behalf of Gaëtan Bwampamyé) v. Burundi, the African Commission ruled that the judge’s refusal to adjourn the hearing to enable attendance of the defendant’s counsel, who was absent due to ill-health, was contrary to the rights of the defence. The Commission found “the judge should have upheld the prayer of the accused, in view of the irreversible character of the penalty involved” (at the end of the hearing, the defendant was sentenced to death). “The Commission holds that by refusing to accede to the request for adjournment, the Court of Appeal violated the right to equal treatment, one of the fundamental principles of the right to fair trial”.¹⁶³ The Commission held that Burundi had violated Article 7(1)(c) of the African Charter and requested that Burundi take appropriate measures to allow reconsideration of the case.

How important is an independent and impartial tribunal?

The independence and impartiality of the court are essential to a fair trial. Judges should have no personal stake in a particular case and should not have preconceived opinions about its outcome. They must be able to form an opinion on the case without interference, pressure or improper influence from any branch of government or other source.¹⁶⁴ 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.¹⁶⁵

Under KUHAP, specific elements of the right to an impartial tribunal include:

- The obligation to resign from handling matter for chief justice of the trial, judge members, prosecutor general and the scribe in the event of a family relationship with the defendant or legal counsel (Art. 157).
- The prohibition of a judge from displaying an attitude or issuing a statement at trial about his conviction regarding the guilt or innocence of the accused (Art 158).
- The prohibition of a judge to adjudicate a case in which he himself has an interest, whether directly or indirectly (Article 220).

RIGHT TO A SPEEDY TRIAL

Every accused has the right to have their case heard within a reasonable time.¹⁶⁶ In criminal cases, the time to be taken into consideration starts running when a suspect is charged. Indonesian law contains no firm deadlines regarding when trials should be held, but specific provisions of law provide the rights to prompt investigation, prosecution and adjudication, demonstrating a desire that trials occur as early as possible after arrest or detention. What constitutes “undue delay” depends on the particular circumstances of the case, i.e., its complexity, the conduct of the parties, whether the accused is in custody, etc.¹⁶⁷

While delays in the prosecution may result in the right of a client to be released from detention or to claim compensation, there is no provision specifically providing for dismissal of a case because of excessive delay.

RIGHT TO RESPECT FOR THE PRESUMPTION OF INNOCENCE

Under international law, all defendants have the right to be presumed innocent.¹⁶⁸ 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. Similarly under Indonesian law, Article 8(1) of the Law No. 48 of 2009 concerning Judicial Power provides that “Anyone who is suspected, arrested, detained, prosecuted, or brought before a trial must be presumed innocent before a court decision states he is guilty and has permanent legal force”. Article 66 of the Law on Criminal Procedure also states that “A suspect or an accused shall not bear the burden of proof”. As a general rule, the burden of proof under criminal law is placed on the Public Prosecutor.

Although these provisions do 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”.¹⁶⁹

In some instances, the burden of proof is reversed. This is true, for example, for defendants charged under Article 98 of the Narcotics Law, who are responsible for demonstrating that certain assets are not proceeds of a drug-related crime. The Narcotics Law also presumes that individuals found with certain amounts of drugs were committing the act of drug trafficking. In 1993, 3 CLJ 113,¹⁷⁰ the judge ruled that a person that is accused of carrying a bag containing narcotics or the like must prove that the bag is not his.

As long as the overall burden of proving 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 defence in a particular case.

Judges and public authorities have a duty to maintain the presumption of innocence by “refrain[ing] from prejudging the outcome of a trial”.¹⁷¹ 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.

RIGHT TO BE PRESENT AT TRIAL AND TO HAVE ACCESS TO INTERPRETERS

To properly conduct a capital defence, you 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 their own defence.¹⁷² For your client’s participation in the defence to be meaningful, they will have to understand what is happening during the proceedings. International law provides that everyone is entitled “[t]o have the free assistance of an interpreter if he cannot understand or speak the language used in court”.¹⁷³ The right to a competent and qualified interpreter is also guaranteed under the KUHAP during the investigation and the trial proceedings.¹⁷⁴

However, the lack of an appropriate interpreter has been reported in cases involving people who do not speak Bahasa Indonesia, whether they are foreign nationals or Indonesian citizens.¹⁷⁵ In 2002, **Nonthanam M. Saicon**, a Thai national, was sentenced to death for drug smuggling. During the judicial review in 2016, the Supreme Court decided to reduce his sentence to life imprisonment because the Tangerang District Court had failed to provide a Thai interpreter during the trial.

You should ensure that the interpreter provided by the court is competent and experienced, and object whenever you observe that the interpreter has failed to give an accurate translation. In general, the right to interpretation also includes the translation of all relevant documents.¹⁷⁶ 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.

RIGHT TO CONFRONT AND EXAMINE WITNESSES

Everyone has the right to examine the witnesses against them. This right also entitles the defendant to obtain the attendance of witnesses on their behalf.¹⁷⁷ According to KUHAP, a suspect or an accused shall have the right to seek and call a witness and/or person with special expertise to provide testimony that is favorable to him (Article 65). Similarly, they must be able to examine any witness who is called, or whose evidence is relied on by the court (Articles 164, 165).

Several other rights flow from these basic principles. First, the parties should be treated equally with respect to the introduction of evidence by means of interrogation of witnesses (see section on witnesses below). 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 have sufficient time to prepare your client's defence. 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. Article 173 of the CrPC allows a judge to hear testimony "on certain matters" outside the presence of the accused, but the accused is informed of all that happened in his absence. You should object to this process as it denies the accused the full benefit of his right to a defense and cross-examination because he is not available to assist his counsel in that defense.

To prevent violations of these rights, you should urge the courts to scrutinise closely any claims of possible reprisals. Rather than removing the defendant from the courtroom, some less drastic measures can be taken, such as placing a screen between a witness and the defendant so that they cannot see each other, or allowing the defendant to view the testimony from another room. Removal of the accused or co-defendants from the courtroom should only occur when there is a risk of reprisals. If witnesses are questioned in your absence, you must object.

These rights 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 themselves or to confess guilt. The right not to incriminate oneself, in particular, "presupposes that the prosecution in a criminal case seek to prove their case against the accused without resort to evidence obtained through methods of coercion or oppression in defiance of the will of the accused. In this sense the right is closely linked to the presumption of innocence".¹⁷⁸

RIGHT TO KNOW THE GROUNDS OF THE TRIBUNAL'S DECISION: RIGHT TO A REASONED JUDGMENT

You should advocate strongly for your client's right to prompt access to a reasoned, written decision from the court. This right is inherent in the right to a fair trial and forms the basis for your client's right to appeal. If the court does not automatically provide a written judgment, you should ask the court to provide such a document as soon as the decision is made and to send it to you as defence counsel.

Similarly, Article 74(5) of the Statute of the International Criminal Court states that 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". 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.¹⁷⁹ The Criminal Chamber of the French Court of Cassation has held that "any judgment or ruling must include the reasons for the decision and address the main points of the parties' submissions. Insufficient or contradictory reasons are tantamount to their absence".¹⁸⁰ Therefore, you must check

whether the legal issues raised in the operative part of the parties' submissions have been examined, and whether the Court has addressed them satisfactorily in its judgment. In Cameroon, it is settled case law that failure to address the pleadings is tantamount to an absence of reasons, and such a judgment must be quashed.¹⁸¹ Decisions must contain genuine reasons, which is not the case of a judgment that simply states that "it is clear from the oral proceedings and the documents submitted to the court that the defendant has committed the offence of which he is accused"¹⁸² or that states that "the facts of the case are sufficiently proved".¹⁸³ In this case, you must ask for the judgment to be declared null and void on the basis of lack of reasoning.

DEVELOPING A DEFENCE STRATEGY

In order to represent your client effectively at trial, you will have to develop your trial strategy. First and foremost, this involves developing a theory of the case that will give your defence its overall shape. This manual seeks to provide some general rules and tips for developing a defence strategy. Some of these rules, such as developing a theory of the case, are universally applicable. Moreover, trial strategy will be affected by local rules, culture and your assessment of how the decision-maker will respond to the tactics you employ.

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 defence. A theory of the case is necessary in order to make sure that the case presented by the defence is consistent and believable. A theory of the case can also guide your search for information to prepare your defence. For example, your theory may be that your client killed the deceased in self-defence, or 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. The theory you develop will therefore guide you in your choice of

evidence to introduce, including the selection of witnesses and exhibits. A well-developed theory of the case should carry you through all phases of trial, witness examination and opening and closing arguments.

Comprehensive

A good theory of the case will be comprehensive, i.e., it needs to encompass all aspects of the case. 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 defence. 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 analyse all the facts and legal arguments that you might present, and select the theory of the case that best fits every element.

Consistent

In order to convince the judge of your theory of the case, your theory must be consistent. If possible, try to develop a theory of the case at the investigation stage that you can rely on at trial. Even though the composition of the court will not be the same, the contents of the investigation file will reflect your strategy and theory of the case at that stage. If you change your theory of the case during trial and take a position that contradicts the case you made at the investigation stage, you may lose credibility with the court. Thus, your theory at the investigation phase should lay the foundation for the case to be presented at trial and prepare the groundwork for presenting mitigating evidence to influence the sentence. You should therefore be as careful as possible to formulate a single, consistent case throughout the proceedings.

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 court 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.

Constant

Judges 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 pretrial motions, opening statement, presentation of evidence and closing argument.

You should make sure that your theory of the case includes all the elements necessary to determination of guilt and of the sentence from the outset. For example, if mental health issues are part of your theory of the case, you should introduce evidence of the defendant's mental health at the beginning of the trial and not wait until your closing argument to mention this mitigating factor.

Concise

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

WITNESSES AT TRIAL

What is the value of Testimonial Evidence?

The testimony of one witness (including the testimony the accused) is not sufficient to prove guilt. It must be supported by at least one other legal means of proof (Articles 185(2), 185(3) and 189(4)). The testimony of a witness who is not under oath may not satisfy the requirement of at least two means of proof being present to support a conviction. It may, however, serve as "supplementary proof" if supported by the testimony under oath of another witness.¹⁸⁴

Judges take in account the following factors when judging the truth of the testimony of witnesses¹⁸⁵:

- The consistency between the testimony of witnesses.
- The consistency between the testimony of witnesses and other means of proof, such as documents or indications.
- The possible reasons for a witness' testimony (motivation or bias).
- The way of life and the morality of a witness and any and all matters which normally may influence whether or not testimony can be believed.

Keep these factors in mind when deciding which witnesses to call and what questions to ask them.

Which witnesses should I call?

The number and type of witnesses you should call will vary depending on the charges faced by your client, the strength of the prosecution case and the resources available to you as defence counsel. In rare cases, your client may be best served by not calling any witnesses and instead focusing your client's defence on demonstrating the failure of the prosecution to meet its burden of proof for each element of the crime that your client is accused of committing. However, in most cases it will be necessary for you to call witnesses. Decisions regarding the type and number of witnesses you are going to call should be made in consultation with your client.

Fact witnesses

Fact witnesses are often crucial to a successful defence strategy and are discussed in Chapter 2. Witnesses who were with your client or at the scene at the time of the crime can provide important information to the court, for example concerning your client's alibi (and hence, their innocence), or whether they saw the accused, or showing that someone else committed the crime, or that your client acted in self-defence. Witnesses who were with your client at the time of their arrest can also often provide valuable information about their actions and the behaviour of the police.

Character witnesses

You can call witnesses who will provide information on your client's character. In rural communities, village chiefs may be very persuasive character witnesses. Colleagues, religious leaders, university professors and teachers can also provide compelling testimony regarding your client's good character.

Expert witnesses

Defendants have the right to "seek and call" expert witnesses (Article 65). The court may also call expert witnesses when "it is necessary to clarify the nature of an issue arising at trial." Where you have the resources, or where the court will pay for these costs, it is important to consider calling witnesses with specific qualifications to provide expertise or second opinions, for example to challenge the reliability of the investigative techniques used and to analyse the

prosecution's forensic evidence, the post-mortem report indicating the cause of death, identification parades, ballistic reports, and DNA and fingerprint evidence (see Chapters 2 and 3). Article 28(1) of the Criminal Procedure Code states that expert testimony is information given by a person who has special expertise on the matters entitled on a criminal case for the purposes of examination. If this evidence is crucial to your client's defence, your client has the right to have it heard by the court.¹⁸⁶ Before calling a witness with particular expertise, check their qualifications and experience and prior court testimony. There should be a clear understanding of what the expert's testimony will be, and advocates must educate themselves on the issue in question so that they understand what questions to ask and what the testimony means.

Should my client testify?

Indonesian law does not explicitly recognize the right of a suspect or accused to remain silent. It is important to note, however, that there is no provision that mandates that a suspect or accused speak. However, under Article 175, the judge can suggest that the defendant answer any questions when he or she refuses to do so. Even if the Judge is aware that the accused wishes to be silent, they may nonetheless ask questions of the accused under Article 164, 165, KUHP. You should object to this suggestion as a violation of Article 153 in that it causes the accused to answer involuntarily. You should also explain this to the client, and help the client implement the decision to remain silent.

One of the most fundamental decisions in defending a capital case is whether your client will testify. Allowing an accused defendant to proclaim his innocence and tell their side of the story can be an effective defence strategy. Conversely, if your client is unable to testify convincingly, or if they lack the ability to withstand strong cross examination, your client's interests may be best served by keeping them 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 them how their testimony may help or hurt their overall defence and how it may affect the strategy and themes you have developed.¹⁸⁷

What should I do if a witness refuses to cooperate?

The head judge is obligated to hear the testimony of any witness referenced in the letter bringing the action and/or any who

is requested by the prosecutor or the accused or their counsel (Article 160(1)(c) KUHP). If you identify a witness who may be helpful to your client's case, but who refuses to testify, you should ask the court to compel their participation in the proceedings. The court can issue a subpoena to force a witness to participate. Be sure you are familiar with the processes to compel such witnesses to attend judicial proceedings. You should be aware, however, that the UN 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.¹⁸⁸

What should I do after selecting 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 demeanour. 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. 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 a witness cannot appear at a hearing where their presence is needed and expected, it is important to notify the court immediately and to ask for the hearing to be postponed. If the court rejects your request, make sure that your request has been recorded in the notes of the hearing as this may be useful to you on appeal.

Witnesses must also be prepared on a substantive level and understand what is expected at the hearing. To avoid witness tampering, some jurisdictions place strict limits on the amount of access lawyers have to witnesses prior to a trial. When preparing a witness, your obligation is to assist the witness in giving their own version of events, their own testimony and not the testimony preferred by you or your client.

How should I examine witnesses?

Civil law systems are inquisitorial in nature, and it is usually the judge who examines the witnesses, rather than the lawyers. However, the influence of the adversarial system of common law jurisdictions has led many civil law jurisdictions to adopt a mixed system, in which

the trial phase becomes more adversarial, giving defence counsel greater freedom to examine witnesses, traditionally through the intermediary of the court.

In *common law* systems, there are two types of examination: direct examination and cross-examination. By transposition, in jurisdictions with a civil law tradition, a distinction is made between the examination of witnesses for the defence and the examination of witnesses for the prosecution. You will not ask questions in the same way depending on whether the witnesses are for the prosecution or the defence. The questions you ask the witnesses must reinforce your theory of the case.

Examining defence witnesses

Asking questions of defence witnesses is an opportunity for you to present your client's case. It serves to further your defence strategy and to develop your theory of the case. Witness statements can lay the foundation for evidence you intend to introduce to support your client's defence. For each witness you are considering, ask yourself the following questions:

- What do I intend to prove or disprove with this testimony?
- How does this testimony support the theory I have developed?
- Can this testimony undermine incriminating evidence?
- Can this testimony bolster or undermine the credibility of other witnesses?
- Can I use this witness to introduce any of the exculpatory evidence I intend to present?
- Is the witness subject to harmful cross-examination because of prior inconsistent statements, a history of lying, their character or reputation? (See, KUHP, 185(6))

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, and your strategy will suffer.

Another purpose of examination of defence witnesses is to bolster their credibility. When appropriate you should ask your witnesses questions that will allow them to testify regarding their reasons for testifying, the basis for their knowledge, their ability to 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 about which they are testifying.

Examining prosecution witnesses

Asking questions of prosecution witnesses gives you the opportunity to challenge their evidence. To properly prepare, you should evaluate what you expect the prosecution's witnesses to say and whether you will need to challenge that information.

Leading questions are not permitted during trial in Indonesia. As a result, you cannot ask closed, or one-fact questions to control an adversarial witness. 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 defence. Frame questions, during cross examination, as narrowly as possible to elicit only the testimony that supports your theory of case or mitigates the government's theory.

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 identify inconsistencies in the testimony of the witness and a prior witness?
- Was the witness in a position to observe the incident about which they are testifying?
- Can the witness help you to establish facts that undermine aspects of the prosecution case?
- Can the witness help you to establish facts that are helpful to your theory and strategy?
- Can you minimise or discredit any damaging testimony that came out during examination of the witness by the prosecutor?
- Can you get the witness to retract or discredit their own testimony?
- Can you get the witness to admit that they are uncertain about something they said?
- Can additional facts be raised that will lessen the impact of the witness's direct examination?

- If the witness overstated their knowledge about an issue, can you make them retract or back away from that testimony?
- Has the witness ever been accused of lying under oath?
- Has the witness ever been convicted of a crime? (You should investigate the criminal records of all witnesses and demand access to them).
- Has the witness attempted to present evidence that is outside their area of expertise?
- Is the witness an expert whose expertise, training, knowledge or experience can be challenged?
- Can the witness's independence be challenged?
- Does a witness meet your jurisdiction's requirements to qualify as an expert witness?

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

EVIDENCE

The burden of proof is on the prosecution to rebut the presumption of innocence and prove the guilt of the accused beyond reasonable doubt, so as to convince the court. Your client can therefore in principle remain silent because the defence does not have to prove that they are not guilty. However, it is usually in the defendant's interest to provide evidence that will counter the evidence presented by the prosecution.

What evidence should be presented and how should it be presented?

As a matter of principle, in criminal law, all types of evidence are admissible.¹⁸⁹ Under Indonesian criminal procedure laws, judges cannot convict a defendant unless they have strong belief (*memperoleh keyakinan*) that a crime has taken place and that the accused has committed it. The strong belief must be supported by at least two valid pieces of evidence (*alat bukti yang sah*) (Article 183). According to Article 184 of the KUHP, the following types of evidence exist:

- Witness statements
- Expert testimony
- Letters/documents
- Indications (*petunjuk*)
- Statement of the accused/the defendant

Judges assess the probative value of the evidence presented to them according to their personal conviction, i.e., judges have discretion to assess the weight to be given to each piece of evidence.¹⁹⁰ This means that no evidence is irrefutable or absolute. However, there are rules governing the admissibility of evidence. All evidence must respect the adversarial principle, which means that it must be submitted to the parties for debate, otherwise it will not be admissible.¹⁹¹ In some jurisdictions, even if evidence is obtained illegally or unfairly, it is still admissible (but the person who provided the evidence may be liable to prosecution).

In order to prepare for trial, you need to determine what evidence you want to present to support your case and ensure that the evidence is admissible. Although the specifics of each case will dictate the type of evidence you should present, consider whether there is any physical evidence that could exonerate your client or support mitigating factors. Favourable reports from forensic experts, for example on ballistics, DNA or fingerprint evidence, should be submitted to the court. Similarly, if you have reports from mental health experts that describe the psychological state of your client, they should be presented to the Court.

How can I object to the presentation of evidence?

Although it is impossible to list all the types of evidence that are inadmissible and the exceptions to those exclusionary rules, it is important that you are aware of several common principles and examples. These rules are not exhaustive and you must study all relevant legislation and directives depending on which evidence is being presented.

Physical Evidence

Physical evidence can have an unparalleled persuasive effect on a judge. You should object to the destruction or loss of any physical evidence prior to defense examination of that evidence, review of the evidence by an appropriate defense expert, or completion of the trial, depending on the circumstances (e.g., the possible destruction of drugs before the defense has had the opportunity to have them tested).

All physical evidence must be authenticated either through witness testimony or by presenting an unbroken chain of possession from

the time it was collected to the time it was presented in court. You should raise an objection if the evidence is not authenticated through one of these two means.

Evidence obtained illegally or improperly will not necessarily be inadmissible under Indonesia criminal procedure. Ask yourself the following questions: Is the evidence reliable? Does the evidence affect the right of your client to a fair trial?

Documentary Evidence

You should object to evidence being improperly admitted through a document, rather than through a live witness.

Indications

Article 188 provides that indications may arise only from: (a) the testimony of the witness or accused; and (b) a document. Therefore, you should object to indications arising from any other sources, such as physical evidence other than documents.

Witness Testimony

You should be able to challenge testimony if the witness is speculating or guessing, or does not qualify as an expert witness and is attempting to testify about his opinions or conclusions. As a matter of principle, witnesses must testify to what they have seen or heard. Therefore, hearsay evidence is generally inadmissible.¹⁹² Article 185, KUHAP provides that witness testimony should not include information learned from another party or testimonium de auditu (hearsay evidence). There is one exception to the rule against hearsay evidence: if a witness testifies during an investigation and either dies or for another valid reason cannot be present at trial, then that witness' testimony during the investigation shall be read in court; if the investigatory testimony was given under oath, then it shall be considered equal in value to testimony given under oath at trial. On the other hand, evidence "by common knowledge", which concerns facts of which the witnesses did not have personal knowledge, but of which they simply heard, is not admitted.

As a matter of principle, only statements made during a trial can be used as evidence. 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 (...)"¹⁹³ 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 from crime scene witnesses 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 court.¹⁹⁴ Be vigilant in relation to attempts to circumvent your client's right to cross-examine adverse witnesses and remind the court of the adversarial principle whenever it accepts witness statements as evidence without giving the accused a proper and sufficient opportunity to challenge the incriminating evidence.

PREPARING AN OPENING AND CLOSING STATEMENT

The opening and closing statements are critical opportunities for the defence. Your introduction is your first chance to present your theory of the case in a comprehensive way to the judge or jury. Similarly, your closing argument is your final chance to explain the various pieces of evidence and to convince the judge or jury of your client's innocence and/or the mitigating circumstances of the case. You should therefore spend time preparing and practising what you will say in your introduction and conclusion. This will help you to be credible and convincing.

Opening statement

Opening arguments are crucial opportunities to present your case. It is therefore advisable to make a request to the president of the court to be able to make an opening statement. You could, for example, say: "I respectfully request the opportunity to say a few words before the court begins to hear evidence, as I think it will help the court to understand what is at stake in this trial".

Your introduction should be factual in nature. You should tell the judge or jury the narrative that forms the theory of your case. You do not need to cover all the facts in your opening statement, but make sure you cover the most important aspects of your version of events. Try to present a compelling and believable story that is supported by the evidence.

You should start with a sentence or two that summarises your case simply and concisely. You should then proceed to tell the narrative that communicates your client's innocence or reduced culpability. As with every stage of trial, you should be mindful to weave in themes that apply to the determination of guilt and sentencing. These themes should complement each other.


Use the prescribed formalities, such as "May it please the Court". The best opening statements are short and simple.

Closing argument


Your closing argument is your last opportunity to leave the judges with an impression of your case. This is a chance to summarise the evidence and, more importantly, to explain what the evidence means and how it fits into your overall theory of the case. Your argument should be limited to the evidence presented and the reasonable inferences that can be drawn from it. 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 present the conclusions that should be drawn by the judge or jury from the evidence that has been presented.

In some jurisdictions, after the prosecution has made its case and the defence counsel has made a closing statement, 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 them to prepare the content of their statement and the manner in which they will deliver it.

CHAPTER 6



INDIVIDUALISATION OF SENTENCES



INTRODUCTION

Capital defence lawyers should take advantage of every opportunity to argue against imposing the death penalty on their client at every stage of the case. You should start looking for evidence of mitigating circumstances as soon as possible after being appointed as a lawyer in a case.¹⁹⁵ The strategy you develop in relation to mitigating evidence should be consistent with the theory of the case you will be presenting (see Chapter 4 for guidance on developing the theory of the case). In Indonesia there is generally no separate sentencing phase. In general, before a court imposes a sentence, both the prosecution and defence are given an opportunity to address the court on sentence. Therefore, you must present all the evidence relating to culpability (exculpatory evidence) and sentence (mitigating evidence) at the same hearing. Regardless of whether you develop a defence based on your client's innocence, you must present your client in a way that humanises them through their psycho-social history and mitigating evidence from the very beginning of proceedings. This approach does not imply an admission of guilt.

The principle of individualisation of sentences allows judges to use their discretion to impose a “tailor-made” sentence, adapted to the seriousness of the offence and to the circumstances surrounding the offence and the offender. As such, although they do not necessarily meet the criteria for exoneration from responsibility, mitigating factors can be used to *explain* the behaviour of the accused, to humanise them, and thus to elicit compassion from the sentencing judges, so that an alternative to the death penalty is imposed.¹⁹⁶

Respect for the principle of individualisation of sentences is guaranteed through the obligation to give reasoned decisions,¹⁹⁷ including with regard to the sentence imposed, and is also linked to the principle of legality of sentences. You must ensure that the court takes into account the circumstances surrounding the offence and your client when sentencing. You must therefore ensure that the information necessary for an informed decision on sentence is presented to the Court.

The case law of Indian courts also illustrates how such circumstances might be evaluated. In *Mulla et al. 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.¹⁹⁸ The court also emphasised 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.¹⁹⁹

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 defence of diminished responsibility—mitigates strongly against the death penalty.²⁰⁰ The UN Commission on Human Rights has urged countries not to execute people with mental disorders or intellectual disabilities. In 2002, the US Supreme Court cited an international consensus that “mentally retarded offenders are categorically less culpable than the average criminal”.²⁰¹

MITIGATING EVIDENCE

Mitigating evidence may include both the circumstances of the offence and the circumstances of the defendant. There is no legal definition of mitigating factors or exhaustive list of circumstances that can be considered mitigating.²⁰² Instead, you have full freedom to present all relevant evidence that will help the judge understand the circumstances of your client. Although it is the role of the police or investigators to investigate the case for both the prosecution and the defence, in practice they are more focused on the facts of the case against the accused, and hardly ever focuses on mitigating circumstances. You should therefore seek out several types of mitigating evidence to present on behalf of your client, including evidence related to:

- The circumstances of the crime (self-defence, duress, threat, provocation, etc.).
- The mental health of the accused (mental disorder, intellectual disability).
- The lack of previous criminal history.
- The background of the accused (family, social and medical history).
- The good character of the accused.
- Expression of remorse.

- Interests of the community.
- Previous cases with similar facts where the sentence was mitigated
- Other factors that may elicit the court's compassion.

You can conduct this research with the help of paralegals and colleagues. You can, for example, meet the relatives of the accused, if they are not already witnesses, so that you can then propose them to the investigating judge as witnesses at the investigation stage, or have them called as witnesses at the trial later on. As long as you do not reveal information that is part of the confidentiality of the investigation or that comes from your confidential communications with your client, and you do not suggest answers to the individuals you are questioning, but only collect information, this does not pose an ethical problem.

The defendant's remorse can be a powerful mitigating factor. You should keep in mind that the expression of remorse may take a different form to that you may expect; expressions of remorse are affected by both cultural norms and mental disorders. For example, individuals who have endured traumatic experiences may find it difficult to express their emotions. 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.

SUCCESS STORIES

In Uganda, the Foundation for Human Rights Initiative (FHRI) assists legal aid lawyers in conducting capital case investigations. Recognising that legal aid lawyers are often unable to conduct sufficient research and investigation prior to trial, FHRI 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 the Human Rights Initiative

In Malawi, the Malawi Human Rights Commission and the Paralegal Advisory Service worked together to enforce two decisions of the Malawi Supreme Court declaring the mandatory death penalty unconstitutional and calling for the review of sentences against those automatically sentenced to death.²⁰³ The two bodies conducted investigations into mitigating circumstances in 168 cases. After reviewing the evidence, the courts decided that no former death row inmate deserved the death penalty. More than 140 prisoners have been released after serving a prison sentence.

CIRCUMSTANCES OF THE CRIME

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 UN Human Rights Committee defines as crimes that result in the loss of life.²⁰⁴ The African Commission on Human and Peoples' Rights has also included this principle in the *Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa*.²⁰⁵

The UN Special Rapporteur on Extrajudicial, Summary, or Arbitrary Executions has further concluded that, “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.”²⁰⁶ It follows 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 killing—such as an accidental death during a bar fight—is not one of the most serious crimes and would not warrant the death penalty. Nor should the death penalty be imposed for a murder conviction based on mere participation in a crime leading to death, where the defendant did not kill or intend to kill anyone.

It is widely recognised 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”.²⁰⁷ In other words, the death penalty should be an exception and the recommended sentence for any crime punishable by death would be life imprisonment or a term of years – including in the most serious cases of murder.²⁰⁸ 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.²⁰⁹ 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”.²¹⁰ Thus, if the crime for which the accused was charged was not premeditated and did not involve torture or other aggravating circumstances, you should argue that it does not merit the ultimate sanction of the death penalty.

In some cases, you may also argue that the role of your client in the crime is relatively minor and therefore deserves a lesser sentence than the main perpetrators. It is also possible that the accused was provoked or acted under extreme stress. For example, in a case involving an act of terrorism 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 they were acting in self-defence or defence of another, even though their reasoning was flawed. This, again, may show that they were less culpable of the crime. For example, they may have acted to end the abuse of a family member by a partner or close relative.

Thus, even in the event that the accused is convicted of the crime, you should argue that there are special circumstances that mitigate their responsibility and should be taken into account in sentencing.

THE DEFENDANT'S MENTAL CONDITION

Mental health problems and trauma are often not discussed and there is a real risk that lawyers and courts will minimise the impact of these disorders. Detecting a mental disorder in an accused could save their life. It is not uncommon for an accused not to have dementia, but to have a mental disorder that reduces responsibility. Indeed, even if the disorder does not completely remove the accused's capacity and free will, at the time of the crime the disorder may have diminished the accused's capacity and ability to control their actions, and therefore merits consideration in sentencing.²¹¹ Examples of such disorders include low intelligence, post-traumatic stress disorder, schizophrenia, bipolar disorder, intellectual disability, foetal alcohol syndrome, pesticide or lead poisoning, and head injuries caused by accidents or beatings. Medical and psychiatric tests and evaluations may be required to prove that the accused is affected by one of these conditions.

Studies in several countries have shown that people who have suffered a head injury have a higher risk of committing a crime because of the cognitive and psycho-behavioural problems that follow.²¹² However, you should be careful if you decide to use this argument to avoid it backfiring on your client. Your client could

be perceived as a greater danger to their community because of their disorder.

Evidence of mental disorder may enable you to show the court that the accused's mental capacity or ability to control their actions was impaired, that they were vulnerable to mood swings and outbursts of anger, or that they have difficulty understanding and communicating with those around them. These factors will not necessarily allow you to plead insanity (which would lead to your client not being criminally responsible),²¹³ but they may be mitigating factors. They can help you to explain the circumstances of the crime and thus to inspire empathy for the defendant.

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. Mr Kamanga was sentenced to death in 2009 for killing his uncle's maid by striking her on the head with a footstool. Mr Kamanga argued that the victim's death was not intentional. He told the court that at the time of the crime he was suffering from severe and debilitating headaches. His mother and aunt told the court that he had been suffering from unexplained headaches and inexplicable rages for some time, despite seeking treatment from a traditional healer. Mr Kamanga's legal aid lawyer argued that he was insane at the time of the crime, but he did not support his defence with expert testimony. The court rejected the defence case and found Mr Kamanga guilty of murder. The defence failed to argue that Mr Kamanga's mental disorder should be taken into account as a mitigating factor to reduce his sentence and limited its presentation of mitigating circumstances to Mr Kamanga's young age and his lack of previous criminal convictions. The court sentenced Mr Kamanga to death without discussing any mitigating factors.*
- *This is a good example of how lawyers often fail to recognise the connection between a mental disability and 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.*

SUCCESS STORY

Case V. M. (Malawi)

In Malawi, as part of the sentence review hearings following the abolition of the mandatory death penalty, a mental health expert conducted an interview with a woman who had been sentenced to death for the murder of her grandson. On the basis of a clinical assessment, the expert concluded that she had an intellectual disability that was caused by alcohol, as her mother had consumed alcohol during pregnancy. The legal assistants and lawyers provided the expert with statements they had collected from the woman's family and friends, which included accounts of the famine that was taking place at the time. The expert explained that the stress of the famine, combined with her intellectual disability, had affected the defendant's ability to reason at the time of the crime. She had beaten her grandson after learning that he had stolen a neighbour's food. The court relied on the expert's statements to commute V. M.'s death sentence to a prison term.

THE DEFENDANT'S PERSONAL HISTORY

Whether or not tests and interviews with your client reveal a mental disorder or intellectual disability, you should research their family, social and medical history to find clues to explain their behaviour. Elements of their history may include sexual or physical abuse and maltreatment, childhood neglect, extreme poverty, other trauma, experiences of 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 judge how the defendant's difficult circumstances put them in the position to commit the crime.

By presenting your client's history you can show them in a better light and thus give the court a strong reason to impose a lighter sentence.

SUCCESS STORY (MALAWI)

In Malawi, in the case of Republic v. Richard Maulidi and Julius Khanawa, the defendants had robbed an elderly person who was fatally injured. The lawyers presented the difficult circumstances of the defendants to the sentence review court to explain their actions. The High Court took into account the fact that these people were living in abject poverty and had acted out of hunger and desperation. Because of their desperate situation, the Court did not sentence them to death, but to 19 years' imprisonment.²¹⁴

PRACTICE TIP

How should I conduct an interview with my client or their family members to gather information about my client's life history and sensitive issues?

- If you are meeting the person for the first time, start by explaining who you are and why you need to collect information about the accused's life history.
- Make sure that the person understands the language you are using, and if not, use an interpreter.
- Do not use overly technical or scholarly language. Adapt your language to the person you are questioning so that they understand you.
- Ask the person to tell you specific stories in as much detail as possible.
- In some cultures, it may be taboo for a man to talk to a woman alone and discuss matters connected to the latter's modesty. You may need to be accompanied by someone of the same gender as the person to whom you want to ask questions.
- Do not be judgmental or behave as if you are conducting an interrogation. Try to put the person at ease so that they feel confident to open up to you and reveal potentially difficult things about the defendant's life history.
- In relation to certain topics that may elicit shame or dishonour, or that are not openly discussed in some cultures (e.g., alcohol and drug use, sexuality, health, family, etc.), start by asking general, open-ended questions, and then limit yourself to more specific questions. It can be helpful to ask questions in a roundabout way. The person may become defensive if you ask a sensitive question too directly, such as "Did you drink alcohol during your pregnancy?" You could ask, for example, if anyone makes alcohol in the village, or if young people drink alcohol, or if they allow alcohol in their house. To the extent possible, try to use the same language and codes as the community.
- Remind the person that you will not publicly disclose information that they wish to keep confidential.
- You can find more advice on how to conduct interviews with your client and what questions to ask on the Cornell Center on the Death Penalty Worldwide website: <https://deathpenaltyworldwide.org/fr/>.

EVIDENCE OF GOOD CHARACTER

You should make every effort to portray your client's character in a favourable light and show the court their good character. You can do this by presenting character witnesses²¹⁵ and physical evidence (see Chapter 4 for more details). Depending on the facts, you may wish to emphasise your client's low level of participation in a crime and his lack of future dangerousness or likelihood to reoffend. If a client is a first-time offender, you should emphasise that fact.

You may also be able to demonstrate your client's remorse. Showing that the client voluntarily confessed to the offence 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 who are well cared for, stable employment, completion of military service, participation in community activities, church attendance, educational commitments, or participation in drug or alcohol rehabilitation programmes.

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 sewing, carpentry, welding, or car mechanics. Such activities demonstrate that an offender has the capacity for reform. Holding positions of service or responsibility in the prison community may provide a good argument that your client is able to adapt and rehabilitate.

OVERCOMING BARRIERS

What should I do if an investigation into my client's good character has not been carried out by the investigating judge?

- If you have to defend an accused at trial and no investigation into their life history and family, social and professional situation has been carried out, ask the court to postpone sentencing until such an investigation has been conducted so that the court can ensure individualisation of the sentence.
- If the court refuses to order a character investigation, you will have to present the court with information about the background and character of your client. This is essential in order to defend their interests and to do everything possible to ensure that the sentence handed down takes account of their personal circumstances.

OTHER ELEMENTS THAT MAY ELICIT THE COURT'S COMPASSION

Many of the factors described above may elicit compassion and leniency by the court. In addition, in some cases you may be able to present evidence that your client suffers from ill health or has endured difficult conditions in prison. For example, an offender's HIV status may be a factor that attracts the court's sympathy. Elderly offenders who have limited ability to withstand the rigors of prison life may also gain the court's compassion. Indeed, as previously mentioned, some international authorities have found it impermissibly cruel to execute the elderly.

Various national and international tribunals have held that detention for a long period on death row may constitute cruel and unusual punishment.²¹⁶ In *The Queen v. Patrick Reyes*, the Belize Supreme Court held that the appellant's detention on death row for more than three years was in itself a circumstance justifying mitigation of his sentence.²¹⁷

Similarly, you may be able to argue that a long period of time spent in pre-trial detention or on remand justifies the imposition of a lesser sentence, since the offender has already been heavily punished for their crime. Prison overcrowding, lack of food, exposure to infectious disease, lack of activities, and the inability to have contact with family are factors that add to the punishment an offender has endured for their crime.²¹⁸ In the case of *Republic of Malawi v. Chiliko Senti*, the Malawi High Court held that the appalling conditions in which the defendant was detained, which fell far

below international standards, should be taken into account when reviewing the sentence and that imprisonment in such conditions was punishment in itself.

Finally, the victim's family may be a source of input into the determination of the sentence. In some countries, a defence 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

What areas should I explore during my research into mitigating circumstances that may be relevant to sentencing?²¹⁹

- *Medical history (including hospitalisations, mental and physical illness or injury, alcohol and drug use, pre-natal and birth trauma, malnutrition, developmental delays, and neurological damage).*
- *Family and social history (physical, sexual or emotional abuse; family history of mental illness, cognitive impairments, substance abuse, or domestic violence; poverty, familial instability, neighbourhood 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 discrimination on race, social or ethnic grounds; cultural or religious influences; failures of government and child protection services (e.g., failure to intervene or provide necessary services, placement in poor quality foster care or juvenile detention facilities).*
- *Educational history (including achievement, performance, behaviour and activities), special educational needs (including cognitive limitations and learning disabilities) and opportunity or lack thereof, and activities.*
- *Military service (including length and type of service, conduct, special training, combat exposure, health and mental health services).*
- *Employment and training history (including skills and performance, and barriers to employability).*
- *Prior juvenile and adult correctional experience (including conduct while under supervision, in institutions of education or training, and regarding clinical services).*

OTHER ARGUMENTS TO CHALLENGE THE 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. In a criminal case, challenges to the imposition of the death penalty can usually be raised: at the outset of the trial or later when raising mitigating circumstances aimed at eliciting the court's leniency or, if the death penalty is imposed at first instance, during an appeal. These arguments are more fully developed in Chapter 7, which addresses post-conviction appeals.

CHAPTER 7



APPEALS AND POST-CONVICTION RELIEF



In this chapter, we will provide some insight on the duty of effective representation after a death sentence and advice on how to make sure that your client's right to a fair trial will be respected during an appeal and when seeking other forms of relief. We will also consider different approaches to challenging the legality of the death penalty in your country and the lawfulness of its application to your client.

DEFENDING YOUR CLIENT'S RIGHTS AFTER CONVICTION

RIGHT TO APPEAL CONVICTION AND SENTENCE

Indonesia

The right to appeal a capital conviction is provided under Indonesian law.²²⁰ In general, individuals charged by the public prosecutor with an offence punishable by the death penalty are first tried in lower district courts. The conviction and sentence can be appealed before the high courts (pengadilan tinggi) and the Supreme Court (Mahkamah Agung). The death penalty may be imposed at any stage during the criminal justice process – by the lower district court, the high courts or the Supreme Court. Once the Supreme Court has imposed the sentence or confirmed the sentence issued by the lower court, the remaining legal avenues are to submit an application to the Supreme Court for a case review (Peninjauan Kembali, PK) and to seek clemency from the President.

In Indonesia, there are no hearings during appeals and no opportunities for verbal submissions.²²¹ The High Court, during the first appeal, reviews the decision of the district court based upon whether or not there was a negligent application of law, a mistake was made, or the examination was incomplete. The High Court has the option of remitting the decision back to the same district court, making the correction itself (Art. 240(1)) or vacating the decision entirely and issuing its own (Art. 240(2)). If the parties (both defence and prosecution) are dissatisfied with the High Court's decision, they can apply for Cassation (kasasi) by the Supreme Court. Formally, the purpose of cassation is to ensure the correct application of the law. However, in practice, the Supreme Court usually reconsiders matters of fact by characterizing them as involving problems of law.²²² The Court's approach in this matter is generally inconsistent.

Following a cassation decision, there is an extraordinary legal remedy available under the KUHP called reconsideration (peninjauan kembali, or PK). A PK enables the Supreme Court to reopen a decision of any court (except the Constitutional Court), including its own cassation decisions. The requirements for a PK are: (1) the emergence of new determinative evidence or circumstances (novum); (2) judicial error; or (3) inconsistent lower court decisions.

A Constitutional Review can also be initiated to challenge the constitutionality of a law before the Constitutional Court (MKRI). However, this remedy is not available to foreign nationals.²²³

HOW MANY RECONSIDERATION (PK) APPLICATIONS CAN BE FILED?

In 2013, the Constitutional Court removed the restrictions under Article 268(3) KUHP that prevented a person from lodging more than one PK application (34/PUU-XI/2013). However, in December 2014, the Supreme Court issued Circular Letter No. 7/2014 reaffirming that only one application was allowed per case review, and only on the basis of new evidence. According to Amnesty International and other Indonesian human rights groups, the Circular Letter was issued following an intervention by the Attorney General and the Ministry of Law and Human Rights, who stated that multiple case review applications would "interfere with executions". In 2016 and 2017, the Constitutional Court in a series of decisions held that the Supreme Court's interpretation did not apply to criminal cases (108/PUU-XIV/2016, 1/PUU-XV/2017 and 23/PUU-XV/2017). The Supreme Court largely respects the Constitutional Court's decision and has entertained multiple PKs in some cases.

International Law and Comparative Practice

Many international human rights instruments provide for the right to appeal.²²⁴ The UN Human Rights Committee has stressed that the right to appeal is of particular importance in cases where the convicted person faces the death penalty.²²⁵ Further, a state must provide free legal aid on appeal if the prisoner cannot afford to retain his or her own lawyer.²²⁶

In many countries, the law provides that a convicted person may present new evidence on appeal. In addition, the African Commission considers that the right to appeal includes the right to review of a case when new evidence is discovered after conviction, and therefore

accepts that new evidence can be considered on appeal.²²⁷ 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. In the case of *Benedetto v. The Queen*, the Judicial Committee of the Privy Council, the final court of appeal for many commonwealth states, held that the discretionary power of appellate judges to receive fresh evidence represents a potentially very significant safeguard against the possibility of injustice; and that 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. According to the Judicial Committee, the defendant should be punished for the crimes he has committed, not for the failure of his representatives to conduct his defence as they ought.²²⁸

In any event, it is generally accepted that the right to appeal is a fundamental right, particularly in death penalty cases, and it is essential that your client be given the opportunity to challenge the lawfulness of their conviction and sentence before a higher court.²²⁹

Some countries impose limitations on the right to seek review of a conviction. These limitations must have a legitimate aim and must not infringe the very essence of the right to review.²³⁰ 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 this regard, the UN Human Rights Committee has repeatedly reaffirmed that convicted persons have the right to have their appeal heard within a reasonable time.²³¹

You have a duty to respect the time limits and conditions, but you can also challenge unreasonable limitations that infringe the convicted person's right to access a court. For example, in March 2012, the Eastern Caribbean Court of Appeal held that a 14-day time limit for filing a death penalty appeal was an unreasonable and arbitrary limit on a death row prisoner's right to appeal.²³² 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."²³³

CAN YOU APPEAL OR APPLY FOR RELIEF IF THE CASE FILE IN YOUR CLIENT'S CASE HAS BEEN LOST?

- *The loss of certain elements of the case file, or the entire file, by the judicial administration must not penalise the convicted person. Their right to lodge an appeal or seek review must not therefore be jeopardised by the absence of case file documents.*
- *In Malawi, in the context of death penalty review proceedings, many files could not be found. In the case of Republic v. Lackson Dzimhiri, the High Court ruled that the loss of the file should not penalise the convicted person by preventing them from exercising the right to appeal. The Court added that it would be inconceivable to impose a death sentence where part of the record was missing and there were grey areas surrounding the circumstances in which the offence was committed.²³⁴*

PRACTICAL SUGGESTIONS

Meet with your client as soon as possible

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

The psychological impact of a death sentence is immense, and this impact is sometimes compounded by harsh prison conditions. Both of these factors can weaken the convicted person's health and make them unwilling or unable to help you prepare for their defence 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 their actions (for example, if they decide to represent themselves on appeal). Your client should also be advised of any action they should take personally, according to your national law—for instance, to file an application for legal aid. You should advise them in unambiguous terms what to do and when to do it.

See Introduction for more information on the duty to provide effective representation and the lawyer-client relationship.

Obtain court records and transcripts of 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.²³⁵ Access to these records is an inherent part of the right to a fair trial and the correlative principle of equality of arms,²³⁶ according to which “each party must be given a reasonable opportunity to present his case in conditions which do not place him at a disadvantage compared with his opponent”.²³⁷

Get a copy of the file kept by the previous counsel

If you did not represent the convicted person at trial, you should contact the trial counsel and arrange to obtain their file. Take the opportunity to discuss their 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 behaviour, but it will also allow you to assess what issues to raise on appeal. Try to find out about the work done by the previous lawyer. This may enable you to argue on appeal that the convicted person did not receive effective representation at first instance. Be careful, however, not to appear hostile and ensure that you ask questions in a neutral and disinterested manner (see Section II.E below).

Look for new exculpatory evidence

New evidence can be presented during appeal and post-conviction reviews in Indonesia. Where possible, always start by considering

whether there is any new evidence or lines of enquiry that have not yet been explored. For example, if evidence of mitigating circumstances was not presented at first instance but you are satisfied that the convicted person has a mental disorder, you may wish to introduce evidence such as psychiatric reports or testimony from lay witnesses establishing the nature of their disability and the extent to which it impairs their judgment and behaviour.

For example, in *Pitman v. 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.²³⁸ 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 defence offered a reasonable explanation for the failure to adduce medical evidence at trial.

Similarly, in *Solomon v. the State*, the Judicial Committee of 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 offence. 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 hospitalised for depression prior to the incident, that he attempted suicide after his arrest, and that he was diagnosed with depression one year after the offence, 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.²³⁹

Master the procedural rules and case law relating to death penalty cases 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 issue of timing: there is a risk that the deadline to file for appeal will have passed the moment you realise (or are told) that the petition you submitted is not admissible.

Deadlines

At the risk of stating the obvious, you should familiarise yourself with the deadlines for filing appeals. An appeal to the High Court (2nd degree) must be filed within seven days after the district court decision is read out or made known to the appealing party. Following the decision by the High Court, the aggrieved party may make an application for an appeal to the Supreme court within 14 days from the party filing the appeal receiving a copy of the High Court decision. In many cases, appeals have been rejected after lawyers missed a deadline—even when the appeal was filed only one day late. However, if the deadline for appealing has passed, do not give up and do everything you can to ensure that your client is not penalised and that their right to appeal the decision is respected (see below).

OVERCOMING BARRIERS

What can I do if I am consulted by a client after the deadline for appeal has passed?

Determine why no appeal was filed on time:

- *Perhaps your client was not assisted by counsel and did not know that they 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 your client was deprived of their right to be assisted by counsel on appeal.*
- *Perhaps 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 their defence and the right to access to court, which must be effective and not theoretical.*
- *Perhaps 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 they did not authorise or were 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 their 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.*

Know the case law and laws of Indonesia

It is important that you have in-depth knowledge of capital punishment jurisprudence in Indonesia, especially the landmark decisions issued by higher courts (court of appeal, constitutional court, etc). If judicial decisions in death penalty cases are not readily available, it may be useful to discuss and share experiences with other capital defence lawyers, as well as with NGOs specialising in criminal justice or campaigning against the death penalty.

Using international law

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 neighbouring countries. You can find examples 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.

Review the judgment of the trial court

Your client's right to appeal encompasses the right to know why they were convicted so that they can formulate arguments on appeal. Therefore, defendants have a right to a reasoned judgment. A reasoned judgment will also help you determine if your client's case has been heard in a fair and equitable way. If the decision is not sufficiently reasoned, you can ask for it to be overturned on appeal for lack of reasoning. 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 (see Chapter 5).²⁴⁰

The right to a reasoned judgment was invoked in a case before the UN Human Rights Committee concerning 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 stated that the failure of the Jamaican court to issue a reasoned written judgment violated the defendants' rights to be tried without undue delay (Article 14(3)(c) of the ICCPR), and to have their conviction and sentence reviewed by a higher tribunal according to law (Article 14(5) of the ICCPR).²⁴¹

SUCCESS STORY

An extraordinary lesson in perseverance

- In Taiwan, lawyers can in principle appeal to the Supreme Court an unlimited number of times. One lawyer unsuccessfully tried ten appeals to the Supreme Court on behalf of a single client before succeeding on the eleventh attempt.
- If you are practising in a jurisdiction with similar regulations, you should take advantage of the possibility of appealing several times if necessary.
- If you are practising in a jurisdiction with a limit on the number of appeals, make sure that your arguments are as thorough and complete as possible, as you may only have one chance to overturn the conviction.
- It is important to familiarise yourself with the relevant legislation and the latest legal developments so that you can use all available approaches to help your client.²⁴²

CHALLENGING THE DEATH PENALTY AND ITS APPLICATION

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 legislation. Nonetheless, there are a number of legal arguments based on international law that have successfully been raised in national courts around the world. 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.

CONSTITUTIONAL CHALLENGES TO THE DEATH PENALTY IN INDONESIA

There have been five major decisions on the constitutionality and legality of the death penalty and its implementation throughout Indonesia's recent history. The Supreme Court in the case of Ito Sukarta Bin Sapri²⁴³ held that the death penalty as a form of criminal punishment violated Pancasila, the five-factor Indonesian state ideology as described in the Preamble to the original 1945 Constitution. Here, the court ruled that "only the Almighty has the right to bring someone to life or to kill him." The impact of this decision was limited as the Indonesian Courts are not bound to follow

previous rulings of court²⁴⁴ and the Indonesian constitutional court with the power to strike down legislation was only established by constitutional amendment in 2001.

Thereafter, the next major legal challenge came in the 2007 Constitutional Court case of *Sianturi v. State*. Two Indonesian and two Australian defendants sentenced to death for drug trafficking challenged the constitutionality of the death penalty for drug offences, on the basis of the right to life contained in Article 28(A). The court ruled against them. It stated that the revised 1945 Constitution's Article 28J(2) permitted limitations on human rights in order to protect the rights of others, and that the right to life was not absolute in the face of punishment for particularly serious crimes.

Another unsuccessful constitutional challenge was bought alleging that the method of execution (shooting) was a form of torture under the 1945 Constitution's Article 28G. In the 2008 "firing squad" case *Nurhasyim v. State*,²⁴⁵ the Constitutional Court held that pain is inherent to execution, and that execution by shooting allows the prisoner to retain dignity. The Court did, however, suggest that Indonesia consider adopting less painful methods of execution in the future.

In 2012, the application of the death penalty was challenged for cases of violent robbery where serious injury or death results. However, the constitutionality of the death penalty was affirmed by the Constitutional Court, which ruled that such aggravated robbery was one of the "most serious crimes," that the death penalty is a necessary deterrent, and that (as in the 2007 decision on drug trafficking)²⁴⁶ the constitutional right to life is not absolute, with capital punishment a permitted limitation.

While fundamental challenges to the death penalty have either been rejected or have not been adopted as *yurisprudensi* by subsequent court decisions, there do remain other potential challenges on the basis of the procedural laws governing the processing of death penalty cases in Indonesia. The following is an overview of international law and comparative jurisprudence that can be used to challenge the application of the death penalty in future challenges.

THE 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”.²⁴⁷ The Human Rights Committee has observed that this expression must be “read restrictively,” because death is a “quite exceptional measure”.²⁴⁸ 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).²⁴⁹

In 1984, the UN Economic and Social Council further defined the restriction to “most serious crimes” in its Safeguards Guaranteeing Protection of the Rights of Those Facing the Death Penalty.²⁵⁰ These safeguards, which have been 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.²⁵¹ The UN 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”.²⁵² In 1999, the Special Rapporteur considered that “these restrictions exclude the possibility of imposing death sentences for economic and other so-called victimless offences, or activities of a religious or political nature – including acts of treason, espionage and other vaguely defined acts usually described as ‘crimes against the State’ or ‘disloyalty’. Similarly, this principle would exclude actions primarily related to prevailing moral values, such as adultery and prostitution, as well as matters of sexual orientation”.²⁵³ The UN Commission on Human Rights also considered that non-violent acts such as financial crimes, non-violent religious practice or expression of conscience and sexual relations between consenting adults are not among the “most serious crimes” and therefore cannot lead to a death sentence.²⁵⁴

In line with these principles, courts in some common law jurisdictions have overturned death sentences imposed on accomplices who did not act with intent to kill.²⁵⁵ The Supreme Court of India has stated that the death penalty should not be applied except in the gravest cases of extreme culpability.²⁵⁶

These examples support the argument that the restriction of the death penalty to intentional crimes with lethal consequences has become part of customary international law.

DEATH ROW PHENOMENON

Article 7 of the ICCPR provides that, “No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment”.²⁵⁷ Other human rights treaties contain identical language.²⁵⁸

Over the past two decades, a substantial body of case law has developed in support of the view that prolonged incarceration on death row, regardless of the conditions of detention or the mental health of the prisoner, constitutes cruel, inhuman or degrading punishment,²⁵⁹ due to the anguish, uncertainty and despair that beset the prisoner faced with the horrific prospect of execution. This phenomenon, which has been denounced by the courts, has been dubbed “death row phenomenon”. These decisions have led to a wealth of articles by legal commentators and mental health experts.

These examples demonstrate that the prohibition against prolonged incarceration on death row, because of the cruel, inhuman or degrading treatment it represents, is now binding under customary international law.²⁶⁰

In 1999, in the case of *Pratt & Morgan v. Jamaica*, the Judicial Committee of 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”.²⁶¹ The Judicial Committee further held 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’”.²⁶² 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 and the anguish and mounting tension of living in the ever-present shadow of death”.²⁶³

More recently, the Supreme Court of Canada, when weighing the legality of extraditing two men to the United States to face capital charges, considered evidence that prisoners on death row in the US state of Washington took, on average, 11.2 years to complete state and federal post-conviction review.²⁶⁴ 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”.²⁶⁵ 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.²⁶⁶

Several reports by Civil Society Organisations have found that detention conditions of death row prisoners in Indonesia constitute as cruel, inhuman and degrading treatment and have the potential to meet the threshold of “death row phenomenon”. For instance, it can be seen that situations in places of detention experienced by convicts, consist of: places of detention with poor brightness, excessive use of restraint devices, overcrowding prison conditions, discrimination and bullying, disproportionate abuse, lack of nutrition in food, absence of periodic medical examinations including to a psychologist, limited visiting times, and limited access to books and reading materials.²⁶⁷

PROHIBITION OF EXECUTION OF CERTAIN CATEGORIES OF OFFENDERS SUCH AS INDIVIDUALS WITH MENTAL DISORDERS

As discussed above (see Chapter 4 in particular), international law squarely prohibits the execution of certain categories of offenders, such as persons under the age of 18 at the time of the crime,²⁶⁸ pregnant women,²⁶⁹ elderly persons,²⁷⁰ mothers with dependent infants,²⁷¹ mothers with young children,²⁷² and individuals with a mental disorder or intellectual disability.²⁷³

Your client may have developed a serious mental disorder after being sentenced to death. The UN Safeguards guaranteeing protection of the rights of those facing the death penalty, which received almost unanimous support from UN Member States, prohibit the imposition of the death penalty on “persons who have become insane”.²⁷⁴ In 1989, the Economic and Social Council extended this protection to include “persons suffering from...extremely limited mental competence, whether at the stage of sentence or execution”.²⁷⁵ The UN Commission on Human Rights likewise called on retentionist countries “not to impose the death penalty on a person suffering from any form of mental disabilities or to execute any such person”.²⁷⁶

International law does not require that a convicted person be formally recognised as having a mental disorder for the prohibition

to apply. In *Francis v. Jamaica*, the UN Human Rights Committee stated that issuing an execution order against 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.²⁷⁷

If your client did not have a mental disorder at the time of the crime or trial, but you suspect that their mental health has deteriorated while on death row, you should apply for a stay of execution and have them examined by a qualified mental health professional. See the section on individuals with mental disabilities in Chapter 3.

INEFFECTIVE ASSISTANCE OF COUNSEL

As discussed in Introduction, your client has the right to legal representation at trial and on appeal. If your client’s trial lawyer did not fulfil their obligation to provide competent assistance, this is an issue that should be raised on appeal as grounds for a new trial that respects the rights of the defence. In the United States, courts have reversed numerous capital cases based on ineffective assistance of counsel.²⁷⁸ See the cases cited in Introduction for additional authority for such an argument under international and national law.

OVERCOMING BARRIERS

How can I argue on appeal that my client did not receive effective assistance at first instance when I was counsel 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, they 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 their duties to their client. How can you raise an ineffective assistance of counsel claim against yourself or a colleague? Should you even consider doing so?*
- *The answer 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.*

FOREIGN NATIONALS DEPRIVED OF CONSULAR RIGHTS

If your client is a foreign national, they have rights to consular notification and access under article 36(1)(b) of the Vienna Convention on Consular Relations and customary international law (ratified by Indonesia in Law No. 1 of 1983).²⁷⁹ In Indonesia, consular notifications are regulated by Criminal Code of Conduct Number 8 of 1981 (Kitab Undang-Undang Hukum Acara Pidana No. 8 Tahun 1981), Articles 57(1) & (2), Articles 59, 60, 61, 62 (1), (2) & (3). It is also possible that your client's home country has a bilateral consular treaty with Indonesia. Until now, Indonesia has Mandatory Consular Notification Agreements with Australia, Brunei Darussalam, the Philippines, Costa Rica and Panama. You should investigate whether the detaining authorities notified your client of the right to have their consulate notified of their detention. With your client's consent, you should also contact consular officers from your client's home country to ascertain whether they are willing to assist in your client's defence.

In *Avena and Other Mexican Nationals (Mexico v. United States)*, 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 their consular rights, they are entitled to judicial "review and reconsideration" of their conviction and death sentence.²⁸⁰

THE PRINCIPLE OF NON-RETROACTIVITY OF THE MORE SEVERE CRIMINAL LAW

Under the principle of legality of offences and penalties, an individual sentenced to death should not be executed if their penalty arose under a law that did not exist at the time of the offence. The principle of non-retroactivity of the more severe criminal law is set out in many national laws but is also enshrined in several international human rights treaties. Article 11(2) of the Universal Declaration of Human Rights states that "No 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".²⁸¹ Indonesia adheres to the non-retroactive principle as one of the fundamental principles to guarantee the protection of human rights as contained in Article 28 I paragraph (1) of the 1945 Constitution of the Republic of Indonesia (2nd amendment, enacted on 18 August 2000), which states that the right not to be prosecuted based on retroactive law is a human right that cannot be reduced under any circumstances.

Article 1 Paragraph (1) of the Criminal Code also stipulates that an act cannot be subject to a criminal penalty, except for an act that has the strength of the provisions of the criminal legislation that was in effect before. Furthermore, Article 18 paragraph (2) of Law Number 39 of 1999 concerning Human Rights stipulates that no one can be prosecuted or convicted unless based on a statutory regulation that existed before the criminal act was committed.

Because *ex post facto* punishments are prohibited, you should investigate the legal history of the offence for which your client was sentenced. If the law applied was not in effect when your client committed the crime, you should argue that their sentence was handed down in violation of international law and national law if your legislation provides for the principle of non-retroactivity of criminal law. Similarly, as some international treaties require the verdict to be changed if there is a new law providing for a lighter sentence, you should consider what the current penalties are for the crime committed. If the crime in question is no longer punishable by death under current law, you should point out that the ICCPR requires your client's sentence to be reduced.

The Constitutional Court through decision number 013/PUU-I/2003 deemed the application of the retroactive principle to the *Bali Bombing I* as unconstitutional. The Bali Bombing I took place on 12 October 2002 at Peddy's Café and Sari Club Café in Kuta, Bali and resulted in the killing of 202 people from 25 countries. On October 18, 2002 (six days after the Bali Bombing I incident) the Indonesian Government issued a Government Regulation in Lieu of Law (hereinafter referred to as Perpu) Number 1 of 2002 concerning Eradication of Criminal Acts of Terrorism and Perpu Number 2 of 2002 concerning Eradication of Criminal Acts of Terrorism. Article 46 of the Perpu Number 1 of 2002 stipulates that the provisions in the Perpu can be retroactively applied to certain cases before the Perpu comes into effect. On 15 October 2003, Masykur Abdul Kadir, one of the defendants in the Bali Bombing I, submitted a judicial review to the Constitutional Court on the enactment of Law Number 16 of 2003 for reasons of unconstitutionality under article 28(I).

In its decision 013/PUU-I/2003, the Constitutional Court in its legal considerations was of the view that:

- The law must apply prospectively. No one can be punished for an act which is legal at the time of its commission. It is also unfair

if a person is subjected to a heavier legal provision for an act which, when committed, fell under lighter legal provisions.

- It is common knowledge that waiving the principle of non-retroactivity opens the opportunity for certain ruling regimes to use the law as a means of revenge against previous political opponents. No opportunity should be provided in that direction.
- The retroactive principle in criminal law can only be enforced in cases of gross violations of human rights (Article 4 of Law Number 39 of 1999 concerning Human Rights). Crimes that are included in this category under the Rome Statute of 1998 are (i) war crimes; (ii) crimes of aggression; (iii) crimes of genocide; and (iv) crimes against humanity. Under Article 7 of Law Number 26 of 2000, crimes included in the category of gross human rights violations are crimes against humanity and crimes of genocide.

VIOLATION OF THE RIGHT TO A FAIR 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 it refers to minimum procedural protections that are necessary to ensure that the accused is tried by a competent, independent and impartial court and in accordance with the right to a fair trial.²⁸² The concept of equality of arms is also essential to this definition: the defence must be granted autonomy, confidentiality, the power to challenge the prosecution's case, and adequate resources that are at least equal to those provided to the prosecution to prepare an effective defence.

International agreements protect the right to a fair trial even where national law does not. Article 6 of the ICCPR provides that the death penalty can only be imposed when these minimum guarantees have been met. Accordingly, the UN Human Rights Committee has held that where a state violates the due process rights of an accused, the execution of that person would violate article 6 of the Covenant.²⁸³

Many retentionist states fail to provide the most basic procedural protections necessary for a fair trial. Some of the minimum guarantees of due process are set out in article 14 of the ICCPR and are described in Chapter 4 of this manual. For example, in cases of inadequate legal assistance, unreasonable delays, trials before a military tribunal, allegations of corruption, refusal to allow the accused to call witnesses on their behalf, refusal to allow the accused

to be examined by a doctor, and cases where the accused has been coerced into confessing guilt, the minimum guarantees of a fair trial are not met and a death sentence would violate articles 6 and 14 of the ICCPR.²⁸⁴

CLEMENCY PROCEDURE IN PRACTICE

The right to seek clemency in Indonesia is limited through certain practices:

- Only one petition for clemency may be submitted to the President (Law No. 5/2010).
- There is a lack of transparency and consistent guidelines regulating the consideration of clemency applications by the President.
- The Supreme Court does not provide names of prisoners and their sentences in its annual report on clemency.
- Clemency petitions for drug-related crimes are systematically rejected without consideration of individual circumstances.
- Presidential decrees on clemency are considered as confidential information.

THE REQUEST FOR CLEMENCY

THE RIGHT TO SEEK PARDON OR COMMUTATION OF THE SENTENCE

Several international instruments guarantee the right of individuals sentenced to death to apply for a pardon or commutation of a death sentence, which may be granted in all cases of capital punishment.²⁸⁵ In Indonesia, the President's authority to grant pardon is stipulated under Article 14(1) of the Constitution. This authority is further stipulated under Law No. 22 of 2002 on Pardon (Pardon Law), lastly amended by Law No. 5 of 2010.

It is not enough for national legislation to allow a pardon to be requested in order to comply with international law. The procedures for applying for an amnesty, pardon or clemency must "guarantee condemned prisoners (...) an effective or adequate opportunity to participate in the mercy process".²⁸⁶ These minimum due process guarantees 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”.²⁸⁷ Furthermore, requests for pardon may be subject to judicial review and the prerogative of mercy must be exercised in a fair and appropriate manner.²⁸⁸

In Indonesia, however, there is no legal requirement for the President to thoroughly consider the specific aspects of each clemency request nor to provide an explanation when approving or rejecting a clemency application. The President is simply required to decide after considering (*mempertimbangkan*) the advice from the Supreme Court, although this recommendation is not binding.²⁸⁹ The Supreme Court has a time-limit of 30 days to transmit its compulsory recommendation on the clemency petition, along with the case file, to the President.²⁹⁰

YOUR DUTIES WHEN APPLYING FOR A PARDON

If you are representing an individual who faces a real risk of execution, you need to be aware of the procedures and possible time limits for applying for a pardon. You should also research the factors that are decisive for a pardon application to succeed and the arguments which the pardoning authorities usually find persuasive (this can also be done by researching the socio-cultural background of the person making the decision, their interests and values). For example:

- New evidence establishing the innocence of the convicted person;
- Humanitarian reasons, such as serious illness;
- Evidence that the trial was unfair;
- Personal characteristics of the convicted person (youth, advanced age, mental disorder, childhood abuse and neglect, etc.);
- Behaviour in detention;
- Rehabilitation capacity;
- Remorse;
- Whether the victim’s family supports the request for a pardon.

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.

THE RIGHT TO A STAY OF EXECUTION

Under international law, a person sentenced to death cannot be executed while their request is being considered, either by a national

or international body, in appeal or clemency proceedings. In resolution 2001/68, the UN Commission on Human Rights called on all states “not to execute any person as long as any related legal procedure, at the international or at the national level, is pending”.

Humphrey Ejike Jefferson was sentenced to death for possession of 1,7 kg of heroin and executed in 2016. A year after his execution, the Indonesian Ombudsman stated that the execution was not in accordance with the provisions of Article 3, Law No. 22 of 2002, as at the time of his execution, Jefferson was applying for clemency and therefore should not have been executed.²⁹¹

The UN Human Rights Committee similarly decided that the execution of a detainee when his sentence was being reviewed in a state party to the ICCPR violates the right to life provisions of Article 6.²⁹² As Roger Hood points out 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”.²⁹³

SU’UD RUSLI’S CHALLENGE TO THE ONE-YEAR CLEMENCY DEADLINE

- *Rusli was an Indonesian sailor convicted of premeditated murder in 2005 and sentenced to death by a military court. Following the failure of all judicial appeals, he applied for clemency in 2015 – only to be informed that the one-year application deadline (established via the 2010 amendment to the 2002 Clemency Law) had already elapsed. In August 2015, Rusli (along with two other petitioners) bought a constitutional challenge to the new clemency time-limit before the Indonesian Constitutional Court. The Court ruled that the one-year deadline contravened the constitution because it conflicted with the right to apply for clemency (based on the non-derogable right to life in Articles 28A and I) and the right to equal treatment before and equal protection of law (Art 28D). It also abridged the President’s unlimited power to grant clemency.*
- *The Court stated that waiver of the right to clemency would occur in cases where the prisoner postpones petitioning for clemency solely in order to delay their execution. In that case, the authorities would be entitled to execute the prisoner, given the usual execution procedures, such as providing 72 hours’ notice.*

RAISING PUBLIC AWARENESS

DEVELOPING A MEDIA STRATEGY FOR THE CASE

Throughout your representation of your client, you should carefully consider whether they 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. You should carefully think through all possible repercussions for your client and yourself before speaking out publicly about your client's case. Despite these caveats, media coverage has proven to be an effective and life-saving tool in many cases. Technological advances such as the internet have made it easier to publicise a case through traditional media and social networks.

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 the executive's decision, especially if it is a democratically elected government that cares about its country's reputation on the international stage. 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. Moreover, because of the principle of investigative secrecy, you may be limited in what you can reveal to the media at the investigation stage, and failure to respect investigative secrecy may backfire. In cases that have already been publicised, where your client has been demonised by the media, it may be useful to organise press conferences to set the record straight and present them in a better light.

-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 6) and you need to be able to tell a compelling story that justifies either a commutation of your client's death sentence or their release. Many potential claims in capital cases are newsworthy, especially claims of innocence. However, do not ignore other aspects that may attract media attention, such as prosecutorial or police misconduct, a biased or flawed investigation, discrimination, and aspects of their life history that may attract public sympathy.

SUCCESS STORY

Using social networks 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. Since she had already spent several years in prison, Noor has now been released and reunited with her family.*

USING TRADITIONAL MEDIA

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

One route to favourable media coverage is to educate a reporter by allowing them 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 have received inadequate education and can be easily manipulated. You should therefore try to maintain as much control over the interview as possible. Insist on being present. Ask for a list of questions in advance and go through them with your client. You should be aware that once you give a journalist access to your client, you have limited control over the nature of the publicity that follows.

CRIMINAL DEFAMATION AS A TOOL OF INTIMIDATION

Social media is a powerful mechanism to raise awareness about human rights violations. However, human rights defenders using social media have also faced intimidation through politically motivated prosecutions under criminal defamation laws. In Indonesia, human rights defenders Fatia Maulidiyanti and Haris Azhar were charged with defamation under Article 27 of the Electronic Information and Transactions Law on 17 March 2021. The allegations stemmed from a video on Azhar's Youtube channel expressing concerns about mining actions affecting human rights in Blok Wabu, Intan Jaya Regency, Papua. The video suggested that the ongoing military operations in West Papua are serving to protect mining businesses in the province. A Letter by the National Commission on Human Rights (Komnas HAM) issued on July 2022 stated that Fatia and Haris were protected by Law Number 32 of 2009 on Protection and Environmental Exploration, and Article 66 concerning the Protection and Management of the Environment, which states that "everyone who fights for the right to a good and healthy environment cannot be prosecuted criminally or civilly sued."

On 6 March 2023, Indonesian police filed a criminal defamation case with the Attorney General's Office against both human rights defenders, setting the stage for trial.

SOCIAL NETWORKS

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). You should consider using Facebook, Twitter, YouTube and other social media platforms 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 publicising 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 sympathisers 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 defence counsel and human rights advocates. This is particularly true for counsel practising in rural areas, where access to relevant laws, jurisprudence, and human rights instruments may be difficult.

More people oppose the Death Penalty in Indonesia

Indonesian opinion polls indicate around 75% support for the death penalty. A poll by Indo Barometer in 2015 found that 84% supported the death penalty for drug dealers. Superficial surveys, however, cannot measure strength of opinion, knowledge about the topic and how respondents may feel about the different types of offences subject to the death penalty. Comparative analysis of public opinion research from eight countries demonstrates that reliable data on public opinion can only be produced by rigorous, methodologically sophisticated surveys.

A public opinion research by Oxford University (2021) found that while majority of the Indonesians are in favor of the death penalty, their support for it declines as they learn more about its scope or are shown the specific circumstances, including unfair trials. The research highlighted that the public lacked knowledge about the death penalty; only 2% considered themselves “very well informed”, and only 4% stated that they were “very concerned” about the issue.

Of those who had initially supported retention, 70% changed their minds when shown a variety of specific circumstances where the death penalty could be applied. Up to a half of death penalty supporters agreed to change their mind under certain circumstances: the death penalty was applied unfairly (47%), wrongful convictions occur (46%), there was no deterrent effect (38%), or religious leaders showed support for abolition (37%).

Source: The Death Penalty Project. Investigating Attitudes to the Death Penalty in Indonesia: Public Opinion No Barrier to Abolition. 2021

CHAPTER 8



ADVOCATING BEFORE INTERNATIONAL BODIES



USING INTERNATIONAL ADVOCACY TO DEFEND YOUR CLIENTS

Over the last few decades, it has become increasingly common for lawyers and activists to leverage international human rights advocacy to protect the interests of their clients. International advocacy is an effective tool not only to raise attention for the violations suffered by individuals on death row, but also to push the government to bring about legislative reforms to limit the use of death penalty and enhance protections for those on death row. However, it is important to note that international advocacy is only one of the tools in your arsenal and in most cases is effectively used only in combination with domestic remedies. Experienced advocates strategize carefully before taking a case to an international body. You must consider the body's previous decisions, the likelihood of a favorable outcome, your government's stance to international influence in the past and the utility of a decision in your client's favor. Can the international intervention be enforced? Will it provoke a backlash? Or will it prompt a positive change in government policy?

The following chapter highlights some key mechanisms that can be used for international advocacy and outlines the benefits and limitations of each.

THINKING ABOUT AN INTERNATIONAL STRATEGY

A number of factors need to be considered in deciding whether to file a claim in an international forum, and if so, in which forum such a claim is most likely to succeed.

You should also think about how the international decision fits into your national advocacy strategy. Can the international decision be enforced? Will it provoke a backlash, or will it lead to a positive change in government policy? Sometimes decisions by international tribunals generate negative reactions from the government or the public. However, they can also sometimes galvanise courts or authorities to address previously neglected human rights violations. (These two hypotheses can co-exist!)

Gather as many materials as you need to assist you in preparing the petition, and identify the procedural rules.

IDENTIFYING HUMAN RIGHTS AND TREATIES VIOLATED

Before you take a case to an international body, identify which of your client's human rights have been violated. This will help you to decide which legal arguments to make and to which international body to bring the case. To help you do this, see Chapter 7 for a list of the most common international legal arguments relating to the application of the death penalty. In addition, you can raise any violations of your client's right to a fair trial (as described in Chapter 5) which is protected under article 14 of the ICCPR, the right to be treated humanely and to be tried within a reasonable time, and any other pre-trial rights (see Introduction).

Once you have identified the human rights that have been violated, you need to identify the instruments (treaties or other documents) that protect these rights. You can start with the list of treaties included in the Appendix. Another good source is Amnesty International's Fair Trial Manual, available online.²⁹⁴

Having identified the relevant treaties and other instruments, you need to establish: (1) that your country is a party to the treaty, and (2) that the treaty provides a mechanism for you to make a complaint on behalf of your client. You can also quickly check whether your country is a party to a treaty by consulting the website of the Office of the United Nations High Commissioner for Human Rights,²⁹⁵ or other resources such as the database of the Cornell Center on the Death Penalty Worldwide.²⁹⁶

The fact that your state is a party to a treaty does not necessarily mean that you will be able to bring a complaint before the relevant international body. Indeed, in some cases, the state must also be party to an additional protocol. You should also check whether the state concerned has chosen to modify the scope of its obligations by adopting reservations to certain provisions of the treaty. Finally, human rights instruments often provide for a derogation clause, such as Article 4 of the ICCPR, which allows for the temporary suspension of the enjoyment and exercise of certain rights and freedoms set out in the Covenant in time of public emergency which threatens the life of the nation. However, states cannot freely suspend the enjoyment of treaty rights; formal and substantive conditions must be met, and reference should therefore be made to the suspension procedure established by each instrument. Most instruments provide that certain

rights are non-derogable and cannot be suspended under any circumstances. For example, Article 4 of the ICCPR provides a list of non-derogable rights, including the right to life (Article 6), the prohibition of torture (Article 7), the prohibition of retroactivity of criminal laws (Article 15), and freedom of thought, conscience and religion (Article 18).

If the workload is heavy, you can ask for help from an NGO or a law clinic affiliated to a law school, especially in the USA and Australia. Law clinics (made up of law students working under the guidance of their professors on a voluntary basis) are very often willing to assist local actors in preparing for trials before a human rights body. A list of organisations is provided in the Appendix. In addition, consider seeking assistance from bar associations or national human rights commissions.

United Nations

Indonesia has signed and ratified many international agreements, including all eight of the key international human rights treaties. By 2014, Indonesia had served three terms on the United Nations Human Rights Council and had once served as vice-president for the period of 2009–10. Indonesia's position in the United Nations is likely to become only more prominent.

There are two types of human rights monitoring mechanisms within the United Nations system: treaty-based bodies and charter-based bodies:

Charter-based

Universal periodic review

The Universal Periodic Review is a periodic review of the human rights record of a UN Member State by other states. During the review process, states make recommendations to the State under Review (Sur) on how to improve its human rights situation. On average, a state can receive around 200 recommendations per review covering all human rights issues: economic, social, cultural, political, civil and principles of International Humanitarian Law.

How does the process work?

Each state is reviewed based on: (1) a National Report (prepared by the government); (2) reports by other UN mechanisms, including UN Special Rapporteurs and Treaty Bodies; and (3) stakeholder reports, including by NGOs and NHRIs. The UPR Working Group, comprising of 47 member states, reviews the files and puts together a report. Based on the report, the Sur is reviewed in an interactive public consultation that takes place over 3.5 hours. The Sur has the option to “accept” or “note” recommendations. Recommendations cannot be rejected but a state can provide reasons for why they do not enjoy support. Following the public hearing, an outcome document is prepared. The outcome document is adopted after three-to-four months in the regular session of the HRC.

How can you participate?

- NGOs often submit their reports in a coalition. You can ensure that the reform of the death penalty is highlighted in the report prepared by the coalition.
- UN Member States draft recommendations based on inputs from Civil Society Organizations and activists. Identify member states who are most likely to support recommendations pertaining to the death penalty and get in touch with their representations in Jakarta.
- Participate in a pre-session in Geneva. Pre-sessions are organized one month before the UPR Working Group session to provide NGOs and NHRIs a singular international platform to address Permanent Missions in Geneva. This allows Permanent Missions to save time by engaging both local and international NGOs in one forum and not having to read through several long submissions and reports. UPR pre-sessions are organized by UPR-info (an NGO based in Geneva). Information on how to participate is available on their website
- Following the adoption of the outcome report, you can play an active role in monitoring and following up on implementation of the recommendations accepted by the member state. You can also encourage the state to submit its mid-term implementation report.

Why is the UPR important?

The UPR is a review of a state by other UN member states. Therefore, the recommendations carry significant weight. Additionally, the entire human rights record of a state is put under scrutiny regardless of its treaty ratification status. However, given that the review

takes place after four years, it is not the best mechanism to raise urgent cases. Instead, the focus should be on using it as an effective means to influence legislative and policy reform pertaining to the death penalty, torture, juvenile justice reform, etc.

Practical Tips: How to succeed at UPR

The effectiveness of the UPR review depends to a great extent on its visibility in the country. It is not enough for the UN member state to accept recommendations and make commitments during the UPR Working Session before its peers in Geneva. These recommendations need to be followed-up and monitored by key stakeholders nationally. This is only possible if enough national stakeholders are aware of the process and follow-up on the implementation. As the UPR Working Group session is live-streamed, it can be followed by anyone with an internet connection. You can raise the profile of the session and encourage national counterparts to follow along. Sharing the proceedings via social media is also an effective tool.

- Most UN member states decide their recommendations well in advance. Get in touch with embassies and missions three-to-four months before the actual review. In collaboration with other NGOs or NHRI, you can also organize a national pre-session and address them all at one forum.
- Highlight previous recommendations. Use UPR info Database of UPR recommendations and voluntary pledges to access and search recommendations that were made to Indonesia during previous cycles and highlight compliance or non-compliance. This can be raised by UN member states in their comments during the public hearing.
- Propose recommendations that are concrete, specific, address gaps in law and policy and require the state to take targeted actions. Such recommendations are easier to monitor and establish accountability.

SPECIAL PROCEDURES

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 as 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.²⁸⁵

BEST PRACTICE: LIVE SCREENING OF PAKISTAN'S UPR SESSION

On the occasion of the Universal Periodic Review of the Government of the Islamic Republic of Pakistan (third cycle (Feb 2023)), Justice Project Pakistan (a legal action NGO representing prisoners on death row in Pakistan) organized a live screening in collaboration with the National Commission on Human Rights (NCHR) and the Parliamentarians Commission for Human Rights (PCHR). The live screening was held in the presence of prominent civil society activists, diplomats, journalists, students and government representatives. To maximise social media outreach of the session, the event also featured live tweeting with a hashtag #UPRPak, besides providing a space for informal discussions among relevant stakeholders. The participants also expressed their opinions through posters inscribed with emojis of smile and tied lips, and signs such as 'Danger: High Voltage' and 'Just Do It', etc. The public interest in the process resulted in the hashtag #UPRPak trending on Twitter at the end of the session.

EXAMPLES OF UPR RECOMMENDATIONS REQUIRING SPECIFIC ACTION

- Establish an official moratorium on imposing and carrying out the death penalty, as a step towards its complete abolition.
 - Recommendation by France to Oman (Cycle 3 (2017–2021))
- Abolish the death penalty and ratify the Second Optional Protocol to the International Covenant on Civil and Political Rights.
 - Recommendation by Portugal to Malawi (Cycle 3 (2017–2021))
- Immediately commute all death sentences to terms of imprisonment and establish an official moratorium on executions.
 - Recommendation by Slovakia to Belarus (Cycle 3 (2017–2021))
- Harmonize the juvenile justice system with the Convention on the Rights of the Child and amend Article 107 of the Criminal Code to raise the minimum age of criminal responsibility to 18 years.
 - Recommendation by Mexico to Marshall Islands (Cycle 3 (2017–2021))

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.²⁸⁶ 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.

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 corresponding state and may make further appeals through diplomatic channels.

The Working Group on Arbitrary Detention visited Indonesia from 31 January to 12 February 1999, at the invitation of the Government of Indonesia.

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.

In 2016, the SR on Executions (along with the SR on independence of judges) issued an urgent statement urging the Indonesian Government to halt executions of people convicted of drug-related offences and to re-try them in compliance with international standards.²⁹⁷ The statement also expressed alarm at reports that at least four of 16 prisoners scheduled for execution in 2016 were tortured and forced to incriminate themselves, and called on the authorities to urgently investigate, prosecute and sanction those abuses.

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 expert responsible for investigating and reporting on The Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment is a UN 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.

On the invitation of the Government of Indonesia, Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment undertook a visit to Indonesia from 10 to 23 November 2007. In his mission report, the SR made critical observations pertaining to the systemic use of torture and ill-treatment across police stations in Indonesia and the deplorable conditions of long-term detention including solitary detention, overcrowding and restricted access to food and medicine. The SR made several recommendations to the Indonesian Government including the criminalisation of torture through legislation, preventing the use of excessive violence during police and military actions; and ensuring that the criminal justice system is non-discriminatory, inter alia through combating corruption. With regard to the death penalty, he stated:

“Given the lack of legal safeguards and doubts in a number of instances as to how confessions might have been obtained, the Special Rapporteur recommends that the death penalty not be applied. He also regrets the secrecy with which executions are handled and the lack of information of the condemned prisoners and the public.”²⁹⁸

SINGAPORE: UN HUMAN RIGHTS EXPERTS URGE IMMEDIATE HUMAN RIGHTS MORATORIUM

The UN special rapporteurs may also issue press releases calling upon states to take immediate action in cases of gross human rights violations. On 8 May 2022, 8 UN Rapporteurs issued a joint press release calling on the Government of Singapore to immediately impose a moratorium on the use of the death penalty and said its continued use of capital punishment for drug-related crimes ran contrary to international law. The UN experts also condemned the execution in Singapore of a Singaporean and a Malaysian national, Abdul Kahar bin Othman and Nagaenthran Dharmalingam, in March and April 2022 respectively, for drug-related offences. They urged the Government to halt any plan to execute another Malaysian man, Datchinamurthy Kataiah, convicted for a similar offence.

TREATY BASED MECHANISMS

The human rights treaty bodies are committees of independent experts that monitor implementation of the core international human rights treaties. Each State party to a treaty has an obligation to take steps to ensure that everyone in the State can enjoy the rights set out in the treaty. Currently, Indonesia is a State Party to nine international human rights treaties (and two optional protocols).

As a State Party, Indonesia is, thus, required to report periodically to the committees of independent (or Treaty Bodies) of the said treaties on the progress of the implementation of its obligations under these treaties. Based on the State Reports, a consultative review is held with the state delegation and recommendations (“Concluding Observations”) are issued as an outcome of the review. During the review process, the treaty bodies meet with and obtain input from civil society, either through shadow reports or through oral statements during informal meetings held during reviews. As the committees are constituted of independent experts, the recommendations tend to be specific, well-informed and devoid of any diplomacy and considerations of foreign relations. Additionally, unlike the UPR, the state does not have the option of choosing which recommendations it chooses to comply with.

Treaty	Date of Ratification	Treaty Body
International Covenant on Civil and Political Rights (ICCPR)	23 Feb 2006	Human Rights Committee (CCPR)
International Covenant on Economic, Social and Cultural Rights (ICESCR)	23 Feb 2006	Committee on Economic, Social and Cultural Rights (CESCR)
Convention against Torture and Other Cruel Inhuman or Degrading Treatment or Punishment (CAT)	28 Oct 1998	Committee against Torture (CAT)
Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)	13 Sep 1984	Committee on the Elimination of Discrimination against Women (CEDAW)
International Convention on the Elimination of All Forms of Racial Discrimination (CERD)	25 Jun 1999	Committee on the Elimination of Racial Discrimination (CERD)
International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families	31 May 2012	Committee on Migrant Workers (CMW)
Convention on the Rights of the Child (CRC)	05 Sep 1990	Committee on the Rights of the Child (CRC)
Convention on the Rights of Persons with Disabilities (CRPD)	30 Nov 2011	Committee on the Rights of Persons with Disabilities (CRPD)

AGE DETERMINATION PROTOCOLS: COMMITTEE ON THE RIGHTS OF THE CHILD AND PAKISTAN

Pakistan is a party to the Convention on the Rights of the Child (CRC) that prohibits the imposition of the death penalty on anyone that was a juvenile (below the age of 18) at the time of the commission of the offence. This protection is also enshrined under Pakistan's domestic laws. However, given that only less than one-third of the country's population is registered at birth, often at the time of arrest accused persons have no way of proving their age. In the majority of the cases, police arbitrarily assign an age based on the physical appearance of the accused. This practice led to around 10% of Pakistan's death row population comprising of juvenile offenders.

Civil Society Organizations and child rights activists had been advocating for the inclusion of age determination protocols in order to allow for the objective and reliable determination of juvenile offenders at the time of arrest. This call to action was bolstered when during the country's state review in 2017 where the Committee on the Rights of the Child explicitly recommended that:

"b) No person who was below 18 years of age at the time of the commission of an offence is subjected to the death penalty and those charged with a capital offence have access to an effective and independent age determination process, and are treated as children if doubts remain about their age at the time of the crime;"

This led to the enactment of the Juvenile Justice Systems Act, 2018 containing provisions regulating the determination of age for offenders.

SUCCESS STORY

In Tunisia, in the case of Mr Lajili,²⁹⁹ the lawyers referred the case to the Working Group on Arbitrary Detention on the grounds that their client was being held unlawfully while awaiting trial. Although the client was not facing the death penalty, the same principles applied as in a death penalty case. The Working Group found violations of several rights of the defence, including the right of the accused to assistance by counsel during interrogation, as protected under article 14(3)(d) of the ICCPR. The Tunisian government had not provided any evidence to show that the accused had waived this right. Furthermore, the state did not justify the reasons for Mr Lajili's arrest and thus violated Article 9 of the ICCPR which requires the state to produce an arrest warrant to justify the arrest and subsequent detention of a person. Furthermore, the duration of Mr Lajili's pre-trial detention had exceeded the prescribed time limits. The Working Group also denounced violation of the United Nations Standard Minimum Rules for the Treatment of Prisoners due to the ill-treatment suffered by Mr Lajili, and in particular the poor management of his failing health. The Working Group concluded that

Mr Lajili's continued deprivation of liberty was arbitrary in that it was contrary to Articles 9 and 10 of the Universal Declaration of Human Rights and Articles 9 and 14 of the ICCPR and called on the government to release him immediately. The government initially did not cooperate, but Mr Lajili was eventually released.

Nédra Ben Hamida,
Tunisian lawyer.

STRENGTHS AND WEAKNESSES OF THE JURISPRUDENCE OF INTERNATIONAL BODIES

There are a range of arguments that can be strengthened by relying on international law: the prohibition of arbitrary execution of individuals with mental disorders and intellectual disabilities, the violation of the rights of the defence and the right to a fair trial, or the violation of the prohibition of cruel, inhuman or degrading treatment.

However, one of the main weaknesses of international human rights law is that it is difficult to enforce. The decisions of many human rights bodies are non-binding, and some countries challenge or disregard the decisions of international bodies, even if they have recognised their competence and authority. However, although non-binding decisions are sometimes difficult to enforce, they can be used as a persuasive tool in national courts. Indeed, decisions of international bodies can be persuasive to courts seeking to interpret the scope of rights contained in national constitutions. Decisions can be persuasive both in judicial settings and in clemency proceedings. You can use decisions from international bodies to put pressure on the executive to commute your client's death sentence.

The extent to which a state complies with an international decision depends on many country-specific factors, such as the political orientation of the government or the status of international law in domestic law. A good knowledge of these elements can help you to better prepare your defence strategy. For example, if a change of government is expected during the period in which you can file your application, you will need to consider whether it is more strategic to file early or to wait (bearing in mind the time limits for filing an application) if you think that the political transition might have an impact on how the government responds to your application.



APPENDIX



RESOURCES

To find out which international human rights treaties your country is party to, see the United Nations Treaty Collections, Chapter IV:

Human Rights, at:

<https://treaties.un.org/pages/Treaties.aspx?id=4&subid=A&lang=en>

To find out to which regional human rights treaties your country is party, see: Office of the United Nations High Commissioner for Human Rights, Regional Human Rights Treaties, at:

<http://www.ohchr.org/EN/Issues/ESCR/Pages/RegionalHRTreaties.aspx>

See also the website of the Cornell Center on the Death Penalty Worldwide, which provides a database of death penalty laws and practices in all relevant countries, at:

<https://deathpenaltyworldwide.org/fr/>

TEMPLATES

Model UN complaint forms:

Model form under the Optional Protocol to the ICCPR, CAT or CERD, available at:

<https://www.ohchr.org/sites/default/files/Documents/Publications/FactSheet7Rev.2.pdf> (Annex I)

List of guidelines for submitting applications to different human rights bodies, available (in English under “What information do you need to provide to bring a complaint”) at:

<https://www.ohchr.org/en/hrbodies/tbpetitions/Pages/IndividualCommunications.aspx>

Online complaint forms for ICCPR, CAT, CEDAW and CERD, available at:

<https://www.ohchr.org/sites/default/files/Documents/Publications/FactSheet7Rev.2.pdf> (Annexes II, III and IV).

LIST OF ACRONYMS

- ABA - American Bar Association
- ACHR - American Convention on Human Rights
- ACHPR - African Charter on Human and Peoples' Rights
- AComHPR - African Commission on Human and Peoples' Rights
- ACRWC - African Charter on the Rights and Welfare of the Child
- ASEAN - Association of Southeast Asian Nations
- ASHR - ASEAN Declaration on Human Rights
- CAT - Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
- CHR - UN Commission on Human Rights
- CRC - UN Convention on the Rights of the Child
- CRC Committee - UN Committee on the Rights of the Child
- ECHR - European Convention on Human Rights
- ECtHR - European Court of Human Rights
- ECOSOC - UN Economic and Social Council
- ECOWAS - Economic Community of West African States
- HRC - UN Human Rights Committee
- IACHR - Inter-American Commission on Human Rights
- IACtHR - Inter-American Court of Human Rights
- ICC - International Criminal Court

- ICCPR - International Covenant on Civil and Political Rights
- ICJ - International Court of Justice
- ICTR - International Criminal Tribunal for Rwanda
- ICTY - International Criminal Tribunal for the former Yugoslavia
- OHCHR - Office of the UN High Commissioner for Human Rights
- UDHR - Universal Declaration of Human Rights
- UN - United Nations
- UNICEF - United Nations Children's Fund
- UNODC - United Nations Office on Drugs and Crime
- SADC - Southern African Development Community

LIST OF NGOS, LAW CLINICS AND OTHER ORGANISATIONS THAT MAY BE ABLE TO ASSIST YOU IN PRESENTING COMPLAINTS TO HUMAN RIGHTS BODIES AND PUBLICISING YOUR CASE

HUMAN RIGHTS LEGAL CLINICS

- Cornell Center on the Death Penalty Worldwide, Cornell Law School.
Send an email to: deathpenaltyworldwide@cornell.edu.

NGOs

- Amicus
<https://www.amicus-alj.org/contact>, admin@amicus-alj.org
- Amnesty International (Indonesia)
<https://www.amnesty.id/>, info@amnesty.id
- Anti-Death Penalty Asia network
<https://adpan.org/contact-us/>, contactadpan@prontonmail.com
- Death Penalty Project
<https://www.deathpenaltyproject.org/contact/>, info@deathpenaltyproject.org
- ECPM (Together Against the Death Penalty)
<https://www.ecpm.org/en/contact-us/>, ecpm@ecpm.org
- International Federation for Human Rights
<https://www.fidh.org/en/about-us/contact-1776/> (offices in Côte d'Ivoire, Mali, Guinea, South Africa, Tunisia, France, Belgium, The Netherlands and Switzerland).
- Reprieve, info@reprieve.org.uk

To find other organisations that can help you, you can consult the list of members of the World Coalition Against the Death Penalty:

<https://worldcoalition.org/who-we-are/member-organizations/>

LIST OF POSSIBLE MITIGATING FACTORS TO BE CONSIDERED

INTRODUCTION

Consider meeting with the following people who may be suggested as witnesses at the investigation stage or called as witnesses at trial, if they are not already witnesses: the defendant's family members (mother, father, children, siblings, aunts, uncles, nieces and nephews), village leaders, neighbours, religious leaders, teachers, nurses, police, prison staff, etc..

Note: Some communities may be reluctant to help you defend your client. In some rural African communities, it may be necessary to contact the village leaders and inform them of your intentions before interviewing others in the community. Whether the community will be disturbed by your presence depends on many factors, including the time between the crime and your visit, the manner in which the crime was committed, and the relationship of your client to their family and the wider community. You should explain that you are trying to ensure that your client receives a fair trial and that you want to make sure you have accurate information about their life and the nature of the crime. If appropriate, you can explain that you are focused on saving their life and preventing the imposition of the death penalty, and that there is little chance they will be released from prison.

Before you start interviewing the witness, identify yourself and explain that you are assisting the prisoner in his defence. If the case is on appeal, explain that you are assisting in the appeal. Ask the witness if they have had any contact with your client and when they last met or talked. Explain that your client is still detained and give them all the information you can about their health, their general condition, and the status of the case. Ask if they would like you to pass on a message to your client.

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 them that even if it appears to them that you are asking for information that seems harmful, you are only using it to help your client. Assure them that you will not divulge elements that your client, or those

close to them, want to remain confidential. 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 their behaviour and thus help prepare a stronger defence.

LIST OF QUESTIONS YOU SHOULD ASK DURING A MEETING WITH THE RELATIVES OF YOUR CLIENT

For more details on the questions relevant to your research on mitigating circumstances, refer to the questionnaires available on the website of the Cornell Center on the Death Penalty Worldwide: <https://deathpenaltyworldwide.org/>.

QUESTIONS TO ESTABLISH THE PLACE OF YOUR CLIENT IN THEIR FAMILY AND COMMUNITY

- Can you tell me a little about [your client's name]? Can you tell me about your relationship?
- Did [name] hold any leadership positions in the village?
- What was their reputation in the village/community?
- Did [name] have a job? What did they do? At what age did they start working? (If your client worked as a child) What kind of work did [name] do as a child?
- Did [name] go to church/mosque? Did they hold a leadership position there? Did you ever notice a change in their religious practice?
- Schooling: What school did [name] attend? How far did they get? (If relevant) Why did they stop?
- Did [name] learn to read and write? How did they perform at school compared to siblings/other family members? Did they have any difficulties at school?

QUESTIONS TO DETERMINE POSSIBLE MENTAL ILLNESSES AND DISABILITIES

- What was [name's] health like as an infant, child, adolescent? Did they ever suffer from any serious illnesses? Malaria, tuberculosis, other diseases?
- Has [name] ever suffered any head injuries? (Details: circumstances of injury, age, witnesses, hospitalisation)

- Has [name] ever lost consciousness or the sense of time? (Details: at what age, how long, how many times, witnesses)
- Did [name] suffer from headaches?
- Has [name] ever had an epileptic seizure?
- Have you or any member of your family ever taken [name] to a traditional healer? (Details: at what age, for how long, how many times, witnesses)
- What types of traditional remedies, if any, has [name] received for mental difficulties?
- Has [name] ever seen a doctor?
- Have you ever noticed anything unusual about [name], compared to your other [brothers/sisters/children/people in your family/people in your community]?
- Has [name] ever consumed alcohol? How often?
- Was alcohol consumption common in their family?
- Did their parents drink? More or less than other members of their community?
- How did their parents behave when they were drunk?
- What was the relationship between their parents? Did they ever fight? Were they verbally or physically aggressive? Can you describe any of their arguments? Did [name] ever intervene to stop these arguments?
- Has [name] ever been a victim of violence by a family member? How serious was it?
- Has [name] witnessed any other form of violence in the family or community?
- How was [name] punished as a child if they misbehaved? Did [name] behave more or less well than his/her siblings? Did [name] get into difficult situations as a child?
- Is there any indication that [name] was a victim of sexual abuse or sexual violence by a family member or anyone in their community?
- Has [name] ever suffered from rages or panic attacks?
- [If yes]: What makes [name] angry? Do they ever get angry or upset or lose control?
- What happens when [name] gets angry or loses control?
- At what age did this behaviour start?
- Have you ever noticed anything else unusual about their behaviour?

QUESTIONS ABOUT PRENATAL AND POSTNATAL HEALTH (FOR MOTHERS IN PARTICULAR, BUT ALSO OLDER SIBLINGS, AUNTS, FATHERS)

Explain that prenatal and postnatal health (and related problems) can have long-term effects on physical growth, cognitive development and future learning capacity, school performance, and work performance.

- When you were pregnant with [name], did you/she experience periods of severe malnutrition? Periods when there was no food at all? Periods of drought during pregnancy? (Details: when, how often). How would you get extra food? What was your diet when you were pregnant?
- Do you know any details about the pregnancy and birth of [name]'s mother?
- Were there any complications during the pregnancy (ask for details)
- Any complications during delivery? (Ask for details) How was the birth of [name] compared to delivery of your other children? Did you give birth in hospital or at home? Who was there with you?
- Were there times when [name] experienced periods of severe malnutrition? Times when there was no food at all in your home? Due to drought? For other reasons? (Details, when, how often). How did you get extra food?
- How quickly did [name] develop compared to their brothers and sisters? At what age did [name] learn to walk, talk, use the toilet? Was this earlier or later than their siblings?

CLOSING THE INTERVIEW

Thank them for taking the time to talk to you. Tell them how much you appreciate having had this opportunity. Give them an idea of how long you expect the trial/appeal to take. Tell them that you will do your best to help your client but that you cannot make any promises or even predict what will happen. If you are handling the appeal of a prisoner on death row, explain that you are trying to ensure that they are not executed, to provide the physical and mental health care they need and to reduce their prison sentence.

END NOTES

- 1 See "Statement by the delegation of the Republic of Indonesia high-level panel discussion on the question of the death penalty 'regional efforts aiming at the abolition of the death penalty and challenges faced in that regard' at the 28th session of the Human Rights Council", available at: <http://www.missionindonesia.org/article/516/statement-by-the-delegation-of-the-republic-of-indonesia---high-level-paneldiscussion-on-the-question-of-the-death-penalty---regional-efforts-aiming-at-the-abolition-of-the-deathpenalty-and-challenges-faced-in-that-regard---at-the-28th-session-of-the-human-rights-council>
- 2 Bali Nine: Indonesian president rules out clemency for inmates on death row. *The Guardian*. 9 Dec 2014. Available at: <https://www.theguardian.com/world/2014/dec/10/bali-nine-indonesian-president-rules-out-clemency>
- 3 Antara, "No mercy for drug dealers: President", 9 December 2014, available at: <http://www.antaranews.com/en/news/96848/no-mercy-for-drug-dealers-president%20/>.
- 4 ECPM. Dehumanised: The Prison Conditions of People Sentenced to Death in Indonesia. 2019
- 5 Prison Insider. Indonesia: detention conditions of people sentenced to death. 2022.
- 6 Institute for Criminal Justice Reform (ICJR). 2021 Indonesia Death Penalty Report: Double Uncertainty Calling for the Assurance of Commutations in the Death Penalty Case. 2021
- 7 Id
- 8 Id
- 9 These are independent expert bodies and courts established by the treaties or by the UN or regional bodies to monitor implementation of the treaty and to investigate complaints that provisions of the treaty have been violated.
- 10 See James Crawford (ed), *Brownlie's Principles of Public International Law* (8th edition) at p. 42; Malcolm N. Shaw, *International Law* (7th edition) at pp. 81-81 ("Shaw"); Sir Robert Jennings & Sir Arthur Watts (eds), *Oppenheim's International Law* (9th edition) at pp. 48-49.
- 11 Decision, Reviewing Law 39 of 2004 on Placement and Protection of Indonesian Overseas Workers (Overseas Workers case No. 1) (Constitutional Court 019-020/PUU-III-2005)
- 12 Simon Butt, *The Position of International Law Within the Indonesian Legal System*, 28 *Emory Int'l L. Rev.* 1 (2014). Available at: <https://scholarlycommons.law.emory.edu/eilr/vol28/iss1/1>
- 13 Decision, Reviewing Law 36 of 2009 on Health (Health Law Case) (Constitutional Court No.19/PUU-VIII-2010).
- 14 Decision 133/PUU-VII/2009, 68-69.
- 15 Andri Wibisana, *The Development of the Precautionary Principle in International and in Indonesian Environmental Law*, 14 (2011), <http://papers.ssrn.com/abstract=2131666> (last visited 23 March 2023); *Dedi v. Perhutani*, 1794K/Pdt/2004 (Supreme Court of Indonesia, 2007).
- 16 *Dedi v. Perhutani*, 1794K/Pdt/2004 (Supreme Court of Indonesia, 2007)
- 17 Id. At 85
- 18 Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, AComHPR, 2003. "When legal assistance is provided by a judicial body, the lawyer appointed shall:
 1. be qualified to represent and defend the accused or a party to a civil case;
 2. have the necessary training and experience corresponding to the nature and seriousness of the matter;
 3. be free to exercise his or her professional judgement in a professional manner free of influence of the State or the judicial body;
 4. advocate in favour of the accused or party to a civil case;
 5. be sufficiently compensated to provide an incentive to accord the accused or party to a civil case adequate and effective representation."
- 19 AComHPR, Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, H(d), 2003 "An accused or a party to a civil case has the right to an effective defence or representation and has a right to choose his or her own legal representative at all stages of the case."
- 20 Basic Principles on the Role of Lawyers, adopted by the 8th UN Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, 27 August - 7 September 1990, para. 6, UN Doc. A/CONF.144/28/Rev.1, 1990; AComHPR, Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, para. (H)(e), 2003.
- 21 Dewan Pimpinan Pusat Kongres Advokat Indonesia (KAI), *Kode Etik Advokat Indonesia* (Jakarta Selatan, 2013)
- 22 For example: Democratic Republic of Congo, Law 79-028 of 28 September 1979 on the organisation of the bar, the body of legal defenders and the body of state agents, Section III on the rights and duties of lawyers; Tunisia, Law 2011-79 of 20 August 2011 on the organisation of the legal profession, Chapter IV on the rights and duties of lawyers; in France, according to article 13 of the National Rules of Procedure of the legal profession, the main duties of lawyers are to perform their functions with dignity, conscience, independence, probity and humanity and to show competence, dedication, diligence and prudence towards their clients.
- 23 UNGA, UN Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems, introduction, UN Doc. A/67/458, 6 December 2012.
- 24 UNGA, UN Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems, principle 7, UN Doc. A/67/458, 6 December 2012.
- 25 UNGA, UN Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems, principle 7, UN Doc. A/67/458, 6 December 2012.
- 26 UDHR, art. 11(1); ICCPR, art. 14(3)(d); ACHPR, art. 7(1)(c); ECHR, art. 6(3)(c); ACHR, art. 8(2)(d) and (e).
- 27 The Indonesian Criminal Procedure Code is based on Law No. 8/1981
- 28 AComHPR, Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, para. (H)(a), 2003 "The accused or a party to a civil case has a right to have legal assistance assigned to him or her in any case where the interest of justice so require, and without payment by the accused or party to a civil case if he or she does not have sufficient means to pay for it"; *Quaranta v. Switzerland*, App. No. 12744/87, para. 27, ECtHR, 24 May 1991 "The Court points out 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". See also *Artico v. Italy*, App. No. 6694/74, para. 33, ECtHR, 13 May 1980. ECtHR cases are available at <https://hudoc.echr.coe.int/>.
- 29 ICCPR art. 14(3)(d); *Taylor v. Jamaica*, para. 8.2, Communication No. 707/1996, UN Doc. CCPR/C/60/D/707/1996, HRC, 14 June 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").
- 30 A permanent legal force is defined as "the decision by the District Court which is not appealed the decision by the High Court which is not appealed; or the decision made by the Supreme Court". (Elucidation (Penjelasan) to Article 2(1), Law on Clemency (No. 5/2010))
- 31 The National Law Development Agency is the implementing agency for the Law No. 16 of 2011.
- 32 AComHPR, Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, para. (H)(d), 2003.
- 33 ICCPR, art. 14(3)(f); ECHR, art. 6(3)(e); ACHR, art. 8(2)(a); ICTR Statute, art. 20(4)(f); ICTY Statute, art. 21(4)(f).
- 34 UNGA, UN Principles and Guidelines on Access to Legal Assistance in the Criminal Justice System, Guideline 5, UN Doc. A/67/458, 6 December 2012; AComHPR, Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, para. (H)(c), 2003.
- 35 UNGA, UN Principles and Guidelines on Access to Legal Assistance in the Criminal Justice System, Guideline 5, UN Doc. A/67/458, 6 December 2012; AComHPR, Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, para. (H)(c), 2003.
- 36 In countries where the death penalty is mandatory, the courts cannot always take these factors into account when sentencing for certain crimes. However, it is still vital to investigate your client's background. Even in countries with mandatory death sentences, prosecutors may use their discretion to charge your client with a less serious crime that may not be punishable by death. You can help convince prosecutors to use their discretion to avoid the death penalty by presenting evidence that your client is mentally ill or has been abused, for example.
- 37 ECOSOC, Implementation of the safeguards guaranteeing protection of the rights of those facing the death penalty, Resolution 1989/64, para. 1(a), 24 May 1989.
- 38 *Kelly v. Jamaica*, Communication No. 253/1987, para. 7, UN Doc. CCPR/C/41/D/253/1987, HRC, 8 April 1991.
- 39 UDHR, Art. 11(1).
- 40 On the other hand, article 14(3) of the ICCPR provides that "In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality: (...) To have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing; To be tried without undue delay; To be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it."

- 41 ICCPR, art. 14(3)(b); see also, ECHR, art. 6(3)(b); ACHR, art. 8(2)(c); ACHPR, art. 7(1)(c); AComHPR, Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, para. (N)(3), 2003; ICTY Statute, art. 21(4)(b); ICTR Statute, art. 20(4)(b); Rome Statute of the ICC, art. 67(1)(b).
- 42 HRC, General Comment No. 13, Article 14 (Administration of Justice), para. 14, (1984): "What is 'adequate time' depends on the circumstances of each case, but the facilities must include access to documents and other evidence which the accused requires to prepare his case, as well as the opportunity to engage and communicate with counsel"; AComHPR, Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, para. (N)(3)(c), 2003: "Factors which may affect the adequacy of time for preparation of a defence include the complexity of the case, the defendant's access to evidence, the length of time provided by rules of procedure prior to particular proceedings, and prejudice to the defence"; see also *Pedersen & Baadsgaard v. Denmark*, App. No. 49017/99, ECtHR, 17 December 2004.
- 43 *Smith v. Jamaica*, Communication No. 282/1988, UN Doc. CCPR/C/47/D/282/1988, HRC, 31 March 1993; *Reid v. Jamaica*, Communication No. 355/1989, UN Doc. CCPR/C/51/D/355/1989, HRC, 8 July 1994 (the Committee concluded that since the accused only met with his lawyer for ten minutes before trial, this did not constitute adequate time to prepare).
- 44 See also *Chaparro Álvarez and Lapo Iñiguez v. Ecuador*, IACtHR, 21 November 2007; Gordillo, Raúl Hilario, G.445.XXI, Fallos: 310:1934, Corte Suprema de Justicia de la Nación (Supreme Court of Argentina), 29 September 1987; *Goddi v. Italy*, App. No. 8966/80, ECtHR, 9 April 1984; *Daud v. Portugal*, App. No. 22600/93, ECtHR, 21 April 1998; *Bogumil v. Portugal*, App. No. 35228/03, ECtHR, 7 October 2008; *Öcalan v. Turkey*, App. No. 46221/99, ECtHR (Chamber), 12 March 2003, ECtHR (Grand Chamber), 5 May 2005, (violation of art. 6(1) and 6(3)(b)).
- 45 *Little v. Jamaica*, para. 8.3, Communication No. 283/1988, UN Doc. CCPR/C/43/D/283/1988, HRC, 1 November 1991.
- 46 ICCPR, art. 9(3); ACHPR, art. 7(1)(d); ECHR, art. 6(1); ACHR, art. 8(1).
- 47 ECOSOC, Safeguards guaranteeing protection of the rights of those facing the death penalty, Res. 1996/15, 23 July 1996.
- 48 UNGA, UN Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems, principle 2, UN Doc. A/67/458, 6 December 2012.
- 49 ICCPR, art. 14(3)(f); ECHR, art. 6(3)(e); ACHR, art. 8(2)(a); ICTR Statute, art. 20(4)(f); ICTY Statute, art. 21(4)(f).
- 50 Amnesty International, Right cause, wrong means: human rights violated and justice denied in Cameroon's fight against Boko Haram, <https://www.amnesty.org/en/documents/afr17/4260/2016/en/>, July 2016.
- 51 Cornell Center on the Death Penalty Worldwide, Justice Denied: A Global Study of Wrongful Death Row Convictions, p.12 et seq. <https://secureservercdn.net/198.71.233.33/8z.2c6.myftpupload.com/wp-content/uploads/2019/12/Justice-Denied-A-Global-Study-of-Wrongful-Death-Row-Convictions.pdf?time=1656537339>, January 2018.
- 52 See Institute for Criminal Justice Research (ICJR), Indonesia's Legal Framework on Terrorism, Indonesia Criminal Law Update. Issue No. 3/2018. URL: <https://icjr.or.id/wp-content/uploads/2018/11/ICLU-3-2018.pdf>
- 53 Article 28(1), Law No. 5 of 2018
- 54 Article 25(2), Law No. 5 of 2018
- 55 UDHR, art. 11; ICCPR, art. 14(2); ACHPR, art. 7(1)(b); ACHR, art. 8(2); ECHR, art. 6(2).
- 56 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.")
- 57 The name has been changed.
- 58 Basic Principles on the Role of Lawyers, principles 8 and 22, 1990; Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, adopted by UNGA resolution 43/173 of 9 December 1988, Principle 18(1); AComHPR, Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, 2003, para. (N)(3)(e) "All arrested, detained or imprisoned persons shall be provided with adequate opportunities, time and facilities to be visited by and to communicate with a lawyer, without delay, interception or censorship and in full confidentiality. 1. The right to confer privately with one's lawyer and exchange confidential information or instructions is a fundamental part of the preparation of a defence. Adequate facilities shall be provided that preserve the confidentiality of communications with counsel."
- 59 Maclean, Effective Capital Defense Representation, p. 674.
- 60 Leona D. Jochowitz, Missed Mitigation: Counsel's Evolving Duty to Assess and Present Mitigation at Death Penalty Sentencing, 43 No. 1 CRIMINAL LAW BULLETIN, art. 5, 2007.
- 61 Maclean, Effective Capital Defense Representation, p. 670.
- 62 Ibid. p. 676.
- 63 Code of Professional Conduct for Counsel, art. 16, ICC, <https://www.icc-cpi.int/sites/default/files/iccdocs/PIDS/docs/COPCEng.pdf>, December 2005.
- 64 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.
- 65 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.
- 66 UNGA, UN Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems, principles 3 and 7, UN Doc. A/67/458, 6 December 2012.
- 67 ICCPR, art. 14(3)(d); ACHPR, art. 7(1)(c); UNGA, 70th session, Resolution 70/175, UN Standard Minimum Rules for the Treatment of Prisoners (Nelson Mandela Rules), UN Doc. A/RES/70/175, 17 December 2015, rules 61 and 119; Guidelines on the Conditions of Arrest, Police Custody and Pre-Trial Detention in Africa (Luanda Guidelines), AComHPR, May 2014, principles 4(d) and 8; UNGA, UN Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems, principle 3, UN Doc. A/67/458, 6 December 2012; AComHPR, Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, para. (N)(2)(b) and (f), 2003.
- 68 UNGA, UN Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems, principle 3, UN Doc. A/67/458, 6 December 2012; AComHPR, Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, para. (N)(2)(b) and (f), 2003; Resolution on Guidelines and Measures for the Prohibition and Prevention of Torture and Cruel, Inhuman or Degrading Treatment or Punishment in Africa (Robben Island Guidelines), AComHPR, art. 20 (c), 23 October 2002.
- 69 Luanda Guidelines, principle 7(b)(ii) "The maximum duration of police custody, prior to the obligation to bring the arrested person before a judge, shall be set out in national law that prescribes time limits of no more than 48 hours extendable in certain circumstances by a competent judicial authority, consistent with international law and standards".
- 70 Articles 59-61, 54-57, and 69-70, KUHP
- 71 See Articles 75 and 102, KUHP
- 72 Article 75, KUHP
- 73 ICCPR, art. 10(1) ("All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person").
- 74 Nelson Mandela Rules, rule 3; Luanda Guidelines, principle 23.
- 75 UDHR, art. 5; CAT, arts. 2 and 16; ICCPR, art. 7; ACHPR, art. 5; UNGA Resolution 43/173, UN Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, principle 6, UN Doc. A/RES/43/173, <https://www.ohchr.org/en/instruments-mechanisms/instruments/body-principles-protection-all-persons-under-any-form-detention>, 9 December 1988; UNGA Resolution 34/169, Code of Conduct for Law Enforcement Officials, art. 5, <https://www.ohchr.org/en/instruments-mechanisms/instruments/code-conduct-law-enforcement-officials>, 17 December 1979; Nelson Mandela Rules, rule 1; Luanda Guidelines, principle 24.
- 76 Nelson Mandela Rules, rule 112; Luanda Guidelines, principle 26.
- 77 Luanda Guidelines, principle 32(b)(ii).
- 78 Nelson Mandela Rules, rule 112; Luanda Guidelines, principle 31(d)(ii)
- 79 Nelson Mandela Rules, rules 12-17, and 21; Luanda Guidelines, principle 4(e).
- 80 Nelson Mandela Rules, rules 96-103; Luanda Guidelines, principle 28.
- 81 Nelson Mandela Rules, rule 23; Luanda Guidelines, principle 28.
- 82 Nelson Mandela Rules, rules 24-35; Luanda Guidelines, principle 28.
- 83 Nelson Mandela Rules, rules 22 and 114; Luanda Guidelines, principle 4(e).
- 84 Nelson Mandela Rules, rules 2 and 66; Luanda Guidelines, principle 14(a).
- 85 Nelson Mandela Rules, rule 58; Luanda Guidelines, principle 27.
- 86 Nelson Mandela Rules, rule 61; Luanda Guidelines, principle 14(c).
- 87 Article 360-61, Penal Code
- 88 An Independent monitoring body established in 2005 through a Presidential decree no 17/200.
- 89 Article 4 (c) of the Presidential Decree No. 17 Year 2005 on the National Police Commission.
- 90 ICCPR, art. 14(2); ACHPR, art. (7)(1)(b); ACHR, art. 8(2); ECHR, art. 6(2).
- 91 ICCPR, art. 9(3); ACHR, art. 7(5); ECHR, art. 5(3); Luanda Guidelines, principle 11(a).
- 92 ICCPR, art. 9(3); ECHR, art. 5(3); ACHR, art. 7(5); *Michael & Brian Hill v. Spain*, para. 12.3, Communication No. 526/1993, UN Doc. CCPR/C/59/D/526/1993, HRC, 2 April 1997 ("The Committee reaffirms its prior jurisprudence that pre-trial detention should be the exception and

- that bail should be granted, except in situations where the likelihood exists that the accused would abscond or destroy evidence, influence witnesses or flee from the jurisdiction of the State party. (...) The mere conjecture of a State party that a foreigner might leave its jurisdiction if released on bail does not justify an exception to the rule laid down in article 9, paragraph 3, of the Covenant”.)
- 93 The Minister of Justice issued Directive No. JC.5/19/18 of 1964 on the Release of Detainee Who is Detained Without Proper Warrant of Detention Order, which directed Heads of Directorate of Correctional Facilities; Heads of Regional Correctional Facility Inspectorates; Director of Regional Correctional Facilities; and Director/Head of Correctional Facilities, not to accept detainee without proper warrant, and to release a detainee who such detention is extended without proper letter.
- 94 UN Working Group on Arbitrary Detention, Opinion No. 77/2018, concerning Mr Sabeur Lajili (Tunisia), UN Doc. A/HRC/WGAD/2018/77, 17 January 2019.
- 95 See for example, *Reyes v. The Queen*, UKPC, 2 AC 235, 241, (Belize appeal) 2002; *Coard v. The Crown*. [2007] UKPC 7 (Grenada appeal) 2007; *Dacosta Cadogan v. Barbados*, IACtHR, 24 September 2009; *Kigula & Others v. Attorney General*, 2006 Supreme Court, Constitutional Appeal No. 03, Uganda, 2009; *Woodson v. North Carolina*, 428 U.S. 280, United States, 1976; *Mithu v. Punjab*, 2 SCR 690 (Report of the Supreme Court of India), 1983.
- 96 Leona D. Jochowitz, Missed Mitigation: Counsel’s Evolving Duty to Assess and Present Mitigation at Death Penalty Sentencing, 43 No. 1 CRIMINAL LAW BULLETIN art. 5, 2007.
- 97 See for example, Allen P. Wilkinson & Ronald M. Gerugthy, Bite Mark Evidence: Its Admissibility is Hard to Swallow, 12 WESTERN STATE UNIVERSITY LAW REVIEW 519, 560, 1985.
- 98 Interview with Ameir Mohamed Suleiman, African Center for Justice and Peace Studies, 24 February 2010.
- 99 CAT, art. 15; ICCPR, art. 14; ACHPR, arts. 5 and 7.
- 100 Convention Against Torture Initiative (CATI). Tool: Non-Admission of Evidence Obtained by Torture and Ill-Treatment: Procedures and Practices. 2020.p.
- 101 Kurniawan et al. Exclusionary Rule Principle and Constitutional Rights Protection in Evidence Seeking. Int. J. Adv. Res. 10(04), 864-871.
- 102 In *Strickland v. Washington*, 466 U.S. 668 (1984), the US Supreme Court held that in a capital case, defence counsel has a duty to make reasonable investigations into potential defences or to make a reasonable determination that such investigations are unnecessary.
- 103 Moeljatno, 2002, Principles of Criminal Law, Rineka Cipta Publisher; Jakarta, p. 146
- 104 See ECOSOC, United Nations Safeguards guaranteeing protection of the rights of those facing the death penalty, para. 3, Resolution No. 1984/50, UN Doc. E/1984/84, 25 May 1984; ICCPR, art. 6(5); art. 37 of the Convention on the Rights of the Child provides that states shall ensure that “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”.
- 105 ECOSOC provides that states should eliminate the death penalty “for persons suffering from mental retardation or extremely limited mental competence, whether at the stage of sentence or execution”, ECOSOC, Implementation of the safeguards guaranteeing protection of the rights of those facing the death penalty, Resolution No. 1989/64, UN Doc. E/1989/91, 24 May 1989. The Commission on Human Rights (CHR) also called on states “[n]ot to impose the death penalty on a person suffering from any mental or intellectual disabilities or to execute any such person”, CHR, The question of the death penalty, UN Doc. E/CN.4/2005/L77, 14 April 2005. See also CHR, Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, para. 116, UN Doc. E/CN.4/1997/60, 24 December 1996 (calling on states that impose capital punishment on the mentally ill to bring their national legislation into conformity with international legal standards).
- 106 Bradley A. Maclean, Effective Capital Defense Representation and the Difficult Client, 76 TENNESSEE LAW REVIEW 661, 670, 2009.
- 107 ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases, para. 10.7, “Investigation”, https://www.americanbar.org/content/dam/aba/administrative/death_penalty_representation/2003guidelines.authcheckdam.pdf, February 2003.
- 108 Daniel Payne, Building the Case for Life: A Mitigation Specialist as a Necessity and a Matter of Right, 16 CAPITAL DEFENSE JOURNAL 43, 2003.
- 109 See for example: Cameroonian Code of Criminal Procedure, art. 203. Mauritanian Code of Criminal Procedure, arts. 141 and 143. Tunisian Code of Criminal Procedure, art. 101.
- 110 See for example: Malian Code of Criminal Procedure, art. 151.
- 111 The Brasilia Regulations Regarding Access to Justice for Vulnerable People (Brasilia Regulations), approved by the 14th Latin American Judicial Summit in 2008, state that the following may constitute causes of vulnerability: age, disability, belonging to an indigenous community or minority, victimisation, migration and internal displacement, poverty, gender and deprivation of liberty. The Brasilia Regulations also stress the importance of public policies aimed at guaranteeing high quality and specialised technical legal assistance for those deemed vulnerable. Since the approval of the Brasilia Regulations, a Protocol on Access to Justice for Vulnerable Persons and Groups has been adopted, <http://www.cumbrejudicial.org/productos-y-resultados/productos-axiologicos/item/38-protocolo-de-acceso-a-la-justicia-para-personas-y-grupos-vulnerables>.
- 112 ICCPR, art. 6(5); ACHR, art. 4(5); African Charter on the Rights and Welfare of the Child (ACRWC), art. 5(3).
- 113 ICCPR, art. 6(5); ACHR, art. 4(5); ACRWC, art. 30(e).
- 114 ACHR, art. 4(5), “Capital punishment shall not be imposed upon persons who, at the time the crime was committed, were (...) over 70 years of age.”
- 115 ACRWC, art. 30(e); Arab Charter on Human Rights, art. 7(b).
- 116 ACRWC, art. 30(e); Arab Charter on Human Rights, art. 7(b); ECOSOC, Safeguards guaranteeing protection of the rights of those facing the death penalty, Resolution No. 1984/50, 25 May 1984 “nor shall the death sentence be carried out (...) on new mothers (...)”.
- 117 ECOSOC, Safeguards guaranteeing protection of the rights of those facing the death penalty, Resolution No. 1984/50, 25 May 1984 “nor shall the death sentence be carried out (...) on persons who have become insane”; CHR, Report submitted by the Special Rapporteur to the Commission on Human Rights, S. Amos Wako, paras. 279-283, E/CN.4/1989/25, 6 February 1989.
- 118 Vienna Convention on Consular Relations, art. 36, 1993.
- 119 Nigel Rodley, The Treatment of Prisoners Under International Law, Oxford University Press, 2008, pp. 322 and 324.
- 120 Rodley, The Treatment of Prisoners Under International Law, pp. 322, 324, Oxford Univ. Press, 2008: “The difference in wording between the language relating to persons under the 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 woman has given birth, she may be executed.”
- 121 Art 7, Law No. 2/PNPS/1964
- 122 CRC, art. 1.
- 123 UN Committee on the Rights of the Child (CRC Committee), 41st Session, Concluding Observations: Saudi Arabia, UN Doc. CRC/C/SAU/CO/2, 17 March 2006.
- 124 ICCPR, art. 24(2); CRC, art. 7.
- 125 Australia Indonesia Partnership for Justice Center on Child Protection Indonesia’s missing millions: AIJF baseline study on legal identity, <http://www.cpcnetwork.org/wp-content/uploads/2015/02/AIJF-PUSKAPA-BASELINE-STUDY-ON-LEGAL-IDENTITY-Indonesia-2013.pdf>
- 126 Robson, Jazz & Davies, Sharyn. (2016). Juvenile (In)justice: Children in Conflict with the Law in Indonesia. Asia-Pacific Journal on Human Rights and the Law. 17. 119-147. 10.1163/15718158-01701009.
- 127 ECOSOC, Guidelines for Action on Children in the Criminal Justice System, Resolution No. 1997/30, Annex, para. 12, 21 July 1997.
- 128 CRC Committee, General Comment No. 10, UN Doc. CRC/C/GC/10, 25 April 2007, paras. 35, 39.
- 129 UNICEF, Innocenti Insight: Birth Registration and Armed Conflict, <https://www.unicef-irc.org/publications/468-birth-registration-and-armed-conflict.html>, 2007.
- 130 ECOSOC, Implementation of the safeguards guaranteeing protection of the rights of those facing the death penalty, Resolution No. 1989/64, 24 May 1989; Rodley, The Treatment of Prisoners Under International Law, p. 325.
- 131 See for example, Malian Code of Criminal Procedure, art. 149.
- 132 The UN Special Rapporteur on the Right to Health has observed that the term “mental disability” encompasses a wide range of disabilities and conditions from intellectual disability to severe psychiatric disorders, ECOSOC, Report of the Special Rapporteur, Mr Paul Hunt, on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, UN Doc. E/CN.4/2005/51, 11 February 2005, para. 19.
- 133 In 1984, ECOSOC addressed this issue for the first time and concluded that the death penalty cannot be carried out on persons who have become insane, ECOSOC, Safeguards guaranteeing protection of the rights of those facing the death penalty, Resolution No. 1984/50, 25 May 1984. In 1989, ECOSOC recommended that states eliminate “the death penalty for persons suffering from mental retardation or extremely limited mental competence, whether at the stage of sentence or execution”, ECOSOC, Implementation of the Safeguards guaranteeing protection of the rights of those facing the death penalty, para. 1(d), Resolution No. 1989/64, 24 May 1989.

- The UN Human Rights Committee (HRC) decided that notification of an execution order to a mentally incompetent person constitutes a violation of article 7 of the Covenant, *R.S. v. Trinidad and Tobago*, Communication No. 684/1996, HRC, 2 April 2002.
- 134 See, e.g., *Pipersburgh v. R.*, 72 WIR 108, para. 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 readaptation which makes social enquiry and psychiatric reports necessary for all such sentence hearings.”) See also *DPP Spencer v. Che Gregory*, E Carib. Supreme Court, High Court of Justice, Federation of Saint Kitts and Nevis, para. 3, 2009 (“It is also now standard practice for the state to provide a Social Enquiry Report and a Psychiatric Report.”).
- 135 Amnesty International. *Fatally Flawed: Unfair Trials and Death Penalty in Indonesia*. 2015. P. 49
- 136 American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders, DSM-5*, Elsevier Masson, 2015.
- 137 *Uganda v. Bwenge*, High Court Uganda, HCT-03-CR-SC-190/1996, 2009.
- 138 *Uganda v. Bwenge*, High Court Uganda, HCT-03-CR-SC-190/1996, 2009.
- 139 *Uganda v. Bwenge*, High Court Uganda, HCT-03-CR-SC-190/1996, 2009.
- 140 *Republic of Malawi v. Margret Nadzi Makolija*, Sentence Rehearing Cause No. 12 of 2015, (judgment unreported).
- 141 See, for example, the Psycrom website (<https://www.psycrom.org/>) or the Mouvement Santé Mentale Québec website (<https://www.mouvementsmq.ca/>).
- 142 UNODC, *Handbook on prisoners with special needs*, p.12, <https://www.unodc.org/documents/justice-and-prison-reform/Prisoners-with-special-needs.pdf>.
- 143 UNGA, *Principles for the Protection of Persons with Mental Illness and for the Improvement of Mental Health Care*, principle 9, Resolution No. 46/119, UN Doc. A/RES/46/119, 17 December 1991.
- 144 United Nations Standard Minimum Rules for the Treatment of Prisoners (Nelson Mandela Rules), UN Doc. A/CONF/611, Annex I, 1977.
- 145 Nelson Mandela Rules, rule 24.
- 146 International Centre for Prison Studies, *A Human Rights Approach to Prison Management*, p. 50, www.prisonstudies.org.
- 147 Nelson Mandela Rules, rule 44.
- 148 Nelson Mandela Rules, rule 82.
- 149 Vienna Convention on Consular Relations, art. 36(1)(b). The Vienna Convention on Consular Relations provides a range of rights for foreign nationals.
- 150 The American Bar Association’s Guidelines for the Appointment and Performance of Defense Counsel in Capital Cases provide, in guideline 10.6, that attorneys have an obligation to advise foreign national defendants of their right 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.
- 151 See Opinion OC-16/99 of the Inter-American Court of Human Rights, 1 October 1999; *Avena and Other Mexican Nationals (Mexico v. United States of America)*, Judgment, International Court of Justice, Reports 2004, p. 12, 31 March 2004.
- 152 See *Tan Seng Kiah v. R.* [2002] NTCCA 1, Northern Territory Court of Criminal Appeal in Australia on the suppression of statements where the accused has been denied the opportunity to seek consular assistance.
- 153 In *Avena and Other Mexican Nationals*, the International Court of Justice (ICJ) 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. For example, the death sentence of one Mexican national was commuted as a direct result of the ICJ’s *Avena* decision. See *Torres v. State of Oklahoma*, 120 P3d 1184, 1188 (Oklahoma, Constitutional Appeal 2005), 7 December 2005. Courts outside of the US have applied the ICJ’s decision: BVerfG, *Beschluss der 1. Kammer des Zweiten Senats vom 19. September 2006*, 2 BvR 2115/01 Rn. (1 - 77), paras. 60–61. (Federal Constitutional Court of Germany), 19 September 2006, http://www.bverfg.de/entscheidungen/rk20060919_2bvr211501.html. The High Court of Malawi also released two detainees whose consular rights had been violated: *Republic v. Lameck Bandawe Phiri*, review of sentence, Case No. 25 of 2017 and *Republic v. Mabvuto Alumeta*, review of sentence, Case No. 36 of 2017.
- 154 *Lexique des termes juridiques* 2012, 19^e ed., Dalloz, 2011.
- 155 See, for example, *Cameroonian Code of Criminal Procedure*, art. 4. *French Code of Criminal Procedure*, art. 385.
- 156 See, for example, UDHR, arts. 7 and 10; ICCPR, arts. 2(1), 3, 26; Convention on the Elimination of all forms of Discrimination against Women (CEDAW), arts. 2 and 15; International Convention on the Elimination of All Forms of Racial Discrimination, arts. 2, 5, and 7; ACHPR, arts. 2 and 3; ACHR, arts. 1, 8(2), 24; American Declaration of the Rights and Duties of Man, art. II, XVIII; ECHR, arts. 6 and 14.
- 157 See UDHR, art. 10; ICCPR, art. 14(1); ACHR, arts. 8(1) and 27(2); ADHR (ASEAN Declaration on Human Rights), art. XXVI; ECHR, art. 6(1); ACHPR, arts. 7(1) and 26. See also, *Basic Principles on the Independence of the Judiciary*, principles 1 and 2, 1985. The HRC held that “the right to be tried by an independent and impartial tribunal is an absolute right that suffers no exception”, *Gonzales del Rio v. Peru*, para. 5.2, Communication No. 263/1987, HRC, UN Doc. CCPR/C/46/D/263/1987, 28 October 1992. In *Richards v. Jamaica*, the Human Rights Committee found that Jamaica had violated article 14 of the ICCPR due to the extensive media publicity in the run-up to the trial and therefore could not lawfully carry out the execution (para. 7.2, Communication No. 535/1993, UN Doc. CCPR/C/59/D/535/1993/Rev.1, HRC, 31 March 1997, “the extensive media publicity surrounding the fact that he had pleaded guilty undermined his right to the presumption of innocence, thereby depriving him of his right to a fair trial”).
- 158 Malian Code of Criminal Procedure, art. 1, “criminal proceedings must be fair, adversarial and preserve the balance of the rights of the parties”.
- 159 For example, the *Basic Principles on the Independence of the Judiciary*, adopted by the UN General Assembly in 1985, provide in para. 5 that “[e]veryone 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.
- 160 Lawyers Committee for Human Rights, *What is a fair trial? A Basic Guide to Legal Standards and Practice*, 2000, p.12, https://internationalcourts.net/system/files/LawyersCommitteeForHumanRights_WhatsAFairTrial_2000.pdf.
- 161 François Sudre, *Droit européen et international des droits de l’homme*, pp. 232–233, 4th edition, puf, Paris, 1999.
- 162 LCHR Fair Trial Manual, pp. 12–13; ICCPR, art. 14(1); HRC, General Comment No. 13 on the right to a fair trial; See e.g. *Media rights Agenda v. Nigeria*, Communication 224/98, para. 51, AComHPR, 6 November 2000, “The publicity of hearings is an important safeguard of the interest of the individuals and of society at large.”
- 163 *Avocats sans frontières (on behalf of Gaëtan Bwampamy v. Burundi)*, Communication 231/99, para. 29, AComHPR, 6 November 2000.
- 164 See *Basic Principles on the Independence of the Judiciary*, 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 ECtHR 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*, Application No. 7819/77, 7878/77, para. 78, ECtHR, 28 June 1984.
- 165 *Ringeisen v. Austria*, Application No. 2614/65, para. 95, ECtHR, 16 July 1971.
- 166 *Collins v. Jamaica*, Communication No. 240/1987, UN Doc. CCPR/C/43/D/240/1987, HRC, 1 November 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.
- 167 *Pedersen and Baadsgaard v. Denmark*, Application No. 49017/99, ECtHR, 17 December 2004. See also *H. v. France*, paras. 50 and 58, ECHR, 24 October 1989.
- 168 See, for example, ICCPR, art. 14(2); ACHPR, art. 7(1)(b); ECHR, art. 6(2); ACHR, art. 8(2).
- 169 See *Draft Body of Principles on the Right to a Fair Trial and a Remedy*, Annex II, para. 59(a), p. 83 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 Protection of Minorities, 46th session, E/CN.4/Sub.2/1994/24, 3 June 1994.
- 170 *Adetunji Adeleye Suli v. Raya*
- 171 ICCPR, art. 14(3)(d); ICTY Statute, art. 21(4)(d); ICTY 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

- on Human Rights, the European Court of Human Rights has stated that the object and purpose of article 6 means that a person charged with a criminal offence is entitled to take part in the trial hearings. See *Colozza and Rubinat*, Application Nos. 9024/80, 9317/81, para. 27, ECtHR, 12 February 1985.
- 172 ICCPR, art. 14(3)(f).
- 173 Articles 53(1), 177(1) and 178(1), KUHAP
- 174 ECHR, art. 6(2); HRC, General Comment No. 13 (art. 14), para. 7, 12 April 1984.
- 175 See ECPM. Dehumanised: The Prison Conditions of People sentenced to death in Indonesia. 2019. p. 60
- 176 For example, the Inter-American Commission on Human Rights 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/II.62, Doc. 10, rev. 3, IACHR, 1983.
- 177 ECHR, art. 6(3)(d); ICCPR, art. 14(3)(e). Article 8(2)(f) of the ACHR recognises 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.
- 178 *Saunders v. the United Kingdom*, Application No. 19187/91, para. 68, ECtHR, 17 December 1996.
- 179 See e.g. *Hadjianastassiou v. Greece*, Application No. 12945/87, ECtHR, 16 December 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”). The Council of Europe Recommendation concerning consistency in sentencing specifically addresses the need to give reasons when imposing a sentence. Recommendation No. R (92) 17 of the Committee of Ministers of the Council of Europe to Member States concerning consistency in sentencing, Appendix, para. E, 19 October 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.”
- 180 Crim. Chamber of the French Cass. Court, 14 December 2010, Application No. 10-85.879.
- 181 *Ministère Public and NDIINGA Bello v. SCT* (Ndoh Daniel), Revue camerounaise de Droit, Series 2, No. 26-Year 1983 C.S. Judgment No. 99/P, 27 January 1983.
- 182 Crim. Chamber of the French French Cass. Court, 28 September 2010, Application No. 10-81.493
- 183 Crim. Chamber of the French French Cass. Court, 10 November 2004, Bulletin criminel 2004, No. 282, Application No. 04-83.541.
- 184 See Article 185(7), KUHP
- 185 Art 185 (6), KUHP
- 186 *J. L. García Fuenzalida v. Ecuador*, para. 95, Communication No. 480/1991, UN Doc. GAOR/A/51/40/ vol. II, HRC, 12 July 1996 (finding violations of articles 14(3)(e) and (5) of the ICCPR where a court had refused to order such expert testimony).
- Diocles William v. Tanzania*, African Court on Human and Peoples’ Rights, Application No. 016/2016, 21 September 2018. (para. 63: “a court seized of a case must hear both the prosecution as well as the defence witnesses”).
- 187 For example, in some jurisdictions, such as the Democratic Republic of Congo, the fact that an accused remains silent has sometimes been perceived as an acquiescence to the version put forward by the prosecution. Such conclusions are in violation of the presumption of innocence. Interview with Liévin Ngondji.
- 188 *D. Gordon v. Jamaica*, para. 6.3, Communication No. 237/1987, UN Doc. GAOR/A/48/40 (Vol. II), HRC, 5 November 1992.
- 189 See for example: Mauritanian Code of Criminal Procedure, art. 363. Cameroonian Code of Criminal Procedure, art. 308. Tunisian Code of Criminal Procedure, art. 150. Malian Code of Criminal Procedure, art. 412.
- 190 See for example: Mauritanian Code of Criminal Procedure, art. 363. Cameroonian Code of Criminal Procedure, art. 308. Tunisian Code of Criminal Procedure, art. 150. Malian Code of Criminal Procedure, art. 412.
- 191 Crim. Chamber of the French Cass. Court, 6 April 1994; Crim. Chamber of the French Cass. Court, 31 January 2012.
- 192 For example, Cameroon Code of Criminal Procedure, art. 335, “To be admitted, testimony must be direct. Direct testimony is testimony that comes from: a) the person who saw the fact, if it is a fact that could be seen; b) the person who heard it, if it is a fact that could be heard; c) the person who perceived it, if it is a fact that could be perceived by any other sense; d) its author, if it is an opinion”.
- 193 *Delta v. France*, para. 36, Series A, No. 191-A, ECtHR, 19 December 1990 (analysing the rights afforded by article 6(3)(d) of the European Convention on Human Rights). See also *Castillo Petrucci et al. v. Peru*, para. 154, Series C No. 52, IACTHR, 30 May 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 (...)”).
- 194 *Delta v. France*, para. 37, Series A, No. 191-A, ECtHR, 19 December 1990 (right to a fair trial under articles 6(1) and (3)(d) of the ECHR 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).
- 195 See generally American Bar Association, ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases, rev. ed. February 2003, 31 HOFSTRA L. REV. 913 (2003), available at https://www.americanbar.org/groups/committees/death_penalty_representation/resources/aba_guidelines/2003-guidelines/.
- 196 See e.g. Niger Penal Code, art. 53: “The penalties prescribed by law against a convicted person, in whose favour mitigating circumstances have been declared, may be reduced, (...) up to ten years’ imprisonment if the crime is punishable by death”.
- 197 For example, Protocol to the African Charter on Human and Peoples’ Rights on the Establishment of an African Court on Human and Peoples’ Rights, art. 28; ECHR, art. 45.
- 198 *Mulla et al. v. State of Uttar Pradesh*, Crim. App. No. 396, 2008, paras 53-59, India, 2010.
- 199 *Mulla et al. v. State of Uttar Pradesh*, Crim. App. No. 396, 2008, para. 65, India, 2010.
- 200 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 et al. v. State*, 2 SRC 92, India, 2000; *Mulla et al. v. State of Uttar Pradesh*, Crim. App. No. 396, 2008, India, 2010; *Reyes v. The Queen*, UKPC, 2 AC 235, Judgment on Sentencing, 2002 (Belize appeal); *Pipersburgh v. R.*, UKPC, para. 33, 72 WIR 108 2008 (Belize appeal); *DPP v. Wycliffe Liburd*, Suit No SKBHCOR 2009/0007, Supreme Court of the Eastern Caribbean, St Kitts and Nevis, Crim. 2009; *George v. The Queen*, Suit No. HCRAP 2009/005, Supreme Court of the Eastern Caribbean, Court of Appeal of Saint Lucia, 2011.
- 201 *Atkins v. Virginia*, 536 U.S. 304, 316 n.21, 2002.
- 202 Even if an illustrative or seemingly exhaustive list existed in your jurisdiction, you should not be limited to it.
- 203 *Kafantayeni v. Malawi*, Constitutional Case No. 12 of 2005, High Court of Malawi, 27 April 2007.
- 204 Concluding observations of the HRC, Islamic Republic of Iran, UN Doc. CCRP/C/79/Add.25, 1993; *Lubuto v. Zambia*, para. 7.2, Communication No. 390/1990, HRC, 31 October 1995 (imposition of the mandatory death penalty for an armed robbery that did not result in death or wounding of any person violated article 6(2)). The IACTHR has likewise concluded that crimes that do not result in death are not “most serious crimes” under article 4(2) of the ACHR. See also, *Raxxacoó-Reyes v. Guatemala*, paras. 56 and 71, No. 133, IACTHR, 15 September 2005.
- 205 AComHPR, Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, para. 9(b) “In countries that have not abolished the death penalty, sentence of death may be imposed only for the most serious crimes”.
- 206 Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, para. 65, UN Doc. A/HRC/4/20/2007/18, 29 January 2007.
- 207 *Bachan Singh v. State of Punjab*, 2 SCC 684, India, 1980. In February 2010, the Indian Supreme Court reiterated that the death penalty may be imposed only in cases of “extreme culpability”. *Mulla & Anr. v. State of Uttar Pradesh*, Crim. App. No. 396, 2008, para. 49, India, 2010.
- 208 See e.g. *Manohar Lal alias Mannu et al. 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 Gandhi” and had lost all reason).
- 209 Press Trust of India, SC saves man who murdered wife, 3 kids from the gallows, Times of India, 29 February 2012, <http://timesofindia.indiatimes.com/city/delhi/SC-saves-man-who-murdered-wife-3-kids-from-the-gallows/articleshow/12085626.cms>.
- 210 *S v. Makwanyane*, 46, 3 SA 391, South Africa, 1995.
- 211 See, for example, Chadian Penal Code, art. 62: “If the psychic or neuropsychic disorder has not totally removed the mental capacity or control of the person’s acts, it constitutes a ground for diminished responsibility”.
- 212 *Adrien Dereix*, PhD Thesis, Pierre and Marie Curie University (Paris, France), pp. 51-52, Antécédent de traumatisme crânien dans une population d’arrivants en prison. Influence de l’âge de survenue du traumatisme crânien sur le parcours de vie et conséquences pour la prise en charge, 2015.

- 213 See, for example, Niger Penal Code, art. 41: "There is no crime or misdemeanour or contravention when the defendant was insane at the time of the action or when he was compelled by a force that he could not resist".
- 214 *Republic of Malawi v. Richard Maulidi and Julius Khanawa*, Sentence Review Hearing No. 65 of 2015 (unpublished decision).
- 215 See for example, Malian Code of Criminal Procedure, art. 319.
- 216 See for example, *Kigula et al. v. Attorney General*, 2006 S. Ct. App No. 03, paras. 56-57, Uganda 2009; *Pratt v. Jamaica*, Communication No. 210/1986 and No. 225/1987, UN Doc. A/44/40, 222, HRC, 1989; *Soering v. United Kingdom*, para. 111, Application No. 14038/88, ECtHR, 7 July 1989.
- 217 *Reyes v. The Queen*, UKPC, 2 AC 235, Judgment on Sentencing (Belize Appeal), 25 October 2002.
- 218 *Republic of Malawi v. Chiliko Senti*, Sentence Review Hearing No. 25 of 2015 (unpublished decision).
- 219 American Bar Association, ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases, Guideline 10.7, "Investigation", 2003, https://www.americanbar.org/groups/committees/death_penalty_representation/resources/aba_guidelines/2003-guidelines/.
- 220 For example: in Cameroon, article 439 of the Code of Criminal Procedure provides that "the convicted person has the right to appeal". See also: Malian Code of Criminal Procedure, arts. 478 and 482. Tunisian Code of Criminal Procedure, art. 258. Central African Code of Criminal Procedure, arts. 193 and 194. Congolese Code of Criminal Procedure, art. 96.
- 221 Butt, S. & Lindsay, T. *Indonesian Law*. (Oxford University Press 2018), p. 228
- 222 Butt, S. & Lindsay, T. *The Indonesian Constitution: A Contextual Analysis* (Hart 2012) 87.
- 223 Article 51(1) of Law No. 24/2003
- 224 See e.g. ICCPR, art. 14(5); ACHPR, art. 7(1)(a); ACHR, art. 8(2)(h); ECOSOC, UN Safeguards Guaranteeing Protection of the Rights of Those Facing the Death Penalty, para. 6, Resolution No. 1984/50, Annex, UN Doc. E/1984/84, 25 June 1998, E/1984/84, 25 May 1998; Arab Charter on Human Rights, art. 16(7), 22 May 2004; ECHR Protocol No. 7, art. 2(1); AComHPR, Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, para. (A)(2)(j) "The essential elements of a fair hearing include (...) an entitlement to an appeal to a higher judicial body" and para (N)(10)(a) "Everyone convicted in a criminal proceeding shall have the right to review of his or her conviction and sentence by a higher tribunal."
- 225 HRC, General Comment No. 32, para. 51, UN Doc. CCPR/C/GC/32, 26 July 2007.
- 226 *LaVende v. Trinidad and Tobago*, para. 5.8, Communication No. 554/1993, UN Doc. CCPR/C/61/D/554/1993, HRC, 11 November 1997 (denial of legal aid to the applicant violated his right to have legal counsel assigned to him ex officio (art. 14(3)(d)) and his right to have his conviction and sentence reviewed by a higher tribunal (art. 14(5))); AComHPR, Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, para. (N)(2)(c) and para (H)(c) "The interests of justice always require legal assistance for an accused in any capital case, including for appeal, executive clemency, commutation of sentence, amnesty or pardon."
- 227 AComHPR, Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, para. (N)(10)(a)(i) ("If exculpatory evidence is discovered after a person is tried and convicted, the right to appeal or some other post-conviction procedure shall permit the possibility of correcting the verdict if the new evidence would have been likely to change the verdict, unless it is proved that the non-disclosure of the unknown fact in time is wholly or partly attributable to the accused.")
- 228 *Benedetto v. The Queen*, Privy Council, [2003] UKPC 27, 1 WLR 1545, 1569-70.
- 229 AComHPR, Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, title (N)(10)(b) "Anyone sentenced to death shall have the right to appeal to a judicial body of higher jurisdiction, and States should take steps to ensure that such appeals become mandatory".
- 230 See e.g. *Lithgo and others v. the United Kingdom*, ECtHR, Series A No. 102, 8 July 1986.
- 231 *Johnson v. Jamaica*, Communication No. 588/1994, UN Doc. CCPR/C/56/D/588/1994, HRC, 22 March 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*, Communication No. 702/1996, UN Doc. CCPR/C/60/D/702/1996, HRC, 18 July 1997 (finding a delay of 31 months between conviction and appeal violated article 14 of the ICCPR); *Ashby v. Trinidad and Tobago*, Communication No. 580/1994, para. 10.5, UN Doc. CCPR/C/74/D/580/1994, HRC, 21 March 2002 (finding a four-and-a-half-year delay in the adjudication of the appeal violated article 14 of the ICCPR, specifically noting that inadequate staffing or general administrative backlog is not sufficient justification for the delay).
- 232 *Isaac, Cannonier, Williams & Gardiner v. The Queen*, Crim. Apps No. 2 dated 2008, Nos. 19, 20, 21, 22 dated 2008, Eastern Caribbean Court of Appeal, 21 March 2012 (appeal by St. Kitts and Nevis).
- 233 *Isaac, Cannonier, Williams & Gardiner v. The Queen*, Crim. Apps No. 2 dated 2008, Nos. 19, 20, 21, 22 dated 2008, Eastern Caribbean Court of Appeal, 21 March 2012 (appeal by St. Kitts and Nevis).
- 234 *Republic v. Lackson Dzimbi*, Sentence Review Hearing No. 4 of 2015, 1 June 2015.
- 235 See, Basic Principles on the Role of Lawyers, para. 21, adopted at the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, 27 August-7 September 1990, UN Doc. A/CONF.144/28/Rev.1 ("It is the duty of the competent authorities to ensure lawyers access to appropriate information, files and documents in their possession or control in sufficient time to enable lawyers to provide effective legal assistance to their clients. Such access should be provided at the earliest appropriate time."
- 236 See, AComHPR, Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, para. (A)(2)(a); ECHR, art. 6; *Neumeister v. Austria*, ECtHR, para. 22, Application No. 1936/63, 27 June 1968 (stating that the principle of equality of arms is encompassed in the notion of a fair trial in art. 6(1) of the Convention); *Foucher v. France*, ECtHR, para. 36, Application No. 22209/93, 18 March 1997 ("As he had not had such access, the applicant had been unable to prepare an adequate defence and had not been afforded equality of arms, contrary to the requirements of article 6 para. 1 of the Convention taken together with article 6 para. 3 (art. 6-3+6-1)."); see e.g., Code of Criminal Procedure (France), Preliminary Art. "Criminal proceedings must be fair and adversarial and must preserve a balance of the rights of the parties"; Amnesty International, *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/O11/1997) ("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)).
- 237 *Foucher v. France*, ECtHR, para. 34, Application No. 22209/93, 18 March 1997.
- 238 *Pitman v. State*, Privy Council, [2008] UKPC 16, paras. 26-32.
- 239 *Solomon v. State*, Privy Council, [1998] 2 LR 50, 54-5.
- 240 *Hadjianastassiou v. Greece*, Application No. 12945/87, para. 33, ECtHR, 16 December 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").
- 241 See *Collins v. Jamaica*, para. 8.3, Communication No. 356/1989, UN Doc. CCPR/C/47/D/356/1989, HRC, 30 March 1993.
- 242 Interview with Rongzhi Kao (in Taiwan, defence lawyers are allowed to "assist" judges by presenting evidence that they may not have had access to during the investigation stage of a case).
- 243 Supreme Court [S. Ct.], 20-11-87 No.14K /MIL /1987, Ito Sukarta Bin Sapri, Nov. 20, 1987 (Indon.).
- 244 Simon Butt, *The Position of International Law within the Indonesian Legal System*, 28 Emory Int'l L. Rev. 1, 5 (2014).
- 245 Constitutional Court [Const. Ct.], No. 1/PHPU.Pres-XII/2014, *Amrozi bin Nurhasyim et al v. State*.
- 246 See Constitutional Court [Const. Ct.], 15/PUU-X/2012, *Raja Syahril v. State*, available at http://www.mahkamahkonstitusi.go.id/putusan/putusan_sidang_15%20PUU%202012-KUHP-TELAH%20BACA%2018-7-2012.pdf (Indon.).
- 247 ICCPR, art. 6(2).
- 248 Human Rights Committee, General Comment No. 6, para. 7.
- 249 See for example, *Chisanga v. Zambia*, para. 5.4, Communication No. 1132/2002, UN Doc. CCPR/C/85/D/1132/2002, HRC, 18 October 2005.
- 250 ECOSOC, Resolution 1984/50; UNGA, Resolution 39/118.
- 251 ECOSOC, Resolution 1984/50; UNGA, Resolution 39/118.
- 252 UN Commission on Human Rights, Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, UN Doc. E/CN.4/1998/68/Add.3, para. 21, 22 January 1998.
- 253 UN Commission on Human Rights, Extrajudicial, Summary or Arbitrary Executions, Report of the Special Rapporteur, para. 63, UN Doc. E/CN.4/1999/39, 6 January 1999.
- 254 UN Commission on Human Rights, Resolution 2003/67, The question of the death penalty, UN Doc. E/CN.4/RES/2003/67, 25 April 2003.
- 255 See e.g. *Ram Anup Singh & Ors. v. State of Bihar*, 2002(3) SCR Penal 7856 (Supreme Court of India).
- 256 *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).
- 257 ICCPR, art. 7.
- 258 See for example, ECHR, art. 3; ACHR, art. 5; ACHPR, art. 5; CAT, art. 16.
- 259 See e.g. *Pratt and Morgan v. Attorney General of Jamaica* [1993], 3 SLR 995, 2 AC 1, 4 All ER 769 (Judicial Committee of the Privy Council); *Soering v. the United Kingdom*, Application No. 14038/88, ECtHR, 7 July 1989.

- 260 See Proclamation of Teheran, Final Act of the International Conference on Human Rights, Teheran, 22 April-13 May 1968, 23 GAOR, UN Doc. A/CONF.32/41, at para. 4, 13 May 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).
- 261 *Pratt and Morgan v. Attorney General of Jamaica* [1993], para. 33, 3 SLR 995, 2 AC 1, 4 All ER 769 (Judicial Committee of the Privy Council).
- 262 *Pratt and Morgan v. Attorney General of Jamaica* [1993], para. 33, 3 SLR 995, 2 AC 1, 4 All ER 769 (Judicial Committee of the Privy Council).
- 263 *Soering v. the United Kingdom*, para. 106, Application No. 14038/88, ECtHR, 7 July 1989.
- 264 *Department of Justice v. Burns and Rafay*, para. 122, 2001 SCC 7, Supreme Court of Canada, 22 March 2001.
- 265 *Department of Justice v. Burns and Rafay*, para. 122, 2001 SCC 7, Supreme Court of Canada, 22 March 2001.
- 266 *Department of Justice v. Burns and Rafay*, para. 122, 2001 SCC 7, Supreme Court of Canada, 22 March 2001.
- 267 See Institute for Criminal Justice Reform. Taking lives during the Pandemic: 2020 Indonesian Death Penalty Report. 2020. <https://icjr.or.id/wp-content/uploads/2020/12/Death-Penalty-Report-ICJR-2020.pdf>
- 268 ICCPR, art. 6(5); ACHR, art. 4(5); ACRWC, art. 5(3).
- 269 ICCPR, art. 6(5); ACHR, art. 4(5); ACRWC, art. 30(e).
- 270 ACHR, art. 4(5), "Capital punishment shall not be imposed upon persons who, at the time the crime was committed, were under 18 years of age or over 70 years of age".
- 271 ACRWC, art. 30(e); Arab Charter on Human Rights, art. 7(b).
- 272 ACRWC, art. 30(e); Arab Charter on Human Rights, art. 7(b); ECOSOC, Safeguards guaranteeing protection of the rights of those facing the death penalty, Resolution No. 1984/50, 25 May 1984 "the death sentence [shall not] be carried out (...) on new mothers".
- 273 ECOSOC, Safeguards guaranteeing protection of the rights of those facing the death penalty, Resolution No. 1984/50, 25 May 1984 "the death sentence [shall not] be carried out (...) on persons who have become insane"; UN Commission on Human Rights, Report submitted by the Special Rapporteur to the Commission on Human Rights, S. Amos Wako, paras. 279-283, E/CN.4/1989/25, 6 February 1989.
- 274 United Nations Safeguards guaranteeing protection of the rights of those facing the death penalty, para. 3, 25 May 1984.
- 275 UN Economic and Social Council, Implementation of the Safeguards guaranteeing protection of the rights of those facing the death penalty, p. 51, para. 1(d), UN Doc. E/1989/91, 24 May 1989.
- 276 UN Commission on Human Rights, Resolution 2003/67, The question of the death penalty, E/CN.4/RES/2003/67, 25 April 2003.
- 277 *Francis v. Jamaica* (No. 606/1994), UN Doc. CCPR/C/54/D/606/1994, HRC, 3 August 1995.
- 278 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).
- 279 Vienna Convention on Consular Relations, art. 36(1)(b).
- 280 *Avena and Other Mexican Nationals (Mexico v. United States)*, para. 140, ICJ, 31 March 2004.
- 281 UDHR, art. 11(2).
- 282 In its resolution 2005/59, The question of the death penalty, adopted on 20 April 2005, the UN Commission on Human Rights calls on states that continue to impose the death penalty to do so "only pursuant to a final judgement rendered by an independent and impartial competent court, and to ensure the right to a fair trial", as well as to "ensure that all legal proceedings, including those before special tribunals or jurisdictions, and particularly those related to capital offences, conform to the minimum procedural guarantees contained in article 14 of the International Covenant on Civil and Political Rights".
- 283 See, e.g., *Johnson v. Jamaica*, Communication No. 588/1994, HRC, para. 8.9 (1996) (finding delay of 51 months between conviction and dismissal of appeal to be violation of ICCPR art. 14, paras 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*, Communication No. 250/1987, HRC, 20 July 1990 (para. 11.5: "since the final sentence of death was passed without having met the requirements for a fair trial set forth in article 14, it must be concluded that the right protected by article 6 of the Covenant has been violated"), (para. 12.2: "in capital punishment cases, the duty of states parties to observe rigorously all the guarantees for a fair trial set out in article 14 of the Covenant is even more imperative"); *McLawrence v. Jamaica*, Communication No. 702/1996, HRC, para. 5.13, 18 July 1997; *Maryam Khalilova v. Tajikistan*, Communication No. 973/2001, HRC, UN Doc. CCPR/C/83/D/973/2001, para. 7.6, 13 April 2005; *Saadat Khomidova v. Tajikistan*, Communication No. 1117/2002, UN Doc. CCPR/C/81/D/1117/2002, HRC, paras. 6.5 and 7, 25 August 2004; IACtHR, Advisory Opinion OC-16/99, para. 135, 1 October 1999 ("States that still have the death penalty must, without exception, exercise the most rigorous control for observance of judicial guarantees in these cases"); UNGA Resolution, Arbitrary or summary executions, 96th plenary session, UN Doc. A/RES/35/172, 15 December 1980 (Member states should "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*, pp. 112-113, 3rd edition, 2002; *Öcalan v. Turkey*, Application No. 46221/99, ECtHR, 12 May 2005.
- 284 *Saadat Khomidova v. Tajikistan*, Communication No. 1117/2002, HRC, paras. 6.4-6.6, UN Doc. CCPR/C/81/D/1117/2002, 25 August 2004.
- 285 ACHR, art. 4(6); ICCPR, art. 6(4); UN Economic and Social Council, Safeguards guaranteeing protection of the rights of those facing the death penalty, principle 7, Resolution 1996/15, 23 July 1996; Arab Charter on Human Rights, art. 6.
- 286 *Rudolph Baptiste v. Grenada*, IACHR, para. 120, Case 11.743, Report No. 38/00, 13 April 2000.
- 287 *Rudolph Baptiste v. Grenada*, IACHR, paras 118-121, Case 11.743, Report No. 38/00, 13 April 2000.
- 288 In its concluding observations on Yemen, the HRC 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 seek a pardon was not guaranteed for all on an equal footing. The HRC decided that "[t]he preponderant role of the victim's family in determining on the basis of financial compensation whether or not the penalty is carried out is also contrary to articles 6, 14 and 26 of the Covenant". HRC: Concluding observations of the Human Rights Committee, CCPR/CO/75/YEM (12 August 2002).
- 289 See Indonesian Constitutional Court Decision 107/PUU-XII/2015, 15 June 2016
- 290 Article 10, Law No. 5 of 2010
- 291 Ombudsman of Indonesia, 'Kelalaian dan Perbedaan Perlakuan yang dilakukan oleh instansi Kejaksaan Agung dan Mahkamah Agung terhadap Humprey Ejike Jefferson tergolong tindakan maladministrasi (Negligence and Difference of Treatment carried out by the Attorney General's Office and the Supreme Court against Humprey Ejike Jefferson is classified as an act of maladministration)' (Ombudsman Press Release, 28 July 2017) <https://www.ombudsman.go.id/news/fr/kelalaian-dan-perbedaan-perlakuan-yang-dilakukan-oleh-instansi-kejaksaan-agung-dan-mahkamah-agung-terhadap-humprey-ejike-jefferson-tergolong-tindakan-maladministrasi>
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