

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



REPRESENTING INDIVIDUALS FACING THE DEATH PENALTY IN MALAYSIA

A BEST PRACTICES MANUAL

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This edition of the manual is an update to support its application to the unique features of the Malaysian legal system. The manual is intended to serve as a resource for lawyers, paralegals, civil society organizations and community activists in Malaysia interested in representing persons facing the death penalty. It is not to be used as a replacement for a legal treatise or a bench book. 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 comparative jurisdictions.

The manual has been adapted and supplemented by the author, Zainab Malik, under the supervision of ECPM (Together against the death penalty). It would not have been possible without the insights and existing work from Rashid Ismail, M. Ravi, Mahmood Amiry-Moghaddam, Edmund Bon, the Commission for Human Rights Malaysia (SUHAKAM), ECPM, Anti-Death Penalty Asia Network (ADPAN), Reprieve, Amnesty International, Harm Reduction International, Capital Punishment Justice Project (CPJP), 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.

This manual may be photocopied and distributed freely. However, no changes or edits may be made without express authorization from ECPM.

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INTRODUCTION

The manual aims to provide lawyers and advocates from Malaysia with legal arguments and strategic guidance in their representation of individuals facing the death penalty. It can also be used as a resource for civil society organisations, human rights activists, parliamentarians, law students and/or media seeking to understand the applicable standards in capital trials. It sets forth best practices in the defence of capital cases, based on the experiences of advocates from comparative jurisdictions, international human rights principles, and the jurisprudence of national courts and international tribunals.

HOW TO USE THIS MANUAL

A STEP-BY-STEP GUIDE TO DEFENCE IN A CAPITAL CASE

This manual covers the representation of individuals facing the possible imposition of the death penalty, from the moment of their arrest until their final clemency application. The manual will guide you through the most important stages of a case, including pretrial detention, initial and ongoing investigation, pretrial motions and negotiations, trial, sentencing and appeals to domestic and international bodies. The manual is intended not as an overview of the law or standards that may apply in a capital case in Malaysia, but rather as a step-by-step guide to the best practices in capital case representation.

THE LAW AND AVAILABLE RESOURCES IN YOUR JURISDICTION

This manual is meant primarily as a resource for lawyers and advocates representing individuals facing the death penalty in Malaysia. Nevertheless, many of the principles and strategies outlined in the chapters that follow are of universal application and can be used by lawyers and advocates from other jurisdictions. Not all the practices referred to in this manual are followed commonly or even at all in Malaysia. As such, you may also face some challenges in persuading your colleagues and the courts to adhere to the principles outlined here. Courts and lawyers alike may benefit from training programmes where they can discuss the relevance of international norms and comparative best practices 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 every capital case, qualified experts are not always available. We are aware of the vast disparities in resources available to capital litigators. Wherever possible, we suggest creative strategies for overcoming resource constraints so that you can provide the best quality legal representation under the circumstances.

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**. International human rights law lays down obligations which States are bound to respect.

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 on the countries that ratify them.** Through ratification of international human rights treaties, governments commit to implementing 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 bodies¹ 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 *technically* have the legal power of treaties, they have the persuasive force of having been negotiated by States and adopted by political bodies such as the UN General Assembly, usually by consensus.² Because of this political force, they are considered authoritative and are cited and relied upon in rulings of regional human rights courts and national courts.

APPLICATION OF INTERNATIONAL LAW IN MALAYSIA

APPLICATION OF INTERNATIONAL TREATIES

The Federal Constitution of Malaysia does not contain any provision stating that international law shall be deemed part of the law of the land or that treaties (upon ratification) shall be the laws of Malaysia. In Malaysia, like in the United Kingdom, the Executive possesses the treaty-making capacity while the power to give legal effect domestically to treaties rests in Parliament. Therefore, for a treaty to be operative in Malaysia, it requires legislation by Parliament (dualist approach).³ For example, The Geneva Conventions Act of 1962 (as revised in 1993) was enacted to give legal effect to the Four Geneva Conventions for the protection of the Victims of War of 1949.

APPLICATION OF CUSTOMARY INTERNATIONAL LAW

A rule of customary international law is binding on all States except persistent objectors. So as long as Malaysia has not persistently objected to a rule of customary international law, that rule is binding on Malaysia, regardless of enacting legislation.⁴ In practice, the courts in Malaysia have applied principles of customary international law, including through the medium of English common law.⁵

JUDICIAL INTERPRETATION AND HUMAN RIGHTS LAW

Increasingly, there is an important trend towards international engagement in Malaysian courts as well as an erosion of the strict dualist approach to international law.

In some recent decisions, Malaysian courts have linked constitutional guarantees to international conventions, including the Universal Declaration of Human Rights (UDHR), when interpreting domestic laws that impede a citizen's constitutional right. For example:

- ▶ In *Abd Malek bin Husin* [2008] 1 MLJ 368, in deciding the fate of a detainee under executive detention incarcerated under the Internal Security Act, 1960, the judge referred to the Universal Declaration of Human Rights 1948 to inform the interpretation of the Malaysian Federal Constitution regarding fundamental liberties.
- ▶ In *Suzana bt Mad Aris* [2011] 1 MLJ 107, the judge referred to the principle of right to life and liberty under the UDHR as part of Malaysian jurisprudence. In this case, the court awarded exemplary damages over the oppressive and arbitrary actions of the police in depriving a detainee of medical attention, leading to his death.
- ▶ In *Muhammad Hilman Idham & Ors v Kerajaan Malaysia & Ors* [2011] 9 CLJ 50, the Court of Appeal stated ([24]) that: "Freedom of expression is one of the most fundamental rights that individuals enjoy. It is fundamental to the existence of democracy and the respect of human dignity. This basic right is recognised in numerous human rights documents such as Article 19 of the Universal Declaration of Human Rights and Article 19 of the International Covenant on Civil and Political Rights."
- ▶ In *Noorfadilla Ahmad Saikin v Chayed Basirun & Ors* [2012] 1 MLJ 832, the High Court applied Articles 1 and 11 of the Convention on the Elimination of all forms of Discrimination Against Women (CEDAW) to its interpretation of Article 8(2) of the Federal Constitution. The court stated (at [28]) that: "... in interpreting article 8(2) of the Federal Constitution, it is the court's duty to take into account the government commitment and obligation at international level especially under an international convention, like CEDAW, to which Malaysia is a party..."

Right to a Fair Trial as Customary International Law

The right to a fair trial is a basic human right. It is one of the universally applicable principles recognised under the Universal Declaration of Human Rights (UDHR). There is an emerging discourse that in the years since the adoption of the UDHR in 1948, the right to a fair trial has become binding on states, regardless of their treaty ratification status, as a part of customary international law. The right to a fair trial (Principle V) is laid down in all the international instruments establishing international criminal tribunals (see arts. 21 ICTY Statute, 20 ICTR Statute and 67 ICC Statute) and in many human rights treaties (see arts. 14 (1) and 26 of the International Covenant on Civil and Political Rights, art. 8 of the American Convention on Human Rights and art. 6 of the European Convention on Human Rights), as well as in national and international case law. It has even been argued that, given the general recognition by all States and international courts and tribunals of its crucial importance and of the inadmissibility for States and national and international courts to derogate or deviate from it, the right to a fair trial has also attained the status of a *jus cogens* norm.

Resources:

Amnesty International. *Fair Trials Manual* (2nd Edition). 2014

William A. Schabas. *The Customary International Law of Human Rights*. Oxford University Press (OUP), 2021

Amal Clooney and Philippa Webb. *The Right to a Fair Trial in International Law*. OUP, 2020

INTERNATIONAL HUMAN RIGHTS LAW AS AN INTERPRETIVE SOURCE: A GROWING MOVEMENT

BANGALORE PRINCIPLES OF JUDICIAL CONDUCT ("BANGALORE PRINCIPLES")

Judges in the commonwealth jurisdictions are increasingly using international human rights law in their judicial reasoning. This emerging approach was given expression in the **Bangalore Principles of Judicial Conduct**, which were adopted by the General Assembly of the UN Human Rights Commission in May 2003. The principles establish guidelines for ethical judicial conduct based on six values: independence, impartiality, integrity, propriety, equality, competence and diligence.⁶ The principles identified a "growing tendency for national courts to have regarded to international norms for the purpose of deciding cases where the domestic law – whether constitutional, statute or common law – is uncertain or incomplete". They stated that:

It is within the proper nature of judicial process and well-established judicial functions for national courts to have regard to international obligations which a country undertakes – whether or not they have been incorporated into domestic law – for the purpose of removing ambiguity or uncertainty from national constitutions, legislation or common law.

The following are examples of cases where the national courts have relied upon international law in their judicial reasoning:

India

Madhav Hayawadanrao Hoskot vs State of Maharashtra (Supreme Court of India)

1978 AIR 1548, 1979 SCR (1) 192

The Supreme Court of India ruled that under right to life guaranteed under Article 21, Constitution of India, the State should provide free legal assistance to all poor defendants irrespective of the gravity of the crime attributed. The Court additionally ruled that legal assistance should be provided not only in the trial stage but in all the three tiers of the appeal process. In its reasoning, the Court relied upon provisions of the International Covenant on Civil and Political Rights (ICCPR) and the Universal Declaration of Human Rights (UDHR).

Australia

Minister of State for Immigration and Ethnic Affairs v. Teoh [1995] AUJHRights 10

In *Teoh*, the government ordered the deportation of a Malaysian national who had six young children in Australia. Teoh argued that the deportation order violated the Convention on the Rights of the Child, an unincorporated treaty that has no formal status as law in Australia. The High Court said:

[R]atification of a convention is a positive statement by the executive government of this country to the world and to the Australian people that the executive government and its agencies will act in accordance with the Convention. The positive statement is an adequate foundation for a legitimate expectation, absent statutory or executive indications to the contrary, that administrative decision-makers will act in conformity with the Convention and treat the best interests of the children as a primary consideration.

On 28 June 1995, however, legislation was introduced into Parliament to reverse the precedent created by Teoh's Case.

New Zealand

Van Gorkhum v. Attorney General [1977] 1 NZLR 535 (Supreme Court of New Zealand)

The Court considered a challenge to the setting of conditions distinguishing between the payment of removal allowances to married male and female teachers pursuant to the discretion conferred under the Education (Salaries and Staffing) Regulations, 1957. In holding that the distinction between the male and female married teachers was beyond the power conferred by the enabling regulations (and therefore invalid), the court referred to articles 2 and 23 of the Universal Declaration of Human Rights (UDHR) and to article 10(1) of the Declaration on the Elimination of Discrimination Against Women. The judge held that, although the instruments were not a part of New Zealand domestic law, they represented desirable international goals, adding that it would be unsafe to conclude that the enabling regulation would be inconsistent with those standards.

CHAPTER 1

DEATH PENALTY IN MALAYSIA

OVERVIEW

The death penalty has been a part of the Malaysian legal system since before the country's independence in 1957 and is currently retained for 20 offences in Malaysia.⁷ In recent years, the death penalty has been used mostly for murder and drug trafficking, and in fewer cases for firearms-related offences. Malaysia is among only 15 countries in the world where the death penalty is known to have been imposed or carried out for drug-related offences.⁸ A de facto moratorium has been in place since October 2018. This chapter provides a brief overview of the context and includes a list of resources for you to consult.

COMPOSITION OF DEATH ROW

Though lawyers and human rights advocates have repeatedly requested that government authorities regularly publish figures on the use of the death penalty in Malaysia, such requests are rarely fulfilled. In 2023, official estimates range between 1,281 and 1,324 prisoners on death row.⁹ Of the 1324 prisoners, 536 are foreign nationals and 129 (almost 9.7%) are women.¹⁰ According to Amnesty International, around 86% of women on death row in Malaysia are foreign nationals.¹¹ Based on official sources, since the Independence of Malaysia in 1957, half of all executions were in relation to drug trafficking.¹² While the number of people executed decreased up until 2018, Malaysian judges continued to sentence people to death. As a result, the death row population has continued to increase.

LEGAL FRAMEWORK AND PROCEDURE

The primary substantive law codifying criminal offences is the Penal Code of Malaysia.¹³ The Criminal Procedure Code outlines the provisions pertaining to criminal procedure.¹⁴ Special legislation, including the Dangerous Drugs Act of 1952, the Armed Forces Act of 1972, the Firearms Increased Penalties Act of 1971, and the Kidnapping Act, 1961, also provide for the death penalty for certain offences.

In Malaysia, individuals who have been charged at a Magistrate Court with an offence for which the death penalty is a possible punishment face trial before one of the 25 High Courts. The conviction and sentence can then be appealed before the Court of Appeal and the Federal Court. The death penalty may be imposed at any stage of the legal process – including at the final stage, by the Federal Court.

Once the Federal Court has confirmed the death sentence issued by a lower court, or has imposed a new death sentence, the remaining avenue available to those facing the death penalty is to seek pardon from the Ruler of the State, or from the King for applications from the federal territories.

In broad terms, the criminal justice process comprises the following procedures:

- ▶ Arrest
- ▶ Pre-Trial
- ▶ Trial
- ▶ Sentencing and Mitigation
- ▶ Detention
- ▶ Appeals
- ▶ Clemency

This manual outlines the national and international safeguards that are available to your client at each of these stages and provides you with examples of best practices that you can use to fulfil your duty as a lawyer representing someone facing the death penalty.

ROAD TO ABOLITION

The Pakatan Harapan in 2018 announced its intention to abolish the death penalty in its entirety. In July 2018, a moratorium on executions was imposed. In December 2018, the country voted for the first time in favour of the UN Resolution on the abolition of the death penalty. However, since then, the Government of Malaysia seems to have shifted its stance from complete abolition to only abolishing the mandatory death penalty. In September 2019, the Minister of Law, the Late Dato VK Liew, appointed a Special Committee to review alternative sentences to the mandatory death penalty. According to the Minister, the Committee, which consisted of various experts,

conducted a study on sentencing policies after considering feedback from several stakeholders. The Committee recommended that the legislature replace the mandatory death penalty with a more appropriate punishment, subject to courts' discretion. However, the COVID-19 pandemic resulted in the fall of the Mahathir Mohamad government and the formation of a new government.

Discussions on the death penalty began to gain traction again in late 2021, as a result of international uproar and heavy campaigning from local and international NGOs fighting against the imminent execution of the late Nagaenthran K. Dharmalingam – a Malaysian National convicted for drug trafficking in Singapore.¹⁵ In June 2022, the government finally announced that it would present the proposals to the alternatives for the mandatory death penalty soon. This was a result of the presentation of a report on the study of alternative sentencing for capital punishment during a Cabinet Meeting. It would mean that the 11 offences holding the mandatory capital punishment will be replaced with alternative forms of punishment. On April 11, 2023, the Dewan Negara, or upper house of parliament, passed two bills reforming death penalty sentencing, following their passage by the Dewan Rakyat, or lower house, on April 3. In addition to removing the mandatory death penalty for the 12 offences that carried it, the Bill also removes the death penalty in its entirety for 7 offences, including murder and kidnapping. However, the death penalty for drug trafficking under the Dangerous Drugs 1952 – which is the most common conviction for death row prisoners – is retained.

Parliament also passed the Revision of Sentence of Death and Imprisonment for Natural Life (Temporary Jurisdiction of the Federal Court) Bill 2023, which will allow prisoners sentenced to death or natural life imprisonment to apply for resentencing by the Federal Court within 90 days of the law being formally published, which the court can extend. The Federal Court can either uphold the original sentence or replace it with 30 to 40 years in prison. Prisoners will only be allowed to apply once.


Resources:

Amnesty International. *Fatally Flawed: Why Malaysia Must Abolish the Death Penalty* (2019)


ECPM. *Isolation and Desolation: Conditions of Detention of people sentenced to Death* (2020)

Monash University and ADPAN. *Drug Offences and the Death Penalty in Malaysia: Fair Trial Rights and Ramifications* (2020)

CHAPTER 2



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



THE RIGHT TO EFFECTIVE REPRESENTATION

Article 5(3) of the Federal Constitution of Malaysia guarantees the right of a person to be allowed to consult and be defended by a legal practitioner of their choice as soon as possible after arrest.¹⁶ This right extends to both citizens and foreign nationals. Section 255 of the Criminal Procedure Code (CPC) also provides that “every person accused before any criminal court may of right be defended by an advocate.”

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

As a capital defence lawyer, you have a duty to provide high-quality legal representation. This means:

- ▶ You must be independent and free to advocate zealously on behalf of your clients.
- ▶ You must have “experience and competence commensurate with the nature of the offense.”¹⁷
- ▶ You should limit caseloads to a level at which you are able to provide high-quality representation.
- ▶ You should receive adequate resources to enable you to provide a competent defence.

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

ARE MY DUTIES TO MY CLIENT DIFFERENT IN CAPITAL CASES?

In every criminal case your client has certain rights, and as a lawyer you have duties corresponding to these rights. In a capital case, where your client’s life is at stake, you have an added responsibility to ensure that you conduct a thorough investigation of the crime as well as your client’s personal background in an effort to convince the decision-maker that your client – even if guilty – does not merit the death penalty. The United Nations Economic and Social Council (ECOSOC) has called on governments to provide “adequate assistance of counsel at every stage of the proceedings, above and beyond the

protection afforded in non-capital cases.”¹⁸ Moreover, international law requires that, in a capital case, the due process rights of the accused be rigorously observed. It is your job as your client’s advocate to ensure that the courts respect and enforce these rights.

WHAT EXACTLY DOES THE RIGHT TO A LAWYER INCLUDE?

The right to legal assistance is essential to secure a fair trial.¹⁹ International law establishes that every person accused of a capital crime, even if indigent, is entitled to legal representation.²⁰ In addition, international law provides that the accused must be given adequate time and facilities for the preparation of his defence. At the least, this requirement entails a right to *effective* legal representation.²¹ States must also provide compensation to lawyers who are appointed to represent indigent defendants.²² Lawyers have a corresponding duty to cooperate in the provision of these services. Finally, legal authorities, including but not limited to lawyers and judges, have a duty to ensure that legal assistance is effective.²³

BASIC PRINCIPLES ON THE ROLE OF LAWYERS

*Between August and September of 1990 at the 8th United Nations Congress on the Prevention of Crime and the Treatment of offenders held in Havana, Cuba, the Congress passed and adopted a significant document called **Basic principles on the Role of Lawyers**. The Government of Malaysia was represented by a three-person delegation (headed by Tan Sri Hanif Omar, the then Inspector General of Police). It is noteworthy noting that the Government of Malaysia adopted these basic principles on the role of lawyers without any reservations.*

The UN Basic Principles refer to a broad range of issues, such as entry into the profession and access to counsel, as well as professional training. The most cited principles (16-18, 23 and 24) refer to the independence of the legal profession, understood as the ability of lawyers to practice their profession without intimidation, hindrance, harassment or improper interference. This includes the core principle that lawyers should not be identified “with their clients or their clients’ causes” (Principle 18).

*The 1990 Principles were recognized by the Malaysian High Court in **Latheefa Beebi Koya & Anor v Suruhanjaya Pencegahan Rasuah Malaysia & Ors** [2014] 7 MLJ 864. The Court stated:*

“After adopting the Basic Principles, it is only right that Malaysia gives due respect and adheres to it. Hence, I am of the view that lawyers must be protected from any form of intimidation and interference in the performance of their obligation to advise and act for clients. In addition, the fundamental principle of solicitor-client confidentiality to which lawyers are bound must be preserved.”

WHEN DOES THE RIGHT TO COUNSEL APPLY?

Effective representation is not limited to the trial phase. You should attempt to be present and engaged as your client's advocate at the earliest stage possible. In Malaysia, the constitution does not prescribe the time within which an arrested person shall be allowed to consult counsel. Recent amendments and judicial pronouncements provide detailed guidance on how and when the right can be enforced.

Section 28A of the Code of Criminal Procedure becomes applicable once an arrest has been made. Under the provision,

- ▶ The person arrested must be informed that they may communicate and consult with a legal practitioner of their choice *before* the commencement of any form of questioning or recording of any statement by a police officer.
- ▶ If the person arrested expresses their wish to communicate with a legal practitioner, the police officer must allow the arrested person to do so.
- ▶ Reasonable time and facilities must also be given for the legal practitioner to be present to meet the person arrested and for the consultation to take place.
- ▶ Any form of questioning or recording of statement by the police officer would have to be deferred until the consultation has been made.

Section 28A (8)-(10) deals with the narrow exception for the postponement of the right to counsel. There are several prerequisites before the police can exercise this exception to the rule of right to counsel:

- ▶ The police officer in charge of the investigation must have *reasonable belief* that:
- ▶ The compliance of the right to counsel is likely to result in an accomplice of the arrestee remaining at large; or
- ▶ The compliance of the right to counsel is likely to result in the concealment, fabrication or destruction of evidence or the intimidation of a witness in the case; or
- ▶ Having regard to the safety of other persons, the questioning or recording of any statement is so urgent that it should not be delayed.

According to the Suhakam (Human Rights Commission of Malaysia), "the requirement of reasonable belief imports an objective test that can be independently tested by an impartial tribunal based on the circumstances of the facts."²⁴ The police must have some credible

evidence to invoke this exception. In cases like **Ramli bin Salleh v. Inspector Yahya Bin Hashim**²⁵ the courts have placed the onus upon the police to prove that, if exercised, the right will impede police investigation. In the English case of **R v Samuel**,²⁶ the Court of Appeal in England held that, even if the police believed that the counsel's interview with their client would jeopardize the investigations, there must be proof with cogent evidence that a particular counsel or solicitor could be prejudicing the investigation. However, police views on why the right must be postponed carry great weight with the courts in Malaysia. Section 28A(11) requires that the right to counsel be restored as soon as the reasons for the invocations of the exception are no longer subsisting.

Your duties during the pre-trial proceedings are discussed in more detail in Chapter 4. You may also be required to pursue related litigation on the client's behalf, including bail applications and challenges to detention conditions and limits on communication. Your client also has an established right to be assisted by counsel on appeal, including the right to free legal aid on appeal.²⁷ Even if you do not represent your client on appeal, you must advise them directly of all applicable deadlines for seeking post-conviction relief and immediately inform any successor counsel of the procedural status of the case, including whether an appeal has been filed.²⁸

BASIC PRINCIPLES ON THE ROLE OF LAWYERS

*In **Mohamad Ezam Mohd Noor v Ketua Polis Negara & Other Appeals**, the Federal Court found a violation of the right to consult with a lawyer. The appellants were political activists who were arrested and detained under the Internal Security Act, 1960 (ISA) and **were denied access to legal representation** throughout the sixty-day duration of their detention.*

The Court held that this denial was "unreasonable and a clear violation" of Article 5(3) of the Federal Constitution and that the ISA did not contain any provision that proscribed access to a lawyer. The Court agreed with the complainants' contention that the ISA had been used as a pretext to deny access to a lawyer to defend them on several other charges they faced in connection with their activism. Although the earlier judgments provided that a delay in allowing a detained person to consult a lawyer was lawful, the Court in this case noted that "[d]enying access during the earlier part of the detentions would have been acceptable to facilitate the police in their investigations but to stretch that denial throughout the duration of the sixty-day period makes a mockery of art. 5(3)."

**The ISA was repealed in 2012*

LEGAL REPRESENTATION AND DUE PROCESS

RIGHT TO A FAIR TRIAL

Your client has the right to a fair trial, including due process, within a reasonable time and without delay. The right to a fair trial is a human right and is legally binding on States as part of customary international law.²⁹ Article 5 of the Federal Constitution also provides that no person shall be deprived of life or liberty save in accordance with law. It is your duty to assure, to the best of your ability and available resources, that this right is upheld.

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

Article 14 of the ICCPR provides that “Everyone shall be entitled to...adequate time and facilities for the preparation of his defence.”³⁰ Section 28A of the Code of Criminal Procedure similarly provides that reasonable time and facilities must also be given for the legal practitioner to be present to meet the person arrested and for the consultation to take place. However, as discussed above, the right can be curtailed by the police in certain circumstances.

Your client’s right to sufficient time to prepare a defence also applies to you, as capital defence counsel. In other words, you, as your client’s advocate, have a right to sufficient time and resources to defend your client, not only during the trial but also during pre-trial hearings, plea negotiations, post-trial appeals and sentencing hearings. It is your duty to vigorously assert these rights.

For example, if you are appointed to defend a client facing capital charges only days or weeks before their trial is scheduled to begin, you will likely need to request that the trial be postponed so that you can interview your client, investigate any defence he may have, and prepare for trial. If the court denies this request, then you should do everything possible to document the violation. It is important to recall that even if you are unsuccessful in persuading the trial court to grant your request, your efforts to document the violation of your client’s rights could serve as the basis for a successful appeal. Documenting the violation of your client’s rights is also a critical first step toward exhausting your domestic remedies in the event you are considering an appeal to an international body.

The definition of “adequate time” varies according to the facts of each case, the complexity of the issues and the availability of evidence.³¹ The UN Human Rights Committee has found violations of the ICCPR in cases where a newly appointed lawyer was given only minutes or hours to prepare.³² These same cases also hold that a lawyer’s preparation for trial is “inadequate” when they meet with a client only briefly before trial.³³

It is important to remember that the right to sufficient time to prepare a defence also applies to the appeals process. As a capital defence lawyer, you are entitled to adequate time between the date of conviction and the date of execution in order to prepare and complete appeals, including petitions for clemency.³⁴

OVERCOMING BARRIERS

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

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

PRACTICE TIP

Meeting your client on the day of trial

In some countries, lawyers do not meet with their clients until the day of trial. The UN Human Rights Committee has found that this violates the rights of the accused to adequate time and facilities to prepare his defence. For example, in Little v. Jamaica, the petitioner only had 30 minutes for consultation with counsel prior to the trial and approximately the same amount of time for consultation during the trial. The Committee found that the time for consultation was insufficient to ensure adequate preparation of the defence with respect to both trial and appeal, stating: “the right of an accused person to have adequate time and facilities for the preparation of his 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 his counsel to prepare the defence for the trial; this requirement applies to all the stages of the judicial proceedings.” ¶ 8.3, Communication No. 283/1988, U.N. Doc. CCPR/C/43/D/283/1988, HRC (Nov. 1, 1991)

WHAT CAN I DO TO OBTAIN NECESSARY PERSONNEL AND RESOURCES?

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

WHAT RESOURCES DO I NEED?

Experts and Investigators: Effective representation requires consulting with investigators as well as experts such as psychologists and social workers. The American Bar Association emphasizes the importance of creating a defence “team” that is composed of at least two lawyers, experts, investigators and “mitigation specialists.”³⁵ This may not be feasible in all cases, but the concept of a team defence is critical. Capital case representation is challenging, and you should use all of the resources at your disposal. Where investigators

are unavailable, paralegals, law students, or non-governmental organizations may be able to assist. Where psychiatrists are unavailable, academics, civil society experts, nurses and others with mental health training may be useful. Refer to **Appendix A** for a list of organizations that have expertise on the death penalty in Malaysia.

Interpreters: The importance of ascertaining a client’s native language and level of fluency in a particular language cannot be overestimated. Do not assume that your client speaks the language of the country in which they are accused. 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. As their lawyer, you have an obligation to uphold the principle that everyone has a right to be informed of the charges against them in a language that they understand, and to be assisted by an interpreter in court.³⁶ In Malaysia, the CPC requires courts to ensure trial proceedings are understood by the accused. For example, S. 270(1) of the CPC establishes the right of an accused to an interpreter’s translation of evidence presented in a language they do not understand; and S. 256(8) states that questions put to the accused must be in a language the accused understands. There are international standards for interpreters, but certified and/or qualified interpreters may not always be available. In this case, you should make a record in court describing the lack of qualifications of the interpreter and the inability of the translator to competently translate the court proceedings for your client. Competent translation and interpretation are particularly important if your client and/or witnesses are testifying in a foreign language.

OVERCOMING BARRIERS

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

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

THE LAWYER-CLIENT RELATIONSHIP

In Malaysia, the rules that govern the relationship between advocate or solicitor and client are divided into two categories: first, the conventional rules that are in written form, including but not limited to the Legal Profession Act, 1976 (“the LPA”), Legal Profession (Practice and Etiquette) Rules 1978 (“the P&E Rules”), Solicitors’ Accounts Rules 1990 and Bar Council Rulings. The second category refers to, the unconventional rules which are unwritten common standards of decency and fairness.

On the basis of the foregoing, you must develop and maintain an effective lawyer-client relationship in order to provide quality representation. This is especially critical in death penalty cases.³⁷ You may find that establishing a good working relationship with a defendant in a capital case is a challenge. Many governments keep defendants in capital cases isolated from other prisoners and from their family and friends, so you may be the defendant’s only link to the outside world. Under these circumstances, you may find it difficult to gain your client’s trust.

But if you communicate with your client regularly, treat them with respect and professionalism, and are a zealous advocate for their rights, you will develop a better and more productive working relationship.

SUCCESS STORY

The Case of Ahmed Khan

- *Ahmed (not his real name) was charged with blasphemy, a capital crime, in Pakistan. When we were first assigned to his case, the first thing we did was arrange a jail visit to meet him. Although this should be a regular legal/investigative practice, it is quite uncommon to visit your client in jail in Pakistan. A simple visit put us in touch with the jail superintendent, who has now become a close ally of our chamber. We are now granted unfettered access to our client and can meet him unmonitored on any given day for any length of time; also unusual in Pakistan.*
- *Meeting our client in jail on a regular basis has helped us in two ways:*
 - *We discovered he had long been suffering from mental illnesses that had never been properly diagnosed and would never be evident to someone who met him once or twice.*

- *We were allowed to bring in our own international medical expert to the jail to evaluate our client. This evaluation was then presented in court and endorsed by local doctors.*
- *Based on our investigations into Ahmed’s family, we were able to piece together his social history and tell a story of his mental illness.*
- *Ahmed’s case has taught us how far using the simplest of practices can take us. We now have international and local experts testifying that our client is mentally ill, which will, of course, go a long way in proving our client is not guilty of the charges.*

Sarah Belal,

Director, Justice Project Pakistan

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

In order to build a successful relationship with your client, it is important to be consistent in your communications and to keep your client informed of the substantive developments and procedural posture of the case. You should schedule regular visits with your client. Respecting a client’s right to confidentiality and avoiding conflicts of interest are particularly important. Assure them that everything they tell you will remain confidential unless they agree to disclose the information as part of your trial strategy. You should also be sure to respond to correspondence in a timely manner and communicate with their family and friends as you see fit. As the case progresses, your client may become increasingly frustrated. This is a normal reaction to the delays inherent in many legal proceedings. If you find yourself unable to meet with your client as often as you would like, consider recruiting a qualified individual to maintain regular communication with them.

Your discussions with your client will be more productive if you have established a trusting relationship with them. Your client will only disclose personal and painful facts that are necessary to craft an effective defence for the trial (such as their role in the crime) if they trust you. For example, if you only meet with your client ten minutes before trial, they may be inclined to tell you that they simply were not there and do not know what happened. But if they trust you, they may confide in you that they killed the alleged victim in self-defence. This may be a much more viable defence in light of the prosecution’s evidence.

OVERCOMING BARRIERS

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

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

Trust is also essential to uncovering facts that are relevant to the sentencing phase of a capital case, where it is your job as a defence lawyer to humanize your client by presenting mitigating evidence.³⁸ Mitigating evidence can include evidence of a “defendant’s impulsivity, impaired judgment, youth and impressionability, mental and developmental impairment or retardation, history of childhood sexual and physical abuse, substance addiction, and manageability in prison.”³⁹ Defendants are often hesitant to disclose certain information to their lawyers, even if it has the potential to be used as factors of mitigating evidence. For example, defendants may be defensive, ashamed or protective of family members when asked about mental, physical or sexual abuse.⁴⁰ Also, in many cultures, mental illnesses are taboo. They are rarely discussed and in many parts of the world are linked to beliefs in witchcraft or other supernatural powers. Developing mitigating evidence takes time, persistence, and cultural sensitivity. Chapter 4 provides a detailed overview of the investigation required to gather mitigating evidence that may determine whether your client is sentenced to death or a lesser punishment, and Chapter 8 discusses how to present that evidence at the sentencing hearing.

You may have a more difficult time developing a relationship with some clients than with others. When you represent a challenging client, it is important to keep in mind that the qualities that make a client difficult often serve as mitigating factors. For example, if your client has a mental illness, their ability to cooperate with you may be impaired. It is crucial that you spend sufficient time with your client to understand when this is the case, and to obtain expert assistance to evaluate your client’s mental status. As explained in

more detail in subsequent chapters, the accused’s mental illness may serve to explain their conduct at the time of the crime – even if they were not legally “insane” at the time of the offense. This can be powerful evidence in mitigation, but most lawyers do not have a sufficient grasp of the signs and symptoms of mental illness to make use of this evidence in the absence of expert assistance. You will first need to educate yourself about the scope of your client’s mental disabilities before you can argue to a judge or jury that those disabilities should serve as grounds for a lesser penalty.

ADDRESSING CONFLICTS OF INTEREST

As a zealous advocate for your client, you must always put your client’s interests ahead of your own.⁴¹ As an impartial advocate for your client, it is important to recognize any potential conflicts of interest that are already in existence or that may arise during the course of your representation.⁴² This commonly arises when lawyers are asked to represent co-defendants in the same criminal proceeding. In most cases, representing co-defendants presents an inherent conflict. For example, a prosecutor may want to enter into a plea agreement with one co-defendant in exchange for testimony against the other. The co-defendants may have inconsistent defences, and they may not be equally culpable.⁴³

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, you will be faced with the task of advocating for both defendants at the time of sentencing if they are convicted. In most jurisdictions, the defendant’s lesser role in the crime can serve as a mitigating factor. If you are representing co-defendants, arguing that one had a lesser role in the crime is directly opposed to the interest of the other co-defendant: you have the choice between harming one client by not presenting the mitigating evidence to protect the other client or presenting the evidence to protect one client which then harms the other. It is an impossible dilemma.

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

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

Death Penalty Representation Guidelines in China

The American Bar Association (ABA) Death Penalty Representation Project and ABA Rule of Law Initiative China programme have been working closely with the All China Lawyers Association, individual defence lawyers, and academics in China since 2003 to develop representation guidelines:

- 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.
- Lawyer associations in China are now using professional practice standards to standardize and elevate the quality of criminal defence provided in death penalty cases. The pioneering lawyers associations in Shandong, Guizhou and Henan have examined the process through which the ABA Guidelines gained mainstream acceptance in the US and the ways in which the ABA Guidelines have been employed to provide better protection for criminal defendants and their legal advocates. This is an excellent example of how lawyers can work together across borders to improve standards of legal representation in capital cases.

Robin Maher,

*Director, American Bar Association
Death Penalty Representation Project*

CHAPTER 3

PRETRIAL DETENTION AND BAIL

One of the most important issues in the pretrial stage of a criminal case is whether your client will be detained or released pending trial. If your adversary or the court wants your client imprisoned until and through trial, then your client is at risk of being subjected to unwarranted punishment.

PRETRIAL DETENTION

POLICE REMAND

According to the Code of Criminal Procedure, the police may hold a person in custody without a warrant for up to 24 hours to complete the investigation, but this remand phase may be extended to 7 days, renewable once if the offence is punishable by a prison sentence of 14 years or more, including in cases of capital punishment.⁴⁴ Lawyers interviewed for this manual have reported that in its extreme form, an accused is remanded indefinitely, through what is now commonly known as “chain-smoking orders,” where an accused person is arrested in one district and detained for 14 days then rearrested in another district and detained for another 14 days, and so forth, for as long as the police wish to keep the accused person in custody. Special legislation also allows the accused to be detained for a period of more than 14 days for investigation. More specifically, this includes 28 days under Security Offences (Special Measures) Act (SOSMA) of 2012,⁴⁵ 59 days under the Prevention of Terrorism Act of 2015 (POTA),⁴⁶ 59 days under the Prevention of Crime Act (POCA) (Amendment) of 2015⁴⁷ or 60 days under the Dangerous Drugs Act (Special Preventive Measures), 1985.⁴⁸

This period of time of police remand is critical both for the investigating police officers and your client. Whether your client’s defence is ultimately successful or not, if they are held in detention until trial, they will experience the mental and physical hardships of being in jail, they will have less access to you as you try to prepare a defence, and those that depend on your client for support may experience hardships as well. Your advocacy at this stage is crucial. You have a duty to protect your client’s rights by resisting pretrial detention and by advocating for their release with the least restrictive conditions possible.

RIGHT TO PRETRIAL DETENTION HEARING

Your client should have the earliest reasonable opportunity to go before a judge and request his release pending trial.⁴⁹ This opportunity

should be within days of your client’s arrest so that your client, if they are to be released, are not unnecessarily detained for too long.⁵⁰ At that hearing, your client has the right to be represented by you, to present evidence as to why they should not be detained pending trial, to present witnesses, and to contest the government’s evidence by cross-examining the witnesses who testify on behalf of the government.

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

OVERCOMING BARRIERS

There is a significant class difference between my client and myself, and I expect that it might be a problem. What should I do?

It is common for there to be class differences between lawyers and their clients, especially in capital cases. The best approach will depend on local culture, but here are some general tips:

- Try to put your client at ease. Start conversations with small talk and make sure your demeanor is friendly and casual. Where appropriate, ask if your client is comfortable. Where possible, bring food and drink to share with your client.
- Ask your client to explain their understanding of the circumstances and fill in the blanks, making sure to ask whether they have any questions for you.
- Do not avoid addressing important issues just because it would require you to acknowledge the class difference. If you are respectful and try to avoid offending your client, being straightforward and honest will help to establish trust.

RIGHT TO BAIL

Human rights treaties and many national constitutions make clear that an individual should not be punished before they are found guilty⁵¹ but this is precisely what happens when your client is detained pending trial.⁵² As a result, there is a presumption that a defendant should be released from prison pending trial. Even in the case of a repeat offender, there is no need for the accused to be remanded and be sitting in the police station while the police investigate. They can be released on police bail and be required to come back to the police station at any time for whatever reason the police may need them. As pointed out in **PP v Tan Kim San** ([1980] 2 MLJ), the police must first investigate and then arrest, not the other way around.

But your client is not always entitled to be released, and a court has some discretion in determining whether your client will be released or detained pending trial. Unfortunately, the majority of capital crimes in Malaysia are either considered non-bailable offences where the Court has the discretion and power to decide whether to grant you bail (Section 388 of the CPC) or unbailable offences (under the First Schedule of the CPC) where the court cannot grant bail.

For non-bailable offences, the court cannot grant bail in offences carrying death penalty or life imprisonment unless the accused is: (1) under 16 years of age, (2) a woman, or (3) sick or inform. If your client's bail is rejected, they are entitled to appeal the decision.

UNBAILABLE OFFENCES IN MALAYSIA

- ▶ Drug trafficking (S. 39B, Dangerous Drugs Act)
- ▶ Kidnapping cases carrying the death penalty (under the Kidnapping Act, 1961)
- ▶ S. 3 of the Firearms (Increased Penalties) Act, 1971

Your client is also entitled to bail during their appeal. If your client was found guilty during trial, they will still be considered as guilty during the appeal process. As a result, the bail can be granted only under **exceptional circumstances** (as provided under S. 311, CPC). If, on the other hand, the prosecution wants to appeal against your client's innocence, the burden is on them to prove that exceptional circumstances exist wherein bail should be denied (under S. 315, CPC).

CLIENT HEALTH AND WELFARE

Every person has the right to be treated humanely, even if they are accused of a crime.⁵³ The only hardships that your client should face if they are jailed pending trial are those that directly result from the fact that they have been deprived of liberty before being convicted. Practically speaking, your client's physical and mental health will be at risk. They will be isolated from family and other support networks, and may face abuse from guards and other prisoners. You have a duty to protect your client's rights, and you will likely be the only person who is in a position to prevent mistreatment and other abuses.

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

- ▶ The right to be secure in one's person and to be free from torture or cruel, inhuman or degrading treatment, including prolonged solitary confinement;⁵⁴
- ▶ The right to be held separate from convicted persons;⁵⁵
- ▶ The right to be held separate from detainees of the opposite sex;⁵⁶
- ▶ If a minor, the right to be held separate from adults;⁵⁷
- ▶ The right to proper living quarters, including sleeping and bathroom facilities;⁵⁸
- ▶ The right to proper working conditions;⁵⁹
- ▶ The right to adequate recreational facilities;⁶⁰
- ▶ The right to necessary medical care;⁶¹
- ▶ The right to food with nutritional value, and prepared in such a way as to obtain and/or maintain mental and physical health;⁶²
- ▶ The right to be free from discrimination of all types, including the freedom to practice religion;⁶³
- ▶ The right to have contact with family members and/or friends;⁶⁴ and
- ▶ The right to have confidential contacts with legal counsel⁶⁵.

Each of these rights is important. You should argue in the detention process that, if your client is to be detained at all, it should be in such a manner or at such a place where your client's rights are least at risk. Unfortunately, you may have very little control over the conditions that your client encounters. Prison conditions in Malaysia are considered inadequate.⁶⁶ Many jails are overcrowded, out-of-date, and run on insufficient budgets. Conditions at police stations, where

individuals may be detained for days, weeks or months before being transferred to jails or prisons, are often much worse. Police or prison officials may be hostile to your client and motivated to make things as uncomfortable and unbearable as possible for various reasons. If your client's rights are being violated—whether by police or prison officials or other detainees, or through active abuse or unacceptable neglect—you must act.

MEDICAL AND FOOD AID

Insufficient medication or food may affect your client's competence and ability to communicate with you. If your client is being deprived of sufficient medication or food, you should make a record of this situation with the court, which may include a complaint about general conditions of detention facilities.⁶⁷ In 2017, in its report *The Right to Health in Prisons*, SUHAKAM observed that there is much room for improvement with regard to the provision of health care in prison.⁶⁸

CRUEL, INHUMAN OR DEGRADING TREATMENT AND TORTURE

If your client is being subjected to inhumane treatment or torture, your first step is to identify who has the authority to address the problem and what evidence you need to have the issue addressed. Typically, you will first complain to the prison authorities, but you must carefully weigh whether this places your client at even greater risk of mistreatment. It may be helpful to file a complaint with SUHAKAM, the National Human Rights Commission, which has the mandate to receive and investigate complaints on alleged violations of human rights. SUHAKAM also conducts periodical visits to places of detention and works closely with the Prisons Department to improve the conditions for prisoners.⁶⁹ You can also appeal to the UN Special Rapporteur on Torture to issue a statement appealing to your government to protect your client's rights (see Chapter 10). Informing the media can also help to expose the abuse and prevent further mistreatment.

OVERCOMING BARRIERS

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

- *It is important to ascertain early in your relationship whether your client is literate. In some countries, illiteracy may be so common that your client readily admits their inability to read or write. In countries where literacy rates are high, your client may feel deep shame because of their illiteracy. Be gentle in your approach, and if you suspect your client may be overstating their reading skills, take measures that will allow you to assess their capacity to comprehend written documents. This is particularly important in cases in which your client has allegedly signed a confession.*
- *Offer to read documents to your client. Ask your client to explain information that was contained in documents that they claim to have read, so that you can gauge their level of comprehension.*
- *Consider whether this raises any competency or other legal issues. (For more information, see Chapter 5.)*

CHAPTER 4

INVESTIGATION AND OTHER PRE-TRIAL PREPARATION

INTRODUCTION

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

Investigation and presentation of mitigating evidence is a crucial component of capital defence work. It offers defence lawyers an opportunity to provide the court with evidence that may be weighed against aggravating factors. Mitigating evidence normally includes any information about a defendant's character and record that may be helpful in persuading a court that the accused should not be sentenced to death. This can include evidence of a "defendant's impulsivity, impaired judgment, youth and impressionability, mental and developmental impairment or retardation, history of childhood sexual and physical abuse, substance addiction, and manageability in prison."⁷⁰ You can facilitate the information-gathering process by developing a trusting relationship with your client. Defendants are often hesitant to disclose certain information to their lawyers, even if it has the potential to be used as mitigating evidence. For example, defendants may be defensive or ashamed when it comes to mental or physical abuse by family members.⁷¹ Many defendants, however, will divulge painful information in response to their lawyers' continuous efforts to build meaningful relationships with them.⁷²

WHAT IS THE INVESTIGATOR LOOKING FOR?

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

THE CRIME

Identifying and Investigating Witnesses for the Prosecution

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

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

Identifying and Investigating Witnesses for the Defence

You must also search for additional witnesses, including expert witnesses, to challenge the prosecution's version of events and to corroborate the defendant's account. For example, if your client claims to have acted in self-defence, you must establish whether there are witnesses who could attest to the aggressive behaviour of the assailant. If your client claims to have an alibi, it is critical that you locate and interview alibi witnesses to assess the strength of the alibi defence. If character evidence is admissible in your jurisdiction and you believe introducing such evidence would be helpful, you should try to identify and locate character witnesses.

Keep in mind that character evidence should be used with extreme caution. In some jurisdictions, introducing evidence of a defendant's good character allows the prosecution to respond by introducing negative character evidence. When interviewing witnesses who do not speak your language, bear in mind the principles discussed in Chapter 2 about working with interpreters.

Use of Forensic Evidence

All too often, defendants are convicted based on flawed forensic evidence or questionable “expert” testimony. In the United States, for example, convictions have been reversed because of the unreliability of the underlying evidence, such as comparisons of hair and bite marks or predictions by “experts” of the likelihood that a defendant would kill again, based on little more than a review of a case file or brief interview with the accused.⁷³ In the Sudan, convictions have been obtained based on little more than footprints that supposedly match those of the accused.⁷⁴ To avoid such shaky convictions, you must attempt to procure or challenge evidence in the hands of the prosecution or law enforcement officials. If the prosecution seeks to present forensic evidence, you should investigate the qualifications of the experts the prosecution will rely upon at trial. Were they properly trained to assess the evidence? In addition, you must determine whether the evidence was properly tested using the best available technology or whether additional forensic testing is possible. You may be able to argue that deficiencies in preservation or testing make the prosecution's evidence unreliable.

Cause of Death

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

OVERCOMING BARRIERS

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

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

POSSIBLE AFFIRMATIVE DEFENCES

As a defence lawyer, you have an obligation to investigate any possible defences your client may have to a crime. Defences to liability may include self-defence, insanity, diminished capacity or intoxication. Generally, a person who fears for their own safety or that of another person is entitled to use force against an assailant. If your client claims to have killed in **self-defence**, you must endeavour to prove that their fear of the victim was reasonable (under S. 96 of the Penal Code). Carefully review with your client why they believed they were in danger. According to the decision of Mohamed Yusof Bin Haji Ahmad v PP, the duress must be ‘imminent, extreme and persistent’.⁷⁵ Attempt to find witnesses to the encounter who can verify your client's account. You may also be able to introduce evidence that the alleged victim had a reputation for violence, which will help to demonstrate that the defendant's fear was justified.

Requirements for the **insanity defence**, are articulated in S. 84 of the Penal Code, which states that ‘[n]othing is an offence which is done by a person who, at the time of doing it, by reason of unsoundness of mind, is incapable of knowing the nature of the act, or that he is doing what is either wrong or contrary to law’. A lawyer must prove not just that their client was mentally ill, but that at the time of the crime, the accused was incapable of distinguishing between right and wrong or was incapable of controlling their behaviour. Even if the accused does not suffer from permanent mental illness, they may have been temporarily delusional, or they may have acted under the influence of an intoxicating substance administered involuntarily.

While a successful insanity defence is fairly rare, you may also be able to argue that the defendant committed the crime in a state of diminished capacity. This is usually not a complete defence, but it can be employed as a mitigating factor. If presented convincingly, the charges may be reduced to a lesser offense, or the sentence may be more lenient.

You should investigate a number of possible ways in which your client's capacity may have been diminished at the time of the crime. Mental illness or mental disabilities can affect a client's judgment and 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, were under extreme stress or were experiencing a strong emotion or despair at the time of the crime.

OVERCOMING BARRIERS

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

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

CRIMINAL HISTORY AND OTHER PRIOR MISCONDUCT

If the defendant has a criminal history, the prosecution may seek to offer evidence of prior convictions in support of a death sentence. You must investigate those prior offenses and be prepared to challenge their admission. If they are admitted, you must be able to explain

your client's conduct and rebut the prosecution's arguments that your client's criminal history means they are incapable of reform.

ELIGIBILITY FOR THE DEATH PENALTY

Your investigation should ensure that your client does not belong to any category that would make them ineligible for the death penalty. For example, persons under the age of 18 are ineligible for the death penalty.⁷⁶ In many cultures, however, individuals do not have birth certificates and may not know their own age. Determining your client's age may require speaking with their parents, siblings, teachers or others who could remember the month or year of their birth. Other conditions such as pregnancy may also make your client ineligible for the death penalty (See Chapter 5).

MITIGATING EVIDENCE

Mitigating evidence is presented to humanize the defendant and explain their behaviour to the judge. In presenting such evidence, your goal is not to excuse your client's actions, but rather to elicit sympathy, to show that they are less culpable and deserve a reduced punishment.

SUCCESS STORY

Creative Investigation Wins Cases

- *Navkiran Singh, an Indian lawyer, once represented a client accused of killing his wife. Through his investigation, Navkiran discovered that several of the wife's relatives had committed suicide, supporting his theory that the victim had taken her own life. Discussions with family members also led them to produce the wife's diary, which further supported the 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 one case in the United States involving a Mexican defendant, lawyers obtained the help of the Mexican consulate to search for a witness using radio broadcasts.*
- *In a Malawian case in which the client had been mistakenly identified and arrested under another name, investigators created a photo array of prisoners and took it to the village in order to correctly identify the wrongly arrested man. He was subsequently released from prison after serving 11 years on death row for another person's crime.*

THE PROCESS OF INVESTIGATION

WHEN SHOULD INVESTIGATION BEGIN?

You should begin your investigation as soon as possible, ideally shortly after the accused is arrested. Valuable evidence may become unavailable if investigation is delayed. You should also immediately begin to gather mitigating evidence relating to the accused's background. Such evidence can also be used to convince the prosecution to pursue a lesser charge.

WHO IS RESPONSIBLE FOR INVESTIGATION?

The defence lawyer or defence team is responsible for thoroughly investigating both the crime and the defendant's circumstances. Counsel has a duty to independently investigate the facts provided both by the client and by the prosecution and police.

SOURCES OF INFORMATION

The Client's Role in the Investigation

Your client will likely be the starting point in your investigation and may help you identify additional witnesses and sources of exculpatory or mitigating evidence. As explained in Chapter 2, you will need to develop a relationship of trust with your client. Developing rapport with a client in a capital case can be difficult. It can also be particularly difficult to gather potential mitigating information from a client.

Be careful not to rely solely on information provided by your client. 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.⁷⁷

Furthermore, you should not rely exclusively on the client to reveal facts relevant to affirmative defences or mitigating evidence. Not only may they be reluctant to volunteer potentially embarrassing information, they may not understand why certain aspects of their personal history bear on sentencing.

The Family

A proper investigation will usually involve multiple interviews with the family of the accused. The family may also be an important source of mitigating evidence. You may have to pay multiple visits to family members to convince them that the private family history they reveal will not shift blame to them, but rather may help to save the defendant's life.⁷⁸ For example, the defendant's mother may be reluctant to admit to drinking during pregnancy, but this evidence could be valuable in arguing that foetal alcohol syndrome caused the defendant lasting brain damage. Family members can also explain how the execution of the client would adversely affect them, which might lead the court to show compassion.

PRACTICE TIP

Detecting mental impairments

How can you find out whether your client suffers from a mental illness?

The questions you ask will vary, depending on the cultural context and your client's educational level. Here are some questions that lawyers have found useful to ask their clients:

- *Have they ever suffered a head injury?*
- *Have they ever been in an accident?*
- *Have they ever lost consciousness?*
- *Have they ever been admitted to the hospital?*
- *Have they ever seen a traditional healer for any reason?*
- *Have they ever been prescribed traditional remedies for an illness of any sort?*
- *Have they ever suffered from seizures?*
- *Have they ever had periods where they lost track of time and "woke up" at a later time?*
- *Have they ever had inexplicable rages?*
- *Do they ever feel like they are possessed or "bewitched?"*
- *Does anyone in their family have mental problems?*
- *Have they ever been prescribed medication for any sort of mental problem?*

Other Acquaintances and Professionals

You should also interview friends, neighbours, traditional leaders, teachers, clergy, sports coaches, employers, co-workers, physicians, social workers and therapists.

These people may be able to help complete the account of a defendant's life or may know details the family and defendant have

been unwilling to volunteer. They may be able to share details about past trauma or hardship or events that demonstrate that the client is a compassionate, helpful and caring individual.

Documentary Evidence

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

School Records

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

Medical Records

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

Other Documents

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

Prison Staff

Interviews with prison staff may provide valuable information about an offender's behaviour in prison, including any education, training or treatment they have pursued.

The Victim's Family

In some countries, it can be important for a defence lawyer to visit the victim's family. In Taiwan, for example, the court will allow the victim's family to express their opinion about the appropriate sentence. Defence counsel should therefore ascertain the victim's family's attitude toward the accused. In some cases, the defence lawyer may be able to arrange a "settlement" in which the accused will make a

donation to the family or to a charity in exchange for forgiveness. This is easier to do, of course, when the accused has the resources to compensate the family. In other cases, the lawyer may work with intermediaries, such as members of the clergy or social workers, to explore whether the victim's family would support a lesser penalty.

Psychiatric Evaluations

In all cases, consider retaining a mental health expert to assess your client's mental health through testing and a clinical interview. In some countries, prisoners accused of homicide are assessed for their "fitness to stand trial" shortly after arrest. In other countries, the court will appoint a mental health expert at no expense if there are serious questions about a defendant's sanity or competence. The need for a mental health evaluation, however, goes beyond these threshold questions. Moreover, these initial assessments are often uninformed by the prisoner's background and life experiences. As we described above, mental disabilities may arouse compassion in sentencing even when they do not rise to the level of insanity or incompetence.

In some jurisdictions, your client may be entitled to a psychiatric evaluation as a matter of right if defence counsel uncovers some evidence that the client may be mentally ill. For example, in *Dacosta Cadogan v. Barbados*, the Inter-American Court of Human Rights held that Barbados had violated an offender's right to a fair trial by failing to inform him that he had the right to a psychiatric evaluation carried out by a State-employed psychiatrist in a death penalty case.⁷⁹

You must not, however, rely on the court to identify whether a mental health evaluation is needed. Even if an initial assessment was conducted, it is imperative that you carry out an independent evaluation of your client's mental health status. If a client suffers from a disability that is not immediately apparent, such as intellectual impairment or serious depression, it may not be detected by the initial examiner. You may be the only one in a position to identify the potential disorder and request an evaluation by a qualified expert on issues that extend beyond your client's threshold fitness to stand trial. The importance of bringing in qualified mental health experts is discussed further in Chapter 5.

EXPERT WITNESSES

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

An expert should be a recognized authority in his field. The Evidence Act, 1950 provides for the opinion of expert witnesses in legal proceedings. S. 45 states that expert opinion may be sought "when the court has to form an opinion upon a point of foreign law or of science or art, or as to identity or genuineness of handwriting or finger impressions". Identifying appropriate experts can be difficult. A useful place to seek an expert may be at a local university or college where there are professionals recognized in their fields. Experts may also be identified from research into the particular field. Review of scholarly articles may provide a source of potential experts. Bar associations and other legal organizations may also maintain lists of experts available for consultation. These organizations may also be able to provide funds to pay fees charged by experts.

OVERCOMING BARRIERS

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

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

CHAPTER 5

DEFENDING VULNERABLE POPULATIONS

CERTAIN CLIENTS REQUIRE SPECIAL CARE

Over the years, international law has highlighted several categories of defendants that require special protection in the criminal justice system. It is likely that over the course of your career, you will represent defendants who fall into one or more of these categories. As a result, it is important that you are familiar with each of these categories and the special rights they provide for your client.⁸⁰

In some cases, international law prohibits the execution of an entire category of defendants: international mechanisms have disqualified individuals who were under 18 years of age at the time the crime in question was committed, pregnant women,⁸¹ older adults,⁸² mothers having dependent infants,⁸³ mothers of young children⁸⁴ and the mentally disabled⁸⁵ from eligibility for the death penalty. In other cases, international law entitles certain categories of defendants to special legal procedures, such as in the case of foreign nationals. In still other situations, certain categories of defendants possess characteristics, such as mental disabilities, that are widely recognized as critical mitigating evidence during the sentencing process.

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

WHO ARE THESE CLIENTS?

PREGNANT OR NURSING WOMEN

If your client is a woman, it is important that you determine her pregnancy status. The international community has nearly universally condemned the execution of pregnant women, and the International Covenant on Civil and Political Rights (ICCPR) explicitly rejects the practice.⁸⁶ In Malaysia, S. 275 of the CPC also recognizes that pregnant women may not be sentenced to death and at the time of sentencing should have their sentences reduced to life imprisonment.

As a result, if your client is pregnant, you should present this fact to the court and argue that she should not be executed.

JUVENILES AND THE AGED

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

Juveniles

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

Under international law, the age of majority, or age under which your client is considered a juvenile, is the age of 18, unless your country's laws specifically state otherwise.⁸⁷ Courts cannot deviate from this standard, even on a case-by-case basis. In 2006, for instance, the Committee for the Convention on the Rights of the Child reprimanded Saudi Arabia for allowing its justices to determine whether a defendant had reached the age of majority before they reached the age of 18.⁸⁸

If your client was a juvenile at the time the crime was committed, they cannot be sentenced to death. The international community universally forbids the execution of individuals who were below the age of 18 at the time the crime was committed,⁸⁹ and in 2002, the Inter-American Commission on Human Rights determined this to be a *jus cogens* norm.⁹⁰ This is also included under Malaysian law under Article 97 of the Child Act, 2001 which provides that the accused was below the age of 18 at the time of the offence, in accordance with Malaysia's obligation as a signatory to the Convention on the Rights of the Child.

Older adults

International standards proscribe the imposition of death penalty for older persons. The American Convention on Human Rights places an upper age limit on death sentences: it forbids the execution of individuals who were 70 years of age at the time the offense in question was committed.⁹¹ In Belarus, persons 65 years or older at sentencing are excluded from the application of the death penalty.⁹²

The upper age limit may become more widespread in the future: in a resolution on implementation of the Safeguards, the ECOSOC has called for the setting of a maximum age limit.⁹³

Unfortunately, Malaysian law does not prohibit the imposition nor the execution of the death sentence for older persons. Even if your client's age does not disqualify them from the application of the death penalty, it may play an important role as a mitigating factor in sentencing determinations.

WHAT SHOULD I DO IF IT'S DIFFICULT TO DETERMINE MY CLIENT'S PRECISE AGE?

Countries are obligated under international law to provide effective birth registration systems, and the production of a birth certificate should provide adequate documentation of your client's age. Often, however, developing countries or countries recently emerging from conflict are unable to provide adequate birth registration systems. In situations where the age of a child involved in the justice system is unknown, the UN Economic and Social Council (ECOSOC) has mandated that countries take measures to ensure that the "true age of a child is ascertained by an independent and objective assessment." Furthermore, international standards suggest that once there is a possibility that your client may be a juvenile, the State must prove they are not before they can be treated as an adult in the criminal justice system. Nevertheless, as your client's advocate, you should make every effort possible to prove that your client is a juvenile if you believe them to be one.

There are several different steps that you can take to determine the age of your client when official State records are unavailable.

- **Refer to local community mechanisms that are in place to record births.** Ethiopia, UNICEF has contacted religious communities for certificates issued at the time of baptism or acceptance into Muslim communities in order to establish the age of unregistered individuals. In Sierra Leone, it has reached out to local chiefdoms that maintain similar records. You should begin by interviewing the family to determine whether similar local community traditions exist in the case of your client.
- **Seek the assistance of a physician.** Physicians are sometimes able to approximate age through dental or wrist bone x-rays. It is important to be careful if you decide to seek such assistance, however: these methods can only estimate age. As a result, you must take care to emphasize the speculative nature of such procedures and ensure that an overbroad approximation does not disqualify your client from protections they might otherwise receive as a minor.
- **Speak to your client's family members.** Many families are able to connect the birth of your client with a significant event like a natural disaster.

INDIVIDUALS WITH MENTAL DISABILITIES

It is often extremely difficult for lawyers to assess whether their clients have a mental disability. It is impossible if you do not take the time to meet with your client on a regular basis. As we have emphasized elsewhere in this manual, spending time with your client is essential to developing trust, identifying potential mitigating evidence and presenting an effective defence. Because your client's mental health is highly relevant to their culpability and sentencing, you should do everything possible to consult with the individual who is carrying out the evaluation. This is important for several reasons:

- ▶ You may have critical background information relevant to your client's mental health. If your client is uncommunicative or resistant to disclosing information about their mental illness, the person conducting the assessment may erroneously conclude that your client does not suffer from a mental disability.
- ▶ If you later intend to challenge the conclusions of the forensic assessment (for example, if you are raising an insanity defence and the forensic evaluation concludes that your client was not insane), you should learn as much as possible about the amount of time the forensic expert spent with your client, the testing methods utilized, and the expert's qualifications and training.
- ▶ By meeting with the forensic expert, you can help educate them about the scope of the evaluation in a legal context. This is particularly important when you are trying to establish that your client has a mental disability relevant to the sentencing determination. (For more information, see Chapter 8 on the use of mitigating evidence in sentencing.)

What kinds of mental illness are relevant?

The term "mental disability" refers to a broad range of possible conditions.⁹⁴ As a result, the mental health of your client can mean many different things. In Malaysia, if you can determine that your client was insane at the time the crime was committed, you may be able to prevent trial in the first place, as "unsoundness of mind" is grounds to eliminate criminal responsibility altogether. 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 proscribes the execution of individuals with such conditions.⁹⁵ 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 serve as a critical piece of mitigating evidence during sentencing procedures.

OVERCOMING BARRIERS

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

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

The Importance of a Mental Health Assessment

The most important form of evidence you can use to support your client's claim of mental disability is an official assessment by a mental health expert. Many courts have held that individuals have a right to a mental health assessment prior to being sentenced to death,⁹⁶ and you should do your utmost to ensure that any assessment is conducted in accordance with the highest professional standards.

Who Should Conduct the Assessment?

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

What Standards Should the Assessment Follow?

Although there are no universal standards guiding mental health assessments for legal purposes, the Diagnostic and Statistical Manual of Mental Disorders (DSM) is a widely respected resource.⁹⁷ Published by the American Psychiatric Association, it catalogues mental health disorders for children and adults and is used in many countries beside the United States. That said, the DSM is largely a product of research conducted in the United States, and its diagnostic criteria may not translate reliably across all cultures. Your client's mental health assessment should not be limited to disorders contained within the DSM or disorders that may disqualify the defendant from criminal liability or death penalty eligibility.

How Can the Mental Health Assessment Be Used?

You may be able to use a mental health assessment at during several stages of the capital defence process. Even if your client is not

deemed incompetent or insane, other psychiatric conditions may serve as valuable mitigating factors and contribute to a reduced sentence.

The case of *Uganda v. Bwenge Patrick* is an excellent example of the use of mental disabilities as mitigating factors in a sentencing procedure.⁹⁸ Uganda's High Court re-sentenced a former death row inmate who had been imprisoned for 17 years. The Court gave special significance to evidence surrounding the defendant's impaired mental state at the time of the offence, his history of alcohol addiction, the fact that he had maintained strong ties with his family throughout his long incarceration, his good relations with other prisoners, his remorse, and the lengthy period of time he had already served in prison.⁹⁹ Based on these mitigating factors, the High Court found that the offender did not merit a death sentence, and it re-sentenced him to the 17 years already served, along with an additional year in prison followed by a year of probation.¹⁰⁰

In Malawi, the courts have determined that any "evidence of 'mental or emotional disturbance', even if it falls short of meeting the definition of insanity may nonetheless make an offender less culpable on a murder charge and this should be considered in mitigation of sentence." *Republic v Margret Nadzi Makolija* (Sentence Rehearing Cause No. 12 of 2015) (unreported)

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

Your client's mental disability may cause them to be more vulnerable to the complications of the legal system and the dangers of incarceration. As a result, you have special responsibilities to ensure they understand their rights at all times and are treated properly while incarcerated.

Ensuring Your Client Understands Their Legal Rights

Individuals with disabilities may not completely understand their rights as they manoeuvre through the criminal justice system.¹⁰¹ You must ensure that your client understands their rights and the procedures they are facing, taking care to explain the process at every step. You might also consider taking special steps to meet with your client on a regular basis, as they may not be able to express a desire to meet with you when needed or may not understand how to request a meeting.

Ensuring Your Client Receives Treatment

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

You should ensure that your client is assessed by a mental health professional as soon as they are admitted to prison.¹⁰² This allows medical staff to identify any pre-existing medical conditions to ensure that appropriate treatment is provided and to identify disabilities or injuries that may be developing or may have been sustained during initial detention. It also allows staff to analyse the mental state of the prisoner and provide appropriate support to those who may be at risk of self-injury.¹⁰³ Make sure your client receives periodic examinations, including daily checkups, if they complain of illness.

Mental Health Developments During Incarceration

If your client develops a disability over the course of their incarceration, you should raise this issue in all appeals and clemency proceedings, since international law prohibits the execution of individuals with severe mental disabilities. You should also take care to inform family members of any significant change in mental health.¹⁰⁴ If a client has been determined to be incompetent, you should also ensure that the client is removed from the prison entirely and given access to appropriate treatment.¹⁰⁵

OVERCOMING BARRIERS

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

- *First, be sure. Address your client directly and let 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 making them feel like you think there is something “wrong” with them. Again, being honest and forthcoming while remaining considerate and respectful will make it easier for both you and your client to have this conversation and address the issue.*

- *If your client still refuses, you have a difficult decision to make. If you strongly believe that it is in 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 other defences to the crime. In many cases, you will find that the need for an evaluation outweighs the potential harm to your lawyer-client relationship.*

FOREIGN NATIONALS

Foreign Nationals are disproportionately represented on Malaysia's death row. Amnesty International reported in 2019 that foreign nationals made up approximately 44% of the Malaysia's death row population and include nationals from countries such as Nigeria, India, Thailand and Iran.¹⁰⁶ The majority of 141 women on death row, most of whom were convicted of trafficking drugs into Malaysia, are also foreign nationals.¹⁰⁷

What Does Foreign Citizenship Mean for My Client?

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

What Can My Client's Consulate Do?

Your client's consulate may be able to provide a wide range of services, including financial or legal assistance. Consulates may also facilitate such critical elements of pre-trial investigation as contacts with family members and the development of your client's social history. Consulates may also be able to serve as unique advocates for their nationals, providing diplomatic assistance and access to international

tribunals. For example, the Government of Mexico sought and obtained judgments from the Inter-American Court on Human Rights and the International Court of Justice to vindicate the rights of its nationals who had been convicted and sentenced to death without being advised of their rights to consular notification and access.¹¹⁰

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

Obtaining Your Client's Consent to Contact the Consulate

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

Other Considerations

There is a range of other unique barriers that a foreign national may face as they work their way through the criminal justice system. A client may not speak the necessary language sufficiently to understand the complex vocabulary of the legal system. As a result, it is critical that you offer an interpreter, regardless of the linguistic capacity a client may appear to have. If the client accepts an interpreter, you should ensure that the interpreter is present at all legal proceedings and meetings. You should take extra care to explain necessary rights to your client, as well as procedures to which they will be subject. Some consulates may even provide culturally appropriate resources to explain foreign legal systems to their nationals.¹¹⁴

CHAPTER 6

PRE-TRIAL APPLICATIONS AND NEGOTIATIONS

PLEA NEGOTIATIONS

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

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

In Malaysia, in practice, there exists an informal plea-bargaining agreement between the public prosecutor and the accused. This agreement, called charge bargaining, is quite common in drug cases. The practitioner would normally write a representation letter to the Attorney General's office seeking reduction of the charge based on S. 39B of the Dangerous Drugs Act, 1952 to S. 39A(2) of the Act, whereby the accused is willing to plead guilty to the reduced charge.

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

PRACTICE TIP

Settling Cases with the Victim's Family Under Sharia Law

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

Sarah Belal,

Director, Justice Project Pakistan

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

You have an obligation to thoroughly explain to your client the nature of each charge to which they are pleading guilty and the rights that they are waiving if they decide to plead guilty. These include:

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

You should explain the above in language that a layperson would understand, and explain the advantages of pleading guilty where evidence of guilt is overwhelming. Also point out to your client that

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

PRE-TRIAL APPLICATIONS

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

- ▶ **Abuse of prosecutorial discretion in seeking the death penalty**
- ▶ **Access to resources that may be necessary in the case**
- ▶ **Adequate time and facilities for preparation of your client's defence (see Chapter 1)**
- ▶ **The right to an adversarial procedure, meaning the right to contest the charges**
- ▶ **The right to bail or the right to be released pending trial (see Chapter 3)**
- ▶ **Calling and questioning witnesses, i.e., your client's right to put on evidence in their defence, including calling witnesses and questioning the prosecution's witnesses**
- ▶ **Challenging the imposition of the death penalty as the sentence (see Chapter 9)**
- ▶ **Change of venue**
- ▶ **Constitutionality of the governing statute(s)**
- ▶ **Defects in the charging process**
- ▶ **Effective legal assistance in a capital case**
- ▶ **Exclusion of a confession**
- ▶ **Exclusion of evidence obtained unlawfully**
- ▶ **Exclusion of hearsay**
- ▶ **Exclusion of victim impact evidence**
- ▶ **Free interpretation and translation**

- ▶ **Free legal counsel if your client is indigent**
- ▶ **Humane treatment**
- ▶ **Legal advice and representation by counsel of your client's choosing**
- ▶ **Matters of trial or courtroom procedure**
- ▶ **Notification of charges in a language your client understands**
- ▶ **Presentation of rebuttal evidence, i.e., the right to put on evidence after the prosecution's presentation of evidence**
- ▶ **Private and confidential communication with counsel**
- ▶ **Prohibition of double jeopardy (ne bis in idem)**
- ▶ **Propriety of, and prejudice from, joinder of charges or other defendants in charging documents**
- ▶ **Public judgment, i.e., the right to have the trial in public, rather than before a secret tribunal**
- ▶ **The right to reasoned decisions/rulings on pre-trial issues**
- ▶ **Removal of judge for bias or conflict of interest**
- ▶ **Request for more time to adequately prepare (see Chapter 3)**
- ▶ **Review of denial of pretrial motions by a higher tribunal**
- ▶ **The right to access the case file, including newly discovered evidence if the investigation is ongoing**
- ▶ **The right to a speedy trial**
- ▶ **The right to be present**
- ▶ **The right to object to evidence introduced by the prosecution**
- ▶ **Sufficiency of the charging document**
- ▶ **Suppression of evidence**
- ▶ **Trial by ordinary courts using established legal procedures**
- ▶ **Trial by independent and impartial court**

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

REQUESTS FOR INFORMATION IN THE PROSECUTION'S FILE

As part of your representation and preparation for trial, you need to make sure you have as much information as possible relating to the charge(s) against your client, and you should confirm that the information you do have is accurate. One way to do that is to get access to the information held by the prosecution. If the prosecution refuses to give you the requested information, you should bring an application to compel that information, sometimes called a motion to compel discovery.

Pursuant to s 51A of the CPC, the prosecution is required to share the following documents with the defence:

- ▶ a copy of the information made under S 107 relating to the commission of the offence to which the accused is charged, if any (S. 51 A(1)(a))
- ▶ a copy of any document which would be tendered as part of the evidence for the prosecution (S 51A (1)(b))
- ▶ a written statement of facts favourable to the defence of the accused signed under the hand of the Public Prosecutor or any person conducting the prosecution (S 51 A (1) (c))

S 51A(2) additionally states that the prosecution may not supply any fact favourable to the accused if its supply would be contrary to the public interest. The vague wording of the phrase “public interest” means that evidence that is favourable to the defence can be withheld under a broad range of circumstances.

Independent Experts to Test Evidence

You should request that evidence collected by the police be available for scientific testing by experts. Even if the prosecution’s experts have examined the evidence, you should obtain independent experts to examine the evidence as well, if at all possible. You should also request notice of the State’s evidence. Specifically, you should request disclosure of aggravating factors and information relating to mitigating factors.

Disclosure of Witnesses

Make sure to request disclosure of the names of witnesses the prosecution intends to call at trial, and any they may have called at an earlier phase of the prosecution.¹¹⁹ Also, it is important to request disclosure of rebuttal witnesses, since the State may know of witnesses who could testify in favour of your client, but choose not to call them.

APPLICATIONS TO EXCLUDE EVIDENCE

Often, the prosecution may intend to use evidence at trial that the defence believes should not be admitted into evidence. For instance, you may believe that your client’s confession was taken in violation of national or international law. Your client has the right to remain silent. The right to remain silent has been codified under Section 112(2) of the Criminal Procedure Code and Section 37A of the Dangerous Drugs Act, 1952 (for applicable cases). Both provisions clearly

stipulate that a person “may refuse” or is under “no obligation” to answer any type of questioning from the authorities when detained with or without a legal practitioner around.

Police abuse of criminal suspects is routine in many jurisdictions, including Malaysia, and you should always inquire whether your client’s statement was the product of coercion.¹²⁰ Under S 24 of the Evidence Act, 1950, inducement, threat or promise to obtain confessions can make said confession inadmissible in court. Additionally, under S 25 of the Evidence Act, if a confession was made to any police officer under the rank of Inspector, the court won’t take it into account. S 26 provides that subject to express laws, confessions made in the custody of a police officer without the immediate presence of a Sessions Court Judge or Magistrate shall be inadmissible.

There are certain legislative exceptions that allow for confessions to be made in police custody. Statements remain admissible if obtained under certain laws, including Section 37A of the Dangerous Drugs Act, 1952, the Moneylenders Act, 1951, the Pawnbrokers Act, 1972, Section 21 of the Official Secrets Act and Section 16 of the Kidnapping Act, 1961, provided there were no threats, inducement or promise made and that the confession was made to a police officer of or above the rank of Inspector.

APPLICATIONS CHALLENGING IMPOSITION OF THE DEATH PENALTY

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

APPLICATION FOR A SPEEDY TRIAL

International law also provides that individuals must be tried without undue delay.¹²¹ Your client has the right to have their case heard within a reasonable time, beginning when they are charged and

ending with the final decision delivered by domestic courts.¹²² In criminal cases, the time starts running with the entry of a charge. Time ceases to run when the proceedings have been concluded at the highest possible level, when the determination becomes final, and when the judgment has been executed. What qualifies as “undue” delay will depend on the circumstances of your case, including its complexity, the conduct of the parties, whether the accused is in detention, and so forth.¹²³

Undue delay is a tremendous, recurring problem in many countries due to the high numbers of prisoners awaiting trial and the limited capacity of the judiciary to process the cases efficiently. If you represent a client who has been held without trial for years on end, you should strongly consider petitioning the courts for your client’s immediate release under domestic law and constitutional provisions.¹²⁴ If this fails, consider filing an appeal with one of the international bodies discussed in Chapter 10.

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

APPLICATION FOR RELIEF FROM PREJUDICIAL JOINDER

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

CHAPTER 7

TRIAL RIGHTS AND STRATEGY

YOUR CLIENT'S FAIR TRIAL RIGHTS

Under international law, all individuals are entitled to due process and equality before the law.¹²⁵ Both of these fundamental rights are multi-faceted. They include, among other things, the right to a fair hearing before an impartial tribunal, the right to trial without undue delay and for a reasonable duration, the right to be present at trial and to participate in a meaningful way, a presumption of innocence, and the right against self-incrimination.

RIGHT TO A FAIR HEARING BEFORE AN IMPARTIAL TRIBUNAL

Your client has the right to a fair trial before an independent, impartial tribunal within a reasonable time of being charged or taken into custody. This right is fundamental and well-documented in international law.¹²⁶

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

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

All general and regional human rights instruments guarantee the right to a fair trial.¹²⁷ Some of the basic guarantees from these sources include:

- ▶ **“Equality of arms” between prosecution and defence**
- ▶ **The right to adversarial proceedings**
- ▶ **The right to prompt, intelligible and detailed information about the charges**
- ▶ **Adequate time and facilities to prepare the defence**

According to the Lawyers Committee for Human Rights, “[t]he single most important criterion in evaluating the fairness of a trial is the observance of the principle of equality of arms between the defence and the prosecution. Equality of arms, which must be observed throughout the trial, means that both parties are treated in a manner ensuring their procedurally equal position during the course of a trial.”¹²⁸ It is impossible to identify all of the situations that could violate this principle. Such situations might range from excluding the accused and/or counsel from a hearing where the prosecutor is present or, perhaps, denying the

accused and/or counsel time to prepare a defence or access to relevant information. This principle encompasses your access to the prosecution's case file to the extent that is necessary to refute the charges and prepare your client's defence. Watch closely for such situations and, if they arise, make appropriate objections before the tribunal.

How important is an independent and impartial tribunal?

Independence and impartiality of the tribunal are essential to a fair trial. Judges should have no personal stake in a particular case, should not have pre-formed opinions about the outcome, and should be free of any interference, pressures or improper influence from any branch of government or other source.¹²⁹ 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.¹³⁰ The presence of judicial or legally qualified members in a tribunal is one indication of its independence.¹³¹ You should also consider the following questions when protecting your client's right to an independent tribunal:

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

THE PRESUMPTION OF INNOCENCE

Under international law, your client is entitled to be presumed innocent.¹³² According to Article 14(2) of the ICCPR: “Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law.” Although Article 14(2) does not specify the required standard of proof, it is generally accepted that guilt must be proved “to the intimate conviction of the trier of fact or beyond a reasonable doubt, whichever standard of proof provides the greatest protection for the presumption of innocence under national law.”¹³³

Whilst Article 5 of the Federal Constitution implies the presumption of innocence, in practice Malaysia deviates from international standards by transferring the burden of proof from prosecution to defence in two ways. First, the prosecution in Malaysia needs only establish its case on a prima facie basis.¹³⁴ If the court is satisfied that a prima facie case has been made out, the accused will be called upon to enter their defence. It follows that in order to be acquitted, an accused only needs to raise a doubt as to the existence of a fact on which the prosecution is relying on, or simply that contrary facts exist.¹³⁵ Failure to do so, however, has been found by the Malaysian judiciary to mean that the prosecution had established its case on a prima facie basis.¹³⁶

Additionally, particular statutory provisions also transfer the burden of proof onto the accused. In death penalty cases involving drug trafficking charges, S 37 of the DDA sets up a series of “deeming” presumptions which allow the prosecution to automatically establish knowledge of the nature of the drug and knowledge of possession of the drug. These are difficult – if not impossible – to rebut in practice.

RIGHT TO BE PRESENT AT TRIAL

To properly conduct a capital defence, you will need immediate access to your client in open court in order to communicate about evidence and witness testimony, among other things. Therefore, your client must be present at trial to participate in their own defence.¹³⁷ For your client’s participation in the defence to be meaningful, they will have to understand what is happening during the proceedings. As noted in Chapter 2, international law establishes that everyone is entitled “[t]o have the free assistance of an interpreter if he cannot understand or speak the language used in court.”¹³⁸ 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 translate accurately. Generally speaking, the right to an interpreter includes the translation of all the relevant documents.¹³⁹ 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

Your client has the right to examine the witnesses against them. This right also allows the defendant to obtain the attendance of

witnesses on their behalf under the same conditions as witnesses against them.¹⁴⁰ The general principle, adopted by most courts, is that accused persons must be allowed to call and examine any witness whose testimony they consider relevant to their case. Similarly, they must be able to examine any witness who is called, or whose evidence is relied on, by the prosecutor. Several other rights spring from these basic principles. First, the parties should be treated equally with respect to the introduction of evidence by means of interrogation of witnesses. Second, the prosecution must tell you the names of the witnesses it intends to call at trial within a reasonable time prior to the trial so that you may have sufficient time to prepare your client’s 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. You should immediately object when a witness has been examined in the absence of both the defendant and counsel. Similarly, the use of the testimony of anonymous witnesses at trial is generally impermissible, as it represents a violation of the defendant’s right to examine or have examined witnesses against him.

RIGHT TO KNOW THE GROUNDS OF THE TRIBUNAL’S DECISION

You should advocate strongly for your client’s right to access a reasoned, written opinion from the tribunal, completed in a prompt fashion. This right is inherent in the right to a fair trial and forms the basis for your client’s right to appeal. If the tribunal does not automatically provide a written judgment, you should move the court to provide such a document. In March 2020, the Federal Court set aside the conviction of **Sangsil Udtoom**, a Thai national sentenced to death for the possession of firearms. The four-member bench allowed Udtoom’s review application to quash the death sentence on the grounds that the apex court had not adequately informed him of the grounds for his conviction. The Federal Court had stated that judges have the duty to provide the broad grounds for their decisions, and that failure to do so violates Article 5 of the Federal Constitution.¹⁴¹

TRIAL STRATEGY

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

This manual provides some general rules regarding trial strategy. Some of these, such as the development of a theory of the case, have universal application. However, trial strategy will be affected by local rules, culture and your assessment of how the decision-maker (the judge) 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 provide a guide for your investigation of the defence. For example, your theory may be that your client killed the deceased in self-defence. Or, it may be that this is a case of mistaken identity, and that 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.

Comprehensive

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

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

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 jury selection, witness preparation, pretrial motions, opening statement, presentation of evidence and closing argument. You should make sure to introduce concepts that will be important at the penalty phase of trial as early as possible. For example, if mental health issues are part of your theory of the case at the penalty phase, you should introduce evidence relevant to mental health during the guilt phase.

Concise

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

IDENTIFYING WITNESSES YOU WILL CALL

What Kind of Witnesses Should I Call?

The number and type of witnesses you should call will vary widely depending on the crime your client is charged with, the strength of the prosecution's case and the resources available to you and your client. In rare instances, your client may be best served by not calling any witnesses and instead focusing your client's defence and on highlighting the prosecution's inability to meet its burden of proof for each element of the crime your client is charged with. In many cases, however, defending your client will require calling and examining witnesses. Decisions regarding the type and number of witnesses you are going to call should be made based on direct involvement with your client.

Fact Witnesses

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

Family members and witnesses who have known your client for a long time may be able to provide favourable testimony regarding your client's character or testimony that may be useful in humanizing your client. Former employers, religious leaders and teachers can also provide compelling testimony regarding your client's good character.

Expert Witnesses

Where funding is available, it is important to consider calling expert witnesses to opine on the reliability of the prosecution's investigation techniques and forensic evidence, including the post-mortem report indicating cause of death, identification parades or "lineups," ballistics, DNA evidence and fingerprints. These witnesses are discussed at length in Chapters 5 and 6. If expert witness testimony is crucially important to your client's case, your client has the right to secure and produce such testimony.¹⁴² Before hiring an expert witness or asking the court to appoint one, verify the credentials

of the expert and determine whether they can qualify as an expert in your jurisdiction.

Should My Client Testify?

Allowing an accused defendant to affirmatively proclaim their innocence and tell their side of the story can be a powerful tool. Conversely, if your client does not possess the ability to be a convincing witness, or if they lack the ability to withstand a 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 their testimony may affect the strategy and themes you have developed.

What if a Witness Refuses to Cooperate?

If you identify a witness who may be helpful to your client's case, but who refuses to cooperate, you should attempt to compel their participation in the proceedings. The court can issue a *subpoena ad testificandum* to force a witness to testify. In **Wong Sin Chong & Anor v Bhagwan Singh & Anor**,¹⁴³ it was mentioned that although the parties can choose who to produce in court as a witness, the court has the right to refuse the choice, particularly in cases where no useful purpose could be obtained from the attendance of the witness in Court. If this happens, then the subpoena can actually be set aside.

What Do I Need to Do After Selecting My Witnesses?

Once you have decided which witnesses to call, it is your responsibility to make sure they are prepared to testify and are able to come to court. On the most basic level, this means advising them about suitable courtroom dress and 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 at which they are expected to testify. In rural communities with poor roads, it may take witnesses a day or more to travel to court, and they will need advance notice. Transportation is often a challenge. If a witness cannot appear at a hearing where they are expected to testify, it is important to notify the court immediately and to ask for a continuance. If the court refuses to delay the hearing, it is your duty to raise a formal objection.

Witnesses must also be prepared on a substantive level. Providing a witness with an overview of how their testimony fits into your case strategy and theme can often lead to more compelling and useful testimony. If possible, you should let your witnesses review the demonstrative evidence and exhibits you will be questioning them about. It is equally advisable to notify your witnesses of questions you think they may be asked on cross-examination. When preparing a witness your obligation is to assist them in giving their own testimony and not the testimony preferred by you or your client.

IDENTIFYING EVIDENCE AND EXHIBITS YOU WILL INTRODUCE

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

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

Examining witnesses

Examination in Chief

Examination in Chief or Direct examination is your opportunity to present your client's case. Direct examination should be used to further your defence strategy and to develop your theory of the case. If your client is pursuing an affirmative defence, such as lack of mental capacity, you will need to elicit testimony that is sufficient to satisfy the applicable burden of persuasion. In common law

jurisdictions, it may also be necessary to use your witnesses to lay the foundation for exhibits you intend to introduce into evidence.

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

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

Avoid the temptation of trying to prove too much through any single witness. If you rely too much on a single witness, and that witness is disbelieved or disliked by the judge or jury, your theory of the case will be less convincing. Another purpose of direct examination is to bolster the credibility of your witnesses. When appropriate you should ask your witnesses questions that will allow them to testify regarding the basis for their knowledge, their ability to observe the incident they are testifying about and their lack of bias or interest in the outcome of your client's case. For expert witnesses, it is important to help your witness establish their expertise in the field they are testifying about.

Cross Examination

Sections 137 and 138 of the Evidence Act, 1950 provide for "cross-examination" of a witness by "the adverse party". Cross examination presents your opportunity to undermine the prosecution's witnesses. To properly prepare for a cross examination you must evaluate what you expect the prosecution's witnesses to say and whether you will need to challenge that information. Your cross-examination should consist of leading questions that call for a yes or no answer. However, bear in mind that S 143 lays out the following qualifications on leading questions:

- ▶ *(a) the question may not put into the mouth of the witness the very words which he is to echo back again; and*
- ▶ *(b) the question may not assume that facts have been proved which have not been proved, or that particular answers have been given contrary to the fact.*

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. Your questions should always concern only one fact at a time (e.g., "You said it was 7 p.m. when you saw the incident?" "The sun sets at 6 p.m.?" "There were no streetlights?" "You were standing 50 meters away?"). Do NOT be tempted to ask the following question: "So therefore, you could not see what happened?" By asking this final question, you invite the witness to insist that he *could* in fact see, and you destroy the effect of your careful cross examination up to that point.

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

- ▶ **Does the witness have a bias or motive for testifying against your client and for the prosecution?**
- ▶ **Does any part of the witness's testimony conflict with other portions of their testimony?**
- ▶ **Does the witness's testimony conflict with their earlier statements about the topic?**
- ▶ **Can you spot inconsistencies in the testimony of the witness and a prior witness?**
- ▶ **Was the witness in a position to observe the incident they are testifying about?**
- ▶ **Can the witness help you establish facts that undermine aspects of the prosecutor's case?**
- ▶ **Can the witness help you establish facts that are helpful to your theory or theme?**
- ▶ **Can you minimize any damaging testimony that came out during direct examination?**
- ▶ **Can you make the witness retract or discredit their own testimony?**
- ▶ **Can you get the witness to admit that they are uncertain about an issue they testified about?**
- ▶ **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 charged with lying under oath?**
- ▶ **Has the witness ever been convicted of a crime? (You should investigate the criminal record of all witnesses and demand that the prosecution provide criminal records in their possession.)**
- ▶ **Has the witness attempted to introduce evidence that requires particular knowledge or expertise?**

- ▶ **Is the witness an expert whose expertise, training, knowledge or experience can be challenged?**
- ▶ **Does the prosecution's expert meet your jurisdiction's requirements to qualify as an expert witness?**

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

INTRODUCING AND OBJECTING TO EVIDENCE

Introducing Evidence

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

Objecting to Improper Evidence and Hearsay

In Malaysia, locally decided cases seem to bear out that evidence is not inadmissible merely because it has been obtained unfairly or illegally. The test is whether the illegally obtained evidence is relevant and admissible under the Evidence Act, 1950. Per Lord Goddard in **Kuruma v The Queen**,¹⁴⁴ evidence is not admissible if the strict rule of admissibility would operate unfairly against the accused.

Hearsay evidence is generally inadmissible under the Evidence Act, 1950. Typically, only statements made during a trial or hearing may be offered as evidence to prove the truth of the matter being testified about. The underlying reason for this rule is that in order to have a fair trial "an accused should be given an adequate and proper opportunity to challenge and question a witness against him, either at the time of the proceedings..."¹⁴⁵ While this may seem obvious, the implications of this rule may be more difficult to apply in practice. For instance, prosecutors routinely attempt to introduce statements

crime scene witnesses make to law enforcement officials. If those witnesses do not appear at trial and you have not otherwise had the opportunity to subject them to adversarial questioning, you should object that their earlier statements are improper and should not be considered by the tribunal.¹⁴⁶ Be vigilant of attempts to circumvent your client's right to subject adverse witnesses to cross-examination and object when the court allows such statements into evidence.

OPENING AND CLOSING STATEMENTS

The opening and closing statements are critical opportunities for the defence. The opening statement is your first chance to present your theory of the case in a comprehensive fashion to the judge. The closing argument, similarly, is your final chance to explain the evidence in light of your theory and convince the judge of your client's innocence and/or the mitigating circumstances of the case. For both your opening and your closing, you should spend a significant amount of time thinking about and practicing what you will say. This will help you present a convincing and credible demeanour.

CHAPTER 8

SENTENCING

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. In countries like Malaysia, that have a separate sentencing phase, this is the primary purpose of presenting what is known as **mitigating evidence**. You must begin to investigate and prepare the case for mitigation in the earliest stages of your representation,¹⁴⁷ since your mitigation theory must be consistent with your theory of the case in the culpability phase of the trial. (See Chapter 7 for a discussion of the theory of the case.)

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

*Not all murders are committed in the same circumstances, and all murderers are not necessarily of the same character. One may be a first offender, and the murder may have been committed in circumstances that the accused person deeply regrets and is very remorseful. We see no reason why these factors should not be put before the court before it passes the ultimate sentence.*¹⁴⁸

The jurisprudence of the Indian courts offers additional examples of how such circumstances might be evaluated. In *Mulla & Another v. State of Uttar Pradesh*, the Indian Supreme Court noted that circumstances to be heavily weighted in imposing a sentence included the offender's "mental or emotional disturbance," age, likelihood of committing further acts of violence, potential for rehabilitation, sense of moral justification, duress, mental impairment, and socioeconomic status.¹⁴⁹ The court also emphasized that the burden fell to the State to prove that an offender was beyond reform. After reviewing these factors, the *Mulla* court declined to impose the death penalty on extremely poor offenders who had no criminal history.¹⁵⁰

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.¹⁵¹

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

MITIGATING EVIDENCE

Mitigating evidence may include both the facts of the crime committed and the character of the offender. You should seek out several types of mitigating evidence to present on your client's behalf, including: (1) evidence related to the facts of the crime; (2) evidence of the defendant's personal and social history; (3) evidence that demonstrates the defendant's good moral character; (4) other factors that may encourage the court to exercise compassion; and (5) the effects of conviction and the death sentence.

CIRCUMSTANCES OF THE OFFENSE

First, look to the facts of the case itself. The Human Rights Council's 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."¹⁵² It follows from this that the imposition of the death penalty for economic crimes, drug trafficking, burglary, robbery and other crimes that do not involve the loss of human life would violate international law. Likewise, unintentional and unpremeditated killings—such as an accidental death during a bar fight—would not warrant the death penalty. Nor should the death penalty be imposed for a murder conviction based on mere participation in a felony leading to death, where the defendant did not kill or intend to kill anyone.

It is widely recognized that even in cases of intentional murder, the death penalty should only be imposed in the most highly

aggravated cases. India's Supreme Court reserves the penalty for "the rarest of rare cases when the alternative option is unquestionably foreclosed."¹⁵³ In other words, the presumptive sentence for any death-eligible crime is life or a term of years—even for highly aggravated murders.¹⁵⁴ 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.¹⁵⁵ 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."¹⁵⁶ Thus, if the crime in your case was not premeditated and if it did not involve torture or other highly aggravated facts, you should argue that it does not merit the ultimate penalty of death.

You may also be able to argue that your client played a relatively minor role in the crime and thus deserves a lighter punishment than those who were most responsible. In the context of drug trafficking, the "defence of innocent carrier" can be raised as mitigation. The defence is defined as "a state of affairs where an accused person acknowledges carrying for example a bag or a box... containing the dangerous drugs but disputes having knowledge of the drugs".¹⁵⁷

Alternatively, as noted earlier, your client may have been provoked or may have acted under extreme stress at the time of the crime. For example, if your client suffers from a mental disability, that makes them less culpable for their crime. Such conditions include low intelligence, post-traumatic stress disorder, schizophrenia, bipolar disorder, mental retardation, foetal alcohol syndrome, poisoning by pesticides or lead, or a brain injury caused by accidents or beatings. Tests and psychiatric evaluations may be needed to establish that these conditions exist.

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

SUCCESS STORY

Uganda

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

Doreen Lubowa,

Foundation for Human Rights Initiative

Malawi

The Malawi Human Rights Commission and the Paralegal Advisory Service have worked together to implement two Malawi Supreme Court decisions that overturned the mandatory death penalty and required all those automatically sentenced to death to receive new sentencing hearings. Together, these two organizations have conducted mitigation investigations in 168 cases. After considering this evidence, the High Courts decided that none of the offenders merited a death sentence. More than 120 prisoners were released after having served a term of years.

PERSONAL AND SOCIAL HISTORY

Whether or not tests and interviews reveal a serious mental disease or defect, you should look to the client's social history for clues to explain their behaviour. Elements of this history may include physical or sexual abuse, childhood neglect, extreme poverty, other trauma, experience with racial, religious, ethnic or gender discrimination, learning disabilities, a history of drug or alcohol abuse, or difficult family relationships.

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

By framing your client in a sympathetic light using their personal and social history, you may give the court a solid reason for imposing a lighter sentence. For example, in the Malawi case of *Republic v Richard Maulidi and Julius Khanawa*, the High Court took into account that the offenders were "living in abject poverty" and that they had been "driven by desperation fuelled by hunger to commit

the offence”, which was the night-time robbery of an elderly woman in the village during which she sustained fatal injuries. As a result of the desperate situation of the convicts, the court sentenced them to 19 years in prison.¹⁵⁸

EVIDENCE OF GOOD MORAL CHARACTER

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

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

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

Other evidence of good moral character may include the defendant’s marriage or long-term relationship, responsibility for children, steady employment, military service, community activities, church attendance, educational efforts, or participation in drug or alcohol rehabilitation programmes.

EVIDENCE ENCOURAGING THE COURT TO EXERCISE COMPASSION

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

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

that a lengthy stay on death row may constitute cruel and unusual punishment.¹⁵⁹ Similarly, you may be able to argue that extended time spent in pretrial detention or “on remand” justifies the imposition of a lesser penalty since the offender has already been heavily punished for their crime. Prison overcrowding, lack of food, exposure to infectious disease, lack of activities, and the inability to have contact with one’s family are all factors that add to the punishment an offender has endured for their crime. In *Republic v Chiliko Senti*, the Malawi High Court found that the “appalling prison conditions which are quite below the recognised international standard should be taken into consideration in these sentence re-hearing proceedings” and that, indeed, “such imprisonment is a punishment on its own.”¹⁶⁰

EFFECTS OF CONVICTION AND DEATH SENTENCE

Another mitigation factor worth noting is the effects of the conviction and sentence imposed on the accused and others. You would usually submit to the court with information on whether the accused is the sole breadwinner for the family and how many family members are financially dependent on the accused.

CHAPTER 9



APPEALS & POST-CONVICTION RELIEF



INTRODUCTION

In this chapter, we will provide some insight on the duty of effective representation to protect a client's right to appeal and right to a fair trial. You will also be invited to challenge the existence of the death penalty in your country and to question the lawfulness of its application to your client.

DEFENDING YOUR CLIENT'S RIGHTS AFTER CONVICTION

YOUR CLIENT HAS THE RIGHT TO APPEAL THEIR CONVICTION AND SENTENCE

In Malaysia, the right to appeal is contained in the Courts of Judicature Act, 1964. Under this statute, a convicted person is entitled to a two-tier appeal process. A prisoner may appeal their sentence from the High Court to the Court of Appeal.¹⁶¹ After the Court of Appeal determines whether the appeal may be made, the judge who passed the death sentence forwards a report on the case to the Federal Court, which determines the ultimate outcome.¹⁶²

Numerous international human rights instruments likewise provide for the right to appeal.¹⁶³ For example, in its General Comment 32, the Human Rights Committee emphasized that the right to appeal is particularly important in capital cases.¹⁶⁴ Further, a State must provide free legal aid for appeals if the prisoner cannot afford to retain their own lawyer.¹⁶⁵

In many countries, the law provides that a prisoner may present new evidence on appeal. This can provide a crucial opportunity to introduce newly discovered evidence of innocence or of prosecutorial or police misconduct, and any mitigating evidence that the trial attorney may have failed to uncover. The Judicial Committee of the Privy Council, which is the final court of review for many commonwealth countries, held in *Benedetto v. The Queen* that:

[t]he discretionary . . . power to receive fresh evidence represents a potentially very significant safeguard against the possibility of injustice.... While it is always a relevant consideration that evidence which it is sought to adduce on appeal could have been called at trial, the appellate court may nonetheless conclude that it ought, in the interest of justice, to receive and take account of such evidence. A defendant

*should be punished for the crimes he has committed, not for the failure of his representatives to conduct his defence as they ought.*¹⁶⁶

Unreasonable limitations, such as an unduly short window of time in which to seek review, make the right of review illusory and should be challenged. In March 2012, for example, the Eastern Caribbean Court of Appeal held that a 14-day time limit on filing a death penalty appeal was an unreasonable and arbitrary limitation on a death row prisoner's right to appeal.¹⁶⁷ 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."¹⁶⁸ Your client also has the right to have their appeal heard within a reasonable time—a principle that has been reaffirmed on a number of occasions by the United Nations Human Rights Committee.¹⁶⁹

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 their family. Make sure your client understands the appeals process and timeline. Your client will sometimes be advised by the 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.

The psychological impact of the death sentence is immense and is sometimes accentuated by harsh prison conditions. Both can weaken your client's health and make him unwilling or unable to help you prepare for their defence on appeal. 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 (such as filing a *pro se* appeal). Advise your client of any action they should take personally, according to national law—for instance, that they have to file an application for legal aid. You should advise them in unambiguous terms what to do and when to do it.

Obtain the court records and transcript of the trial proceedings

You should obtain access to the court records and trial transcript and make a copy of the entire file. You cannot be denied access to records from the lower court.¹⁷⁰ Access to these records is an inherent part of the right to a fair trial and the correlative principle of equality of arms.¹⁷¹

Get a copy of the file kept by the previous counsel

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.

Investigate the basis for your client's conviction and sentence

As a general rule, courts in Malaysia do not allow the introduction of new or fresh evidence during appeals. An appellate court “should not travel outside the record of the lower court and not take evidence in appeal... consequently, additional or fresh evidence may only be admitted in exceptional circumstances where such evidence is essential to the just decision of the case” (Dato' Seri Anwar Ibrahim v PP [2014]). However, the appellate court has discretion to allow further evidence under exceptional circumstances. The principles governing the adducing of new evidence are summarized by Lord Parker CJ in the English case of R v Parks [1961]¹⁷²:

- (i) the evidence sought to be called must be evidence which was not available at the trial;
- (ii) the evidence must be relevant to the issues;
- (iii) it must be credible evidence in the sense of being well capable of belief; and
- (iv) the Court will, after considering the evidence, go on to consider whether there might have been reasonable doubt in the minds of the jury as to the guilt of the appellant if that evidence had been given together with the other evidence at the trial.

In light of the above, you should always consider whether there are new avenues of investigation that have not yet been explored. For example, if the trial lawyers failed to present mitigating evidence, but you believe your client suffers from a serious mental disability, you may wish to introduce psychiatric reports or testimony from lay witnesses establishing the nature of his disability and the extent to which it impairs your client's judgment and behaviour.

For example, in *Pitman v. The State*, the Judicial Committee of the Privy Council admitted two expert psychological evaluations and multiple affidavits from the appellant's relatives demonstrating the appellant's diminished mental capacity.¹⁷³ 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.

Master the procedural rules and jurisprudence related to capital cases

Deadlines

Familiarize yourself with the deadlines for filing appeals. In many cases, appeals have been rejected after lawyers missed a deadline—even when the appeal was filed only one day late. After the judge or magistrate has pronounced judgment, either the accused or the prosecution may appeal to a higher court within 14 days as provided under the Courts of Judicature Act, 1964.¹⁷⁴ Additionally, within the time limited for filing the appeal (14 days), the appellant must apply for the notes of proceedings and the grounds of judgment. It is provided by Order 3, Rule 5(1) that the Court has the power to extend the period of filing as it thinks fit. However, for the purpose of an appeal to the High Court, an application for a time extension must be filed together with an affidavit showing the reasons for delay.

If the accused decides to appeal, they must also make an application for a stay of execution to the court that passed the sentence. The filing of an appeal will not automatically operate as a “stay of execution”. Therefore, unless the accused applies for a stay of execution, they will still have to serve the sentence while the appeal is pending. The only exception is whipping; an appeal will automatically stay a sentence of whipping.

Jurisdiction

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

Jurisprudence

It is important that you have in-depth knowledge of capital punishment jurisprudence in Malaysia, especially of the landmark decisions issued by higher courts such as supreme or constitutional courts. If judicial decisions regarding the death penalty are not easily accessible in your country, you might want to discuss and share experiences with other capital defence lawyers and NGOs specializing in criminal justice or campaigning against the death penalty in your country.

International remedies

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

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. As discussed in Chapter 7, defendants have a right to a reasoned judgment. A reasoned judgment will also help you determine if the case has been heard in a fair and equitable way.

WHICH REMEDIES TO SEEK

The type of relief you can ask for will depend on the issue. For example, if your client belongs to a category of defendants who may not be sentenced to death, then they may be sentenced to any

penalty provided lawfully in national law for that type of offense except death. If errors were committed during the culpability phase of the trial that call into question the integrity of the verdict, your client is entitled to a new trial on guilt and sentence. If the error only affects sentencing—for example, as in the case of death row phenomenon—the remedy may be life imprisonment or commutation to a term of years.

WHAT TO CHALLENGE

It is beyond the scope of this manual to evaluate all of the legal arguments that can potentially be raised on appeal. Many arguments will be founded on principles of national law that vary from one country to another. Nonetheless, there are a number of international legal arguments that have successfully been raised in national courts around the world. Although 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.

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.”¹⁷⁵ The Human Rights Committee has observed that this expression must be “read restrictively,” because death is a “quite exceptional measure.”¹⁷⁶ 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).¹⁷⁷

In 1984, the Economic and Social Council of the United Nations further defined the restriction to “most serious crimes” in its Safeguards Guaranteeing Protection of the Rights of Those Facing the Death Penalty.¹⁷⁸ Those Safeguards, which were endorsed by the UN General Assembly, provide that the death penalty may only be imposed for intentional crimes with lethal or other extremely grave consequences. The 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.”¹⁷⁹

Consistent with these principles, courts in some common law jurisdictions have vacated death sentences imposed on accomplice defendants who did not conclusively act with lethal intent.¹⁸⁰ The Supreme Court of India has opined that the death penalty should not be applied except in the gravest cases of extreme culpability.¹⁸¹

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

Death row phenomenon

Over the last two decades, a rich body of jurisprudence has developed in support of the notion that prolonged incarceration on death row (also known as “death row phenomenon”) constitutes cruel, inhuman or degrading punishment.¹⁸² These decisions have prompted scores of articles by legal commentators and mental health experts. In *Pratt & Morgan*, the Privy Council held that a delay of 14 years between the time of conviction and the carrying out of a death sentence in the case of a Jamaican prisoner was “inhuman punishment.”¹⁸³ The Privy Council further concluded that “in any case in which execution is to take place more than five years after sentence there will be strong grounds for believing that the delay is such as to constitute ‘inhuman or degrading punishment.’”¹⁸⁴ In *Soering v. United Kingdom*, the European Court found that prisoners in Virginia spend an average of six to eight years on death row prior to execution.¹⁸⁵ 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.”¹⁸⁶

More recently, the Supreme Court of Canada considered evidence that death-sentenced inmates in the state of Washington (United States) took, on average, 11.2 years to complete State and federal post-conviction review, when weighing the legality of extraditing two men to the United States to face capital charges.¹⁸⁷ 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.”¹⁸⁸ 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.¹⁸⁹ These examples demonstrate that, arguably, the prohibition against lengthy confinement on death row as cruel, inhuman or degrading treatment has attained binding force as customary international law.¹⁹⁰

Categories of offenders who cannot be executed

As discussed above, international law squarely prohibits the execution of certain categories of offenders. These are discussed in Chapters 5 and 6 above.

Preventing the execution of mentally ill clients

Your client may have developed a severe mental illness 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 State Parties, prohibit the imposition of the death penalty “on persons who have become insane.”¹⁹¹ In 1989, the ECOSOC expanded this protection to cover “persons suffering from... extremely limited mental competence, whether at the stage of sentence or execution.”¹⁹² The UN Commission on Human Rights has likewise urged retentionist countries “not to impose the death penalty on a person suffering from any form of mental... disabilities or to execute any such person.”¹⁹³ And the European Union has declared that the execution of persons suffering from any form of mental disorder is contrary to internationally recognized human rights norms and violates the dignity and worth of the human person.¹⁹⁴

International law may not require that your client be formally found to be mentally ill for this prohibition to apply. In *Francis v. Jamaica*, the Human Rights Committee held that issuing an execution warrant for a mentally disturbed individual who was examined and found not to be “insane” amounted to cruel, inhuman or degrading treatment in violation of Article 7 of the ICCPR.¹⁹⁵

If you suspect your client’s mental health has deteriorated during their stay on death row, you should seek a stay of execution and seek assistance from a qualified mental health professional. See Chapter 5, “Defending Vulnerable Populations.”

Ineffective assistance of counsel

As discussed in Chapter 2, your client has the right to effective legal representation at trial and on appeal. If your client’s trial lawyer did

not fulfil their obligation to provide competent assistance, this is an issue that should be raised on appeal as grounds for a new trial or sentencing. In the United States, courts have reversed numerous capital cases based on ineffective assistance of counsel claims.¹⁹⁶

OVERCOMING BARRIERS

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

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

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.¹⁹⁷ Their home country may also have a bilateral consular treaty with the country in which they were sentenced to death. Investigate whether the detaining authorities notified your client of their right to have their consulate notified of their detention. With your client's consent, you should also contact consular officers from their home country to ascertain whether they are willing to assist in your client's defence. In *Avena & Other Mexican Nationals (Mexico v. U.S.)*, the International Court of Justice determined that when a foreign national has been sentenced to a "severe penalty" or "prolonged incarceration" after being deprived of their consular rights, they are entitled to judicial "review and reconsideration" of their conviction and death sentence.¹⁹⁸

No ex post facto punishments

Your client may not be subject to the death penalty if the penalty arose under a law that did not exist at the time of the offense. Such ex post facto punishments are prohibited by multiple international human

rights treaties. Article 11, paragraph 2 of the Universal Declaration of Human Rights dictates that "[n]o one shall be held guilty of any penal offence on account of any act or omission which did not constitute a penal offence... at the time was it was committed."¹⁹⁹ The ICCPR, the African Charter on Human and Peoples' Rights, the European Convention for the Protection of Human Rights and Fundamental Freedoms, the Charter of Fundamental Rights of the European Union, and the Arab Charter on Human Rights also contain language to this effect.²⁰⁰ The ICCPR also directs that legal changes to reduce a penalty for a particular offense retroactively apply to those who committed the offense under the harsher version of the law.²⁰¹

Because ex post facto punishments are prohibited, you should investigate the legal history of the offense for which your client was sentenced. If the law forbidding your client's conduct was not in effect when your client committed the crime, you should argue that the sentence was handed down in violation of international law. Similarly, because at least some international treaties require States to alter sentences if a change in the law mandates a lighter sentence, you should investigate what the current penalties for the offense are. If the offense is no longer sufficient justification for the death penalty under the State's law, you should point out that the ICCPR requires your client's sentence to be reduced.²⁰²

Your client was sentenced to death after an unfair trial

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

CLEMENCY

Clemency in Malaysia

In Malaysia, the right to clemency has great importance, especially given the limits on judicial discretion placed by the rules of double presumptions of possession and knowledge of illicit substances and subsequent mandatory death sentences. Research shows that,

compared to neighbouring retentionist countries, Malaysia has a modest clemency with approximately 25 to 40% of applications being approved.²⁰³

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

Malaysian Law

In Malaysia, the power to grant pardons or clemency or to commute death sentences, is established under Article 42 of the Federal Constitution. This power lies in the hands of the King (Yang di-Pertuan Agong) in relation to offences that have been tried by court-martial, irrespective of the location, and offences committed in, or tried by a court exercising jurisdiction over, the Federal Territories of Kuala Lumpur, Labuan and Putrajaya. The Ruler of a State (Yang di-Pertua Negeri or Sultan, depending on the state) has the power to grant pardons and commutations with respect to all other offences committed in that State. The King or Ruler of a State acts on advice of the Board of Pardons on the appropriateness of the pardon. The Board of Pardons consists of the Attorney General, the Federal Territories Minister and three other lay members appointed by the Yang di-Pertuan Agong (Head of State). After consideration of the opinion of the Federal Attorney General, the Board gives its advice to the Yang di-Pertuan Agong on the pardon. Case laws have ruled that the advice provided by the Pardon Board is not binding, and it is not mandatory for the ruler to act on the advice given.

The outcome of the clemency process cannot be reviewed. In **Karpal Sing v Sultan of Selangor**, it was held that the Yang di-Pertuan Agong is not bound to act on the advice of the Pardons Board and is permitted to exercise their discretion in the prerogative of mercy, and that the decision of the Yang di-Pertuan Agong is not reviewable in court.²⁰⁴

International Law

Several international instruments guarantee the right to seek pardon or commutation of a death sentence, which may be granted in all cases of capital punishment.²⁰⁵ It is well established that the procedures for considering amnesty, pardon or clemency in death penalty cases must “guarantee condemned prisoners with an effective or adequate opportunity to participate in the mercy

process.”²⁰⁶ These minimum due process safeguards must include the right “to present, receive or challenge evidence considered” by the clemency authority and “to receive a decision from that authority within a reasonable period of time prior to his or her execution.”²⁰⁷

The following documents are typically considered by the Board for each case:

- ▶ **Petition submitted by the prisoner laying out the reasons a pardon should be granted**
- ▶ **Police, narcotics, psychologist and prison department files on the prisoner**
- ▶ **Written opinion on the case from the Federal Attorney General**
- ▶ **Evidence notes from the prisoner’s trial and a recommendation from the trial judge as to whether or not the death sentence should be carried out**
- ▶ **A report from the Federal Court on any appeal in that court (optional)**

YOUR DUTIES AS A CLEMENCY COUNSEL

If you are representing an individual who faces a real risk of execution, you must be familiar with the procedures and possible time limitations for clemency petitions. You should also determine what factors the clemency authority usually finds persuasive. Unfortunately, there are no legislations or guidelines laying out criteria for the grant of clemency.

The following factors have been used as a basis for successful grants for clemency in Malaysia:

- ▶ Whether the crime involves loss of life
- ▶ Good standing in society before arrest
- ▶ Conduct of prisoner in prison
- ▶ Conduct of prisoner during trial
- ▶ Age
- ▶ Foreign nationality
- ▶ Foreign influence or diplomatic pressure
- ▶ Connections to royal family and government
- ▶ Procedural irregularities
- ▶ Financial contribution to the victim’s family
- ▶ A positive impression on the decision-maker

Examples from comparative jurisdictions that can be used include:

- ▶ New evidence establishing innocence
- ▶ Humanitarian reasons, such as a serious illness

- ▶ Unfair trial
- ▶ Personal characteristics of your client (youth, old age, mental illness, childhood abuse and deprivation)
- ▶ Behaviour since the offense
- ▶ Rehabilitation and remorse
- ▶ Support from the victim's family

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

RIGHT TO POST-CONVICTION REVIEW

In Malaysia any application to review a wrongful conviction must be made to the Federal Court under Rule 137 of the Federal Court Rules 1995. The Federal Court may apply Rule 137 in "limited grounds and very exceptional circumstances" only.²⁰⁸ The possibility to reopen concluded cases when new evidence emerges that cast doubts over the conviction is an essential safeguard under international law that must be guaranteed in all cases—but especially when a person is sentenced to death—to ensure that convictions are based upon clear and convincing evidence leaving no room for an alternative explanation of the facts.²⁰⁹

SUCCESS STORY

Osariakhi Ernest Obayangbonis – mentally ill prisoner pardoned

Nigerian National Osariakhi Ernest Obayangbon (aka Michael Phillips) was sentenced to the mandatory death sentence for murder in 2000 and was scheduled to be executed in the early hours of 14 March 2014 in Malaysia. Obayangbon was diagnosed with schizophrenia before his appeal in 2007 and had been receiving treatment since then.

Once international human rights organizations, such as Amnesty International, were notified of his impending execution and a 24 hour notice a campaign was launched to bring the authorities' attention to the serious concerns pertaining to his case. In 2017, Amnesty International received information that the King of Malaysia had commuted the death sentence.

Given the high threshold used by the Federal Court to reopen a case for review, virtually no applications—even in light of compelling evidence—have been accepted. Unlike some other countries,

Malaysia lacks a dedicated organization to review cases in which the miscarriage of justice is suspected to have occurred. In the United Kingdom, for example, there exists the Criminal Cases Review Commission, an independent body which looks into suspected miscarriages of justice and decides whether to send them back to the Court of Appeal for review. Activists and groups of lawyers have called for the establishment of similar mechanisms in Malaysia.²¹⁰

MAINTHAN ARUMUGAM: WRONGFUL CONVICTION FOR A MURDER WITH NO VICTIM

Mainthan Arumugam was convicted and sentenced to death in August 2004 for the murder of an Indian national by the High Court of Shah Alam. The prosecution's case rested on the evidence of two witnesses who claimed they saw a bloodied person on Mainthan's workshop floor the night before the body parts were discovered. But the four suspects said the alleged victim, known as Devadass, was an occasional worker who they believed had stolen from a neighbour. The suspects admitted to beating Devadass up, and testified that he went to a hospital for treatment. Defence lawyers, however, could not locate Devadass to appear as a court witness. The judge publicly doubted his existence, dismissing him as a fictional "afterthought." All the suspects were found guilty, but three had their convictions overturned on appeal. Only Mainthan's was upheld.

Having exhausted the appeals and pardons process, the only other avenue left to Mainthan to reopen his case is to apply to the Federal Court for review. The court has declined to reopen his case twice, most recently in August 2017, after it appeared that Devadass was both real and very much alive. He had made an appearance at the funeral of Mainthan's mother in March that same year. In Devadass' signed affidavit supporting Mainthan's application for review, he said that he'd only learnt about Mainthan's being on death row at the funeral. He confirmed that Mainthan had beaten him up that night, and that he had been subsequently brought to the hospital where he received stitches. He said that after that incident, he'd moved to another state without telling Mainthan and his family. He'd ignored their calls because he was afraid and did not want to see them. But Devadass' affidavit failed to convince the Federal Court to review Mainthan's case.

THE "COURT OF PUBLIC OPINION" Taking your client's case to the public

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. We encourage everyone to carefully think through all possible repercussions before speaking out publicly about your client's case. Despite these caveats, media coverage has proven to be an effective tool in many cases. As discussed below, given advances in technology such as the internet, it is now easier to generate such publicity with both traditional media and social media.

Timing is an important consideration in all media campaigns. Highly visible media campaigns are most common when execution is imminent. Once a clemency petition has been filed, external pressure can influence an executive's decision on that petition, especially a popularly elected executive sensitive to their country's reputation in the international community. International NGOs such as 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 to determine whether and when to go public while your client's case is still under review in the courts. You must decide whether the risk of alienating the court (and perhaps the executive who may have to consider a clemency petition) is outweighed by the potential benefits of external pressure. This judgment should be made in consultation with experienced members of the bar in your country.

Many journalists look for a "hook" to write a story. Bear in mind that when you are working with the media, you need a theory of the case (see Chapter 7) and 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 actual innocence, but don't ignore claims of prosecutorial misconduct, discrimination, faulty investigative work, and your client's life history.

NOOR ATIQAH: USING SOCIAL MEDIA TO INFLUENCE THE COURT OF PUBLIC OPINION

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, he instead 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 mother while Noor 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.

Using traditional media

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

One route to favourable media coverage is to educate a reporter by giving them access to court filings. Many reporters will want to interview your client, but this is a very risky step. You must carefully evaluate whether your client is liable to say something that could harm their chances of commutation and/or release. Many criminal defendants are uneducated and can be easily manipulated, so you

must control the interview as much as possible. Insist on being present. Ask for a list of questions in advance and go through them with your client. You must also understand that once you give a journalist access to your client, you have limited control over the nature of the publicity that follows.

SUCCESS STORY

Hafez Ibrahim

In 2005, a Yemeni Judge sentenced Hafez Ibrahim to death for a killing that occurred when he was 16-years old. The judge reportedly refused to hear from witnesses or the defence counsel and Ibrahim was denied the right to appeal. Two years later, Ibrahim managed to access a mobile phone and notify Amnesty International of his imminent execution. After a prolonged campaign, Ibrahim was finally released in 2007.

He has since taken up the study of law and dedicated his life to “campaigning against the death penalty and raising awareness about human rights.” The execution of juvenile offenders is prohibited under the International Covenant on Civil and Political Rights.

Using social media

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).

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

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

pressure on the executive who will decide whether to grant or deny clemency.

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

Death Penalty and Public Opinion: Malaysia

Proponents of the death penalty often rely upon public support as a justification for retention. Death penalty surveys have a long history of asking people whether or not they are in favour of the death penalty. However, they do not measure opinion on how the death penalty is actually practiced, which requires follow-up information on the risk of mistakes and bias, torture and coercion, and the costs of the punishment.

In 2013, a major public opinion survey of the views of a representative sample of 1,535 Malaysian citizens found that the majority said they were in favour of the death penalty, whether mandatory or discretionary: 91% for murder, 74 to 80% for drug trafficking, depending on the drug concerned, and 83% for firearms offences. Concerning the mandatory death penalty, 56% said they were in favour of it for murder, but only between 25% and 44% for drug trafficking and 45% for firearms offences. However, when asked to say what sentences they would themselves impose on a series of ‘scenario’ cases, all of which were subject to a mandatory death sentence, a large gap was found between the level of support ‘in theory’ and the level of support when faced with the ‘reality’.

Sources:

The Death Penalty Project. *The Death Penalty in Malaysia: Public opinion on the mandatory drug trafficking, murder and firearm offences.* 2013.

CHAPTER 10



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 is in most cases 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 favourable outcome, your government's stance to international influence in the past, and the utility of a decision in your client's favour. 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.

PREPARING YOUR CASE

Once you identify the rights that have been violated by the government's actions in your case, identify the instruments (treaties or other documents) that address those rights. You can begin with the list of rights contained in the Appendix and discussed throughout this manual. Another excellent resource is Amnesty International's Fair Trials Manual, available online.²¹¹

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

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

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

UNITED NATIONS

Malaysia is an active United Nations Member State. It became a member on 17 September 1957. It is currently one of the 21 elected Vice-Presidents of the General Assembly's 77th session (2022-2023). Malaysia's positive reputation among the international diplomatic community, including as a "facilitator of the advancement of human rights," is an integral component of its foreign policy. In this vein, the country has contested and served three terms on the UN Human Rights Council, including the current one. Given the government's active participation in key UN bodies, it is safe to say that the UN's influence cannot be disregarded.

"Malaysia's election to the HRC is a testament of the international community's recognition and confidence in the country's endeavours as a consensus-builder and facilitator towards the advancement of human rights. During its membership, Malaysia plans to prioritise constructive engagement, cooperation, inclusivity, transparency and mutual respect in the HRC."

*Ministry of Foreign Affairs,
Malaysia. Press Release: Malaysia elected to the UN Human Rights Council for the term 2022-2024*

There are two types of human rights monitoring mechanisms within the UN system: charter-based and treaty-based mechanisms. Both are described below.

CHARTER-BASED MECHANISMS

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) National Reports (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 National Human Rights Institutions (NHRIs). The Universal Periodic Review (UPR) Working Group, comprising of 47 Member States, reviews the files and drafts 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 which 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 Kuala Lumpur.
- ▶ Participate in a pre-session in Geneva. Pre-sessions are organized one month before UPR Working Group sessions 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, since the review takes place after every 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.

SUCCESS STORY

Malaysia at the UPR

During the 2nd UPR cycle, the Malaysian Government did not support recommendations calling for the abolishment of the death penalty and to establish a moratorium on the use of the death penalty. However, this changed in the 3rd UPR cycle, when the Government accepted the recommendations. As of October 2018, the Government has placed a moratorium on the death penalty.

PRACTICE TIP

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 NHRIs, you can also organize a national pre-session and address them all at one forum.

Highlight previous recommendations. Use UPR-Info's Database of UPR recommendations and voluntary pledges to access and search recommendations that were made to Malaysia and previous reviews and to 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.

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 (3rd 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 maximize social media outreach of the session, the event also featured live tweeting with a hashtag #UPRPak and provided a space for informal discussions among relevant stakeholders. The participants also expressed their opinions through posters inscribed with emojis with tied lips, and signs with phrases such as 'Danger: High Voltage' and 'Just Do It'. The public interest in the process resulted in the hashtag #UPRPak trending on the 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))

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 on the UN High Commissioner on Human Rights' website.²¹² In 2019, the Pakatan Harapan government implemented a policy of standing open invitations for visits by the UN Special Procedures. Malaysia has previously hosted various Special Rapporteurs, including on the sale and sexual exploitation of children, on the human rights to safe drinking water and sanitation, and on extreme poverty and human rights.

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.²¹³ 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 applicable State and may make further appeals to the State through diplomatic channels.

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.

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 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.

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, eight 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, saying 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 the 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, Malaysia is a State Party to three international human rights treaties, namely the Convention on the Rights of the Child (CRC), the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) and the Convention on the Rights of Persons with Disabilities (CRPD).

As a State Party, Malaysia is required to report periodically to the committees of independent bodies of the said treaties (called “treaty bodies”) 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.

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 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, since less than 1/3 of the country's population is registered at birth, often accused persons have no way of proving their age at the time of arrest. In the majority of the cases, police arbitrarily assign an age based on the visual appearance of the accused. This practice had 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 during the country's State review in 2017, where the Committee on the Rights of the Child explicitly recommended that:

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.

APPENDIX

RESOURCES

- ▶ See what international human rights treaties your country is a party to at the United Nations Treaty Collections, Chapter IV: Human Rights:
<http://treaties.un.org/pages/Treaties.aspx?id=4&subid=A&lang=en>.
- ▶ See what regional human rights treaties your country is a party to on the following:
 - United Nations Office of the High Commissioner for Human Rights, Regional Human Rights Treaties, at <http://www.ohchr.org/EN/Issues/ESCR/Pages/RegionalHRTreaties.aspx>.
 - The Association of Southeast Asian Nations (ASEAN), at <https://asean.org/our-communities/asean-political-security-community/rules-rule-based-people-oriented-people-centred/human-rights/>
- ▶ See also Death Penalty Worldwide, a website and database about the laws and practices relating to the application of the death penalty around the world, at www.deathpenaltyworldwide.org.

TEMPLATES

MODEL UN COMPLAINT FORMS

- ▶ Model form under the Optional Protocol to the ICCPR, the CAT or the ICERD, available at <http://www2.ohchr.org/english/bodies/docs/annex1.pdf>.
- ▶ List of guidelines for submitting petitions to different human rights bodies, available at <https://www.ohchr.org/en/treaty-bodies/individual-communications>
- ▶ Anne F. Bayefsky, How to Complain to the UN Human Rights Treaty System, Kluwer Law Int'l (2003), available at <http://www.bayefsky.com/tree.php/area/complain>
- ▶ Online complaint form for the ICCPR, CAT, CEDAW, and ICERD, available at <http://www.bayefsky.com/unts/login/index.php>

LIST OF ACRONYMS

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

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

HUMAN RIGHTS CLINICS

- ▶ Center on the Death Penalty Worldwide, Cornell Law School:
deathpenaltyworldwide@cornell.edu

NGOS

- ▶ Amicus
<https://www.amicus-alj.org/contact>
- ▶ Amnesty International
<http://www.amnesty.org/en/contact>
- ▶ Anti-Death Penalty Asia Network (ADPAN)
<https://adpan.org/contact-us/>
- ▶ Death Penalty Project
<http://www.deathpenaltyproject.org/contact/>
- ▶ ECPM (Together Against the Death Penalty)
<https://www.ecpm.org/en/contact-us/>
- ▶ FIDH (International Federation for Human rights)
<https://www.fidh.org/en/about-us/contact-1776/>
- ▶ Interights
<http://www.interights.org/contact-us/index.html>
- ▶ Reprieve
<https://reprieve.org/>

MITIGATION CHECKLIST

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

Note: Depending on the facts of the case, some communities may be disturbed by the thought of the prisoner's release. In some rural communities, it may be necessary to approach the village headperson and inform them of your intentions prior to interviewing any witnesses. Whether the community will be disturbed by your presence depends on many factors, including the length of time that has passed between the crime and your visit, how the offense was committed, and the relationship of your client to their family and the larger community. You should explain that you are trying to ensure that your client receives a fair trial, and that you want to be sure that you have correct information about their life and the nature of the offense. If it is appropriate, you can explain that you are focusing 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 their 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 the prisoner and when they last spoke/saw each other. Explain that the prisoner is still in prison and give them any updates you can on their health, general condition, and the status of the case. Ask them if there is any message they would like you to convey to the prisoner.

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

QUESTIONS TO MAP OUT THE PRISONER'S FAMILY TREE

- ▶ Can you tell me a little about [name of prisoner]? What were they like as a [sibling/child/parent]?
- ▶ Did they have any positions of leadership in the village?
- ▶ What was their reputation in the village/community?
- ▶ Did they have a job? What did they do? At what age did they start working? What kind of work did they do as a child (assuming they worked as a child).
- ▶ Did they go to church/mosque? Did they have any position of leadership? Did you ever notice any change in their religious observance?
- ▶ Where did they go to school? How far did they get? Why did they stop?
- ▶ Did they learn to read and write? How was their school performance compared to their siblings/other family members? Did they have any difficulty learning the material?

QUESTIONS TO DETERMINE POSSIBLE MENTAL ILLNESS AND MENTAL DISABILITIES

- ▶ What was the prisoner's health like as an infant, child, teenager? Did they ever suffer from any serious illnesses? Malaria, tuberculosis, other illnesses?
- ▶ Did they ever suffer any head injuries? (due to what, age, witnesses, hospitalized?)
- ▶ Did they ever lose consciousness, or time? (age, how long, how often, witnesses)
- ▶ Did they suffer from headaches?
- ▶ Did they ever have seizures?
- ▶ Did you or anyone in your family ever take them to a traditional healer? Why? (what age, how long, how often, witnesses)
- ▶ What sort of traditional remedies, if any, did they receive for any mental difficulties? Did they ever go to a doctor?
- ▶ Have you ever noticed anything unusual about them, compared to other [siblings/children/people in your family/people in your community]?
- ▶ Did they ever use alcohol? How much, how often?
- ▶ Was the use of alcohol common in their family?
- ▶ Did their parents drink? More or less than others in his community?
- ▶ How was their behaviour when they were drunk?
- ▶ What was the relationship like between their parents? Did they ever fight? Did they fight with loud words, or were their fights physical? Can you describe some of those fights? Did the prisoner ever intervene to stop those fights?
- ▶ Were they ever a victim of violence from a family member? How severe was it?
- ▶ Were they ever a witness to any other form of violence within their family or in the community?
- ▶ How were they punished as a child when they misbehaved? Did they misbehave more or less than their siblings? What kind of trouble would they get into as a young child?
- ▶ Are there any indications that they were a victim of sexual abuse or sexual violence by a family member or anyone within the community?
- ▶ Did [name] ever suffer from rages or panic attacks?
- ▶ [If the answer is yes]: What sets them off? Do they ever lose it?
- ▶ What happens when they get set off or lose it?
- ▶ At what age did this behaviour start?
- ▶ Have you ever noticed anything else that is unusual about their behaviour?

QUESTIONS ABOUT PRE- AND POST-NATAL HEALTH (FOR MOTHERS IN PARTICULAR, BUT ALSO ELDER SIBLINGS, AUNTIES, FATHERS)

- ▶ Explain that prenatal and post-natal health (problems) can have long-term effects on physical growth, cognitive development and future learning capacity, school performance, educational outcomes and work performance.
- ▶ When you were pregnant with [name], did you ever experience times of severe malnourishment? Times where there was no food at all? Were there any droughts during the pregnancy? (When, how often.) How would you get additional food? What was your diet when you were pregnant?
- ▶ Can you share any details about the pregnancy and the delivery?
- ▶ Any complications during the pregnancy? (Ask for details.)
- ▶ Any complications during delivery? (Ask for details.) How was your delivery of [name] compared to the delivery of your other children? Did you deliver in a hospital or at home? Who was present with you?
- ▶ Were there any times when your child [the prisoner] experienced times of severe malnourishment? Times where there was no food at all? Due to drought? Due to unemployment of the caretaker? (Ask for details, when, how often.) How would you get additional food?
- ▶ How quickly did [name] develop in comparison with your other children? At what age did they learn to walk, talk, use the toilet? Was this earlier or later than your other children?

CLOSING THE INTERVIEW

Thank them for their time. Tell them how much you appreciate having had the opportunity to speak to them. Give them a sense of how long you expect the trial/appeal to take. Tell them that you will do your best to help [prisoner], but that you cannot make any promises or even predict what will happen. If you are handling the appeal of a prisoner on death row, explain that you're trying to make sure they are not executed, to get them the physical/mental health care that they need, and reduce their prison sentence.

END NOTES

- 1 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.
- 2 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).
- 3 See *Mohd Ezam v Inspector General of Police* ([2002] 4 CLJ 309), *Merdeka University Berhad v Government of Malaysia*(1982) 2 MLJ 243)
- 4 <https://www.malaysianbar.org.my/article/news/legal-and-general-news/legal-news/judicial-application-of-international-law-in-malaysia-an-analysis>
- 5 *PP v Oie Hee Koi*
- 6 United Nations Office on Drugs and Crime (UNODC). *Commentary on the Bangalore Principles of Judicial Conduct*. p. 5. Available at: https://www.unodc.org/res/ji/import/international_standards/commentary_on_the_bangalore_principles_of_judicial_conduct/bangalore_principles_english.pdf
- 7 ECPM. *Isolation and Desolation: Conditions of Detention of People Sentenced to Death*. 2020. P.14 Available at: <https://www.ecpm.org/app/uploads/2022/08/OK-mission-enquete-Malaisie-GB-2019-280420-WEB.pdf>
- 8 Amnesty International. *Fatally Flawed: Why Malaysia must abolish the death penalty*. Oct 2019. [Fatally Flawed] Available at: <https://www.amnesty.org/en/documents/act50/1078/2019/en/>
- 9 Question 20, Parliament Reply, 3rd meeting, 3rd Term, 14th Parliament <https://pardocs.sinarproject.org/documents/2020-november-december-parliamentary-session/oral-questionssoalan-lisan/2020-11-26-parliamentary-replies/20201126-p14m3p2-soalan-lisan-20.pdf/view>
- 10 *Id.*
- 11 *Fatally Flawed*, supra note viii, p. 17
- 12 Amnesty International urges Malaysia to end death penalty. AP News. Oct 10, 2019. Available at: <https://apnews.com/article/af112cfb6a9c4bd68c6bdd6092d7942c>
- 13 Criminal Code (Act 574) [Penal Code]
- 14 Criminal Procedure Code (Act 593) [CPC]
- 15 See Chew, M. Malaysia and the Politics behind the death penalty : A Tumultuous Relationship. World Coalition Against the Death Penalty. Oct 24, 2022. Available at: <https://worldcoalition.org/2022/10/24/malaysia-and-the-politics-behind-the-death-penalty-a-tumultuous-relationship/>
- 16 Constitution of Malaysia, 1957, Part II, Article 5(3)
- 17 U.N. Basic Principles on the Role of Lawyers adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, 27 August to 7 September 1990, U.N. Doc. A/CONF.144/28/Rev.1 at 118 (1990).
- 18 ECOSOC Res. 1989/64, ¶ 1(a).
- 19 "The European Court has observed with respect to Article 6(3)(c) of the European Convention that 'the right of an accused to be given, in certain circumstances, free legal assistance constitutes one aspect of the notion of a fair trial in criminal proceedings.'" *Quaranta v. Switzerland*, App. No. 12744/87, ¶ 27, ECHR (May 24, 1991). See also *Artico v. Italy*, App. No. 6694/74, ¶ 33, ECHR (May 13, 1980). ECHR cases are available at: www.echr.coe.int/hudoc.
- 20 ICCPR Art. 14; *Taylor v. Jamaica*, ¶ 8.2, Communication No. 707/1996, U.N. Doc. CCPR/C/60/D/707/1996, HRC (June 14, 1996) ("...where a convicted person seeking constitutional review of irregularities in a criminal trial has insufficient means to meet the costs of legal assistance in order to pursue his constitutional remedy and where the interest of justice so requires, legal assistance should be provided by the State.").
- 21 In *Moreno Ramos v. United States*, Case 12430, Report No. 1/05, OEA/Ser.L./V/II.124, Doc. 5, IACHR (2005), the IACHR found that the United States violated equality, due process, and fair trial protections prescribed under Articles II, XVIII and XXVI of the American Declaration, including the right to competent legal representation, where Mr. Moreno Ramos' trial counsel failed to present mitigating evidence at the penalty phase of the trial and made no attempt to convince the jury to sentence him to life imprisonment. See also *Medellin, Ramirez Cárdenas & Leal García v. United States*, Case 12.644, Report No. 90/09, OEA/Ser.L./V/II.135, Doc. 37, IACHR (Aug. 7, 2009) (finding that the United States violated petitioners' rights to due process and to a fair trial under

- Articles XVIII and XXVI of the American Declaration by providing incompetent defence counsel in a capital case). Moreover, Article 6(3)(c) of the ECHR requires national authorities to intervene (taking positive measures) if a failure to provide effective representation is either manifest or sufficiently brought to their attention in some other way. See *Artico v. Italy*, App. No. 6694/74, ECtHR (May 13, 1980); *Kamasinski v. Austria*, (App. No. 9783/82, ECtHR Dec. 19, 1989); *Imbrioscia v. Switzerland*, App. No. 13972/88, ECtHR (Nov. 24, 1993); *Czekalla v. Portugal*, App. No. 38830/97, ECtHR (Oct. 10, 2002); *Sannino v. Italy*, App. No. 30961/03, ECtHR (Apr. 27, 2006); *Panasenko v. Portugal*, App. No. 10418/03, ECtHR (July 22, 2008). Similar provisions exist in the national laws of many countries, including the United States and Portugal. See, e.g., *Strickland v. Washington*, 466 U.S. 668 (1984); Portugal Estatuto da Ordem dos Advogados, Art. 93 § 2, Art. 95 §§ 1, 2, Act No. 15 (Jan. 26, 2005, last amended in 2010) (describing an lawyer's duty not to accept a case if he knows he doesn't have the required skills or availability to prepare and engage in zealous representation, and to inform the client on the progress of the case).
- 22 U.N. Basic Principles on the Role of Lawyers ¶ 3. "Governments shall ensure the provision of sufficient funding and other resources for legal services to the poor and, as necessary, to other disadvantaged persons. Professional associations of lawyers shall cooperate in the organization and provision of services, facilities and other resources." In *Reid v. Jamaica*, the HRC held that "in cases involving capital punishment, in particular, legal aid should enable counsel to prepare his client's defence [sic] in circumstances that can ensure justice. This does include provision for adequate remuneration for legal aid." ¶ 13, Communication No. 250/1987, U.N. Doc. CCPR/C/39/D/250/1987 (1990).
- 23 *Robinson v. Jamaica*, 241, Communication No. 223/1987, U.N. Doc. Supp. No. 40 (A/44/40) at 41, HRC (1989) (State party is under an obligation itself to make provision for effective representation by counsel in a case concerning a capital offence, even where provision of legal assistance would require an adjournment of the proceedings); ECOSOC Res. 1989/64 (calling on member states to afford "special protection to persons facing charges for which the death penalty is provided by allowing time and facilities for the preparation of their defense, including the adequate assistance of counsel at every stage of the proceedings, above and beyond the protection afforded in non-capital cases"); *Kamasinski v. Austria*, App. No. 9783/82, ¶ 65, ECtHR (Dec. 19, 1989) ("Inequality of parties before the courts may easily result in a miscarriage of justice. When defense counsel fails to provide effective representation, authorities must either replace the counsel or otherwise compel the counsel to fulfill mandatory obligations.")
- 24 <http://www.suhakam.org.my/wp-content/uploads/2013/11/laporan-5-peguam.pdf>
- 25 [1973] 1 MLJ 54.
- 26 [1988] 2 WLR 920
- 27 The U.N. Basic Principles on the Role of Lawyers states, "All persons are entitled to call upon the assistance of a lawyer of their choice to protect and establish their rights and to defend them in all stages of criminal proceedings." The U.N. Safeguards Guaranteeing Protection of the Rights of Those Facing the Death Penalty provide: "5. Capital punishment may only be carried out pursuant to a final judgment rendered by a competent court after legal process which gives all possible safeguards to ensure a fair trial, at least equal to those contained in ICCPR Article 14, including the right of anyone suspected of or charged with a crime for which capital punishment may be imposed to adequate legal assistance at all stages of the proceedings." (May 25, 1984) available at: <http://www2.ohchr.org/english/law/protection.htm>.
- 28 See ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases, Guideline 10.14, "Duties of Trial Counsel After Conviction" (Feb. 2003), available at: http://www.americanbar.org/content/dam/aba/migrated/2011_build/death_penalty_representation/2003guidelines.authcheckdam.pdf
- 29 Amnesty International, Fair Trial Manual (second edition), 2014, p. 5. Available at: <https://www.amnesty.org/en/documents/pol30/002/2014/en/>
- 30 ICCPR Art. 14(3)(b); ECHR Art. 6(3)(b); ACHR Art. 8(2)(c); RACHPR ¶ 2(E)(1); ICTY Statute Art. 21(4)(b); ICTR Statute Art. 20(4)(b); ICC Statute Art. 67(1)(d).
- 31 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.
- 32 *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).
- 33 See also *Chaparro Álvarez y Lapo Iñiguez v. Ecuador*, IACtHR (Nov. 21, 2007); *Gordillo, Raúl Hilario*, Expte: G.445.XXI, Fallos: 310:1934, CSJN (Sept. 29, 1987) (Argentina Supreme Court); *Goddi v. Italy*, App. No. 8966/80, ECtHR (Apr. 9, 1984); *Daud v. Portugal*, App. No. 22600/93, ECtHR (Apr. 21, 1998); *Bogumil v. Portugal*, App. No. 35228/03, ECtHR (Oct. 7, 2008); *Öcalan v. Turkey*, App. No. 46221/99, ECtHR (Mar. 12, 2003, First Section), (May 5, 2005, Grand Chamber).
- 34 ECOSOC Res. 1996/15 (adopted July 23, 1996)
- 35 See ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases, Guideline 4.1, "The Defense Team and Supporting Services" (Feb. 2003) at: http://www.lb9.uscourts.gov/webcites/10documents/Smith_guidelines.pdf.
- 36 ICCPR Art. 14(3)(f). Article 6(3)(e) of the ECHR, Article 8(2)(a) of the ACHR, and Articles 20(4)(f) and 21(4)(f) of the respective Statutes of the International Criminal Tribunals for Rwanda and the former Yugoslavia provide for the right to free assistance of an interpreter for the accused where he does not understand or speak the language of the court.
- 37 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.")
- 38 Maclean, *Effective Capital Defense Representation*, at 674.
- 39 Leona D. Jochowitz, *Missed Mitigation: Counsel's Evolving Duty to Assess and Present Mitigation at Death Penalty*, 43 No. 1 CRIMINAL LAW BULLETIN Art. 5 (2007).
- 40 Maclean, *Effective Capital Defense Representation*, at 670.
- 41 See U.N. International Criminal Court Code of Professional Conduct for Counsel (Feb. 2003).
- 42 Most codes of conduct for lawyers include rules on conflicts of interests. See, e.g., Council of Bars and Law Societies of Europe, Code of Conduct for European Lawyers, Art. 3.2, available at http://www.ccbe.eu/fileadmin/user_upload/NTCdocument/EN_Code_of_conductp1_1306748215.pdf (1988, last amended 2006) ("3.2.1. A lawyer may not advise, represent or act on behalf of two or more clients in the same matter if there is a conflict, or a significant risk of a conflict, between the interests of those clients. 3.2.2. A lawyer must cease to act for both or all of the clients concerned when a conflict of interests arises between those clients and also whenever there is a risk of a breach of confidence or where the lawyer's independence may be impaired. 3.2.3. A lawyer must also refrain from acting for a new client if there is a risk of breach of a confidence entrusted to the lawyer by a former client or if the knowledge which the lawyer possesses of the affairs of the former client would give an undue advantage to the new client."); Portuguese Statute on Lawyers, Art. 94 (*Estatuto da Ordem dos Advogados*, Act No. 15/2005 of Jan. 26, last amended in 2010);
- 43 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).
- 44 CPC, s. 28, 117
- 45 Security Offences (Special Measures) Act (SOSMA) 2012, Section 4(5)
- 46 Prevention Of Terrorism Act 2015 [Act 769], Section 8
- 47 Prevention of Crime Act, 1959 [POCA], Section 19A
- 48 Dangerous Drugs Act 1952 (Act 234), S. 31 (B)
- 49 ICCPR Part II, Art. 9(3)-(4); ACHR Art. 7(6); ECHR, Art. 5(3); ACHR, Art. 7(4)-(7).
- 50 Constitution of Uganda, Ch. 4, § 23(4).
- 51 ACHR Art. 6; ECHR Art. 5(1); ACHPR, *Constitutional Rights Project and Civil Liberties Organisation v. Nigeria*, Communication No. 102/93, ACommHPR (Oct. 31, 1998).
- 52 Pakistan Constitution, Part II, Ch. 1, § 10(4); Constitution of the Republic of the Philippines, Art. III, § 13; Constitution of Uganda, Ch. 4, Art. 23(6).
- 53 ICCPR Art. 10(1); Constitution of the Republic of the Philippines, Art. III, § 12(2).
- 54 HRC, General Cmt. 15; U.N. General Assembly Body of Principles for the Protection of All Persons Under Any Form of Detention or Imprisonment, Principle 23 (Dec. 9, 1988), <http://www.un.org/documents/ga/res/43/a43r173.htm>; U.N. General Assembly Code of Conduct for Law Enforcement Officials, Art. 5 (Dec. 17, 1979), available at: <http://www2.ohchr.org/english/law/codeofconduct.htm>; Constitution of Peru, Art. 2, ¶ 24(h).
- 55 European Prison Rules, Rule 18.8(a), Recommendation of the Committee of Ministers to Member States No. 2006(2) (Jan. 11, 2006).
- 56 European Prison Rules, Rule 18.8(b).
- 57 European Prison Rules, Rule 18.8(c).
- 58 European Prison Rules, Rule 18.
- 59 European Prison Rules, Rule 26.
- 60 U.N. Standard Minimum Rules for the Treatment of Prisoners, Rule 21 (May 13, 1977), available at <http://www2.ohchr.org/english/law/treatmentprisoners.htm>; European Prison Rules, Rule 27.
- 61 European Prison Rules, Rules 39-48; Constitution of Peru, Art. 2, ¶ 24(h); Constitution of Uganda, Ch. 4, Art. 23(5)(b)-(c).
- 62 European Prison Rules, Rule 22.

- 63 U.N. Standard Minimum Rules for the Treatment of Prisoners, Rules 6(1), 41, 42; U.N. General Assembly Body of Principles for the Protection of All Persons Under any Form of Detention or Imprisonment, Principle (5); European Prison Rules, Rules 13, 29.
- 64 U.N. Standard Minimum Rules for the Treatment of Prisoners, Rules 6(1), 41, 42; U.N. General Assembly Body of Principles for the Protection of All Persons Under any Form of Detention or Imprisonment, Principle (5); European Prison Rules, Rules 13, 29.
- 65 U.N. Standard Minimum Rules for the Treatment of Prisoners, Rule 93; U.N. General Assembly Body of Principles for the Protection of All Persons Under any Form of Detention or Imprisonment, Principle 18; European Prison Rules, Rule 23.4; Rules of Detention of the Yugoslavia Tribunal, Rule 67(D); Constitution of Uganda, Ch. 4, Art. 23(5)(b).
- 66 <https://www.prison-insider.com/en/articles/malaisie-conditions-de-detention-des-condamnes-a-mort>
- 67 ICESCR Article 12 affirms each person's right to physical and mental health (Jan. 3, 1976), <http://www.2ohchr.org/english/law/cescr.htm>.
- 68 https://drive.google.com/file/d/0B6FQ7SONa3PRZXNaejlsZktQWTg/view?resourcekey=0-BbH-7_gU9E6OkYTy8VwGVA
- 69 <https://suhakam.org.my/activities/>
- 70 Leona D. Jochowitz, Missed Mitigation: Counsel's Evolving Duty to Assess and Present Mitigation at Death Penalty, 43 No. 1 CRIMINAL LAW BULLETIN Art. 5 (2007).
- 71 Bradley A. Maclean, Effective Capital Defense Representation and the Difficult Client, 76 TENNESSEE LAW REVIEW 661, 670 (2009).
- 72 *Id.* at 671.
- 73 See, e.g., Allen P. Wilkinson & Ronald M. Gerugthy, *Bite Mark Evidence: Its Admissibility is Hard to Swallow*, 12 WESTERN STATE UNIVERSITY LAW REVIEW 519, 560 (1985).
- 74 Interview with Amir Mohamed Suleiman, African Center for Justice and Peace Studies (Feb. 24, 2010).
- 75 [1983] 2 MLJ 167
- 76 See ICCPR, Art. 6¶5; U.N. Safeguards § 3. Article 37 of the CRC also states, "No child shall be subjected to torture or other cruel, inhuman or degrading treatment or punishment. Neither capital punishment nor life imprisonment without possibility of release shall be imposed for offences committed by persons below eighteen years of age."
- 77 See ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases, § 10.7, "Investigation" (Feb. 2003), http://www.americanbar.org/content/dam/aba/migrated/2011_build/death_penalty_representation/2003guidelines.authcheckdam.pdf.
- 78 Daniel Payne, Building the Case for Life: A Mitigation Specialist as a Necessity and a Matter of Right, 16 CAPITAL DEFENSE JOURNAL 43 (2003).
- 79 *Dacosta Cadogan v. Barbados*, ¶¶ 80-88, IACTHR (Sept. 24, 2009). Similarly, the Privy Council has held, and Caribbean courts have acknowledged, that the state is required to provide social enquiry and psychiatric reports for all prisoners considered for the death penalty. *Pipersburgh v. R* [2008] 72 WIR 108 (PC) ("It is the need to consider the personal and individual circumstances of the convicted person and, in particular, the possibility of his reform and social re-adaptation which makes the social inquiry and psychiatric reports necessary for all such sentence hearings."); see also *DPP v. Che Gregory Spencer* [2009] E Carib Sup Ct, High Ct of Justice, Federation of St. Christopher and Nevis, at para 3 ("It is also now standard practice for the state to provide a Social Enquiry Report and a Psychiatric Report.").
- 80 The *Brasilia Rules on Access to Justice for People in a Vulnerable Condition* indicate the following factors may account for vulnerability: age, incapacity, belonging to minorities or indigenous communities, victimization, migration, poverty, gender or deprivation of liberty. The *Brasilia Rules* also stress the importance of public policy and of qualified legal assistance for those vulnerable persons. "100 Regras de Brasilia sobre Acesso a la Justicia de las Personas en condición de Vulnerabilidad" approved by the XIV Iberoamerican Judicial Summit (2008), available at: www.cumbrejudicial.org/web/guest/110.
- 81 ICCPR Art. 6 ¶ 5.
- 82 ACHR Art. 5 § 4.
- 83 African Charter on the Rights and Welfare of the Child, Art. 30(e); Arab Charter on Human Rights, Art. 12.
- 84 ICCPR Art. 6 ¶ 5.
- 85 UN Human Rights Council, Report of the Special Rapporteur to the Commission of Human Rights, S. Amos Wako, 6 February, 1989, E/CN.4/1989/25, para 279-283.
- 86 ICCPR Art. 6 ¶ 5.
- 87 CRC Art. 11.
- 88 Concluding Observations of the Committee on the Rights of the Child, Saudi Arabia, U.N. Doc. CRC/C/SAU/CO/2 (2006).
- 89 Rodley, *The Treatment of Prisoners Under International Law*, p. 322.
- 90 *Michael Domingues v. U.S.*, Case 12.285, Report No. 62/02, IACHR (2002). See also *Thomas v. U.S.*, Case 12.240, Report No. 100/03, IACHR (2003) ("The overwhelming evidence of global state practice... displays a consistency and generality amongst world states indicating that the world community considers the execution of offenders aged below 18 years at the time of their offence to be inconsistent with prevailing standards of decency. The Commission is therefore of the view that a norm of international customary law has emerged prohibiting the execution of offenders under the age of 18 years at the time of their crime.").
- 91 ACHR Art. 4(5).
- 92 Criminal Code of the Republic of Belarus, Art. 59.2(3) (2009).
- 93 Rodley, *The Treatment of Prisoners Under International Law*, p. 325.
- 94 The Special Rapporteur on Health has observed that the term "persons with mental disabilities" encompasses an almost unmanageably broad spectrum of impairments and conditions, ranging from intellectual disabilities to severe psychiatric disorders. Report of the Special Rapporteur on the Right to Health, E/CN.4/2005/51 (Feb. 11, 2005), ¶ 19.
- 95 The HRC has also found that the reading of a warrant for execution to a mentally incompetent person violated ICCPR Article 7. In 1984, ECOSOC addressed itself to the issue for the first time and concluded that the death sentence is not to be carried out on persons who are insane. In its resolution on implementation of the Safeguards, ECOSOC proposes non-execution of persons suffering from mental retardation or extremely limited mental competence. RODLEY, *THE TREATMENT OF PRISONERS UNDER INTERNATIONAL LAW*, p. 325.
- 96 See, e.g., *Pipersburgh v. R*, 72 WIR 108, ¶ 33 (2008) ("It is the need to consider the personal and individual circumstances of the convicted person and, in particular, the possibility of his reform and social re-adaptation which makes the social inquiry and psychiatric reports necessary for all such sentence hearings."). See also *DPP Spencer v. Che Gregory*, E. Carib. Sup. Ct., High Ct. of Justice (2009), Federation of St. Christopher & Nevis, ¶ 3 ("It is also now standard practice for the state to provide a Social Enquiry Report and a Psychiatric Report.").
- 97 American Psychiatric Association. (2013). Diagnostic and statistical manual of mental disorders: DSM-5. Washington, DC: American Psychiatric Association.
- 98 *Uganda v. Bwenge*, HCT-03-CR-SC-190/1996 (2009).
- 99 *Id.* at 5.
- 100 *Id.* at 15.
- 101 U.N. Office of Drugs and Crime, Handbook on Prisoners with Special Needs, p. 12 (2009), available at: www.unodc.org/documents/justice-and-prison-reform/Prisoners-with-special-needs.pdf.
- 102 Standard Minimum Rules, ¶ 24, (1977) U.N. Doc. A/CONF/611, annex I.
- 103 International Centre for Prison Studies, *A Human Rights Approach to Prison Management*, p. 50, available at: www.prisonstudies.org.
- 104 Standard Minimum Rules, ¶ 44
- 105 *Id.* ¶ 82.
- 106 Foreigners make up nearly half of death row inmates in Malaysia: Amnesty. Reuters.Oct 10, 2019. Available at: <https://www.reuters.com/article/us-malaysia-politics-deathpenalty-idUSKBN1WP1WX>
- 107 *Id.*
- 108 The *Vienna Conventions on Consular Relations and Optional Protocol on Disputes*, available at <http://www.state.gov/documents/organization/17843.pdf>, provide a host of rights that will arise if counsel determines that a client is a foreign national. Article 36 of the Conventions, for instance, provides the right to consular assistance, and as a result, local authorities have the duty to inform foreign nationals that are detained or arrested of their right to communicate with their consulate.
- 109 The American Bar Association's Guidelines for the Appointment and Performance of Defense Counsel in Capital Cases (2003) provide, in Guideline 10.6, that attorneys have an obligation to advise foreign national defendants of their rights to contact the consulate and to notify the consulate of their detention if they so wish. See also RODLEY, *THE TREATMENT OF PRISONERS UNDER INTERNATIONAL LAW*, p. 1012.
- 110 See OC-16/99, Inter-Am. Ct. H.R. (Oct. 1, 1999); *Avena and Other Mexican Nationals (Mex. v. U.S.)*, 2004
- 111 See *Tan Seng Kiah v. R* [2002] NTCCA 1 (Court of Criminal Appeal of the Northern Territory of Australia) (suppressing statement where defendant was deprived of opportunity to seek consular assistance).
- 112 In *Avena and Other Mexican Nationals*, the International Court of Justice held that 51 Mexican nationals in the United States who had been sentenced to death without being promptly notified of their consular rights were entitled to have their convictions and sentences reviewed *de novo*, in order to ascertain how they were prejudiced by the violations. 2004 I.C.J. 128 (Mar. 31). The death sentence of one Mexican national was commuted as a direct result of the ICJ's decision. See *Torres v. State*, 120 P.3d 1184, 1188 (Okla. Crim. App. 2005). Courts outside of the United States have applied the ICJ's decision as well. See BVerfG, 2 BvR 2115/01 vom 19.2.2006, Absatz-

- Nr. (1 - 77), ¶¶60-61 (Germany Federal Constitutional Court), available at http://www.bverfg.de/entscheidungen/rk20060919_2bvr211501.html
- 113 *Id.* at 1014.
- 114 *Id.*
- 115 Plea bargaining is an established tool in the United States' system of criminal procedure and elements of plea bargaining are found in many foreign legal systems throughout the world as well as some international criminal tribunals. See generally Dominick R. Vetri, *Guilty Plea Bargaining: Compromises by Prosecutors to Secure Guilty Pleas*, 112 UNIVERSITY OF PENNSYLVANIA LAW REVIEW 865, 866 (1964) (discussing the broad range of plea agreements used by prosecutors in the United States). See also Nancy Amoury Combs, *Copping a Plea to Genocide: The Plea Bargaining of International Crimes*, 151 UNIVERSITY OF PENNSYLVANIA LAW REVIEW 1 (2002) (discussing the use of plea bargaining in Continental Europe, the United Kingdom, Israel, and the International Criminal Tribunals); Penal Reform Int'l, PRI Research on Gacaca Report IV: The Guilty Plea Procedure, Cornerstone of the Rwandan Justice System, at 3 (2003), <http://www.penalreform.org/resources/rep-ga4-2003-guilty-plea-en.pdf> (discussing the guilty plea procedure in Gacaca courts for those accused of genocide to plead guilty in exchange for a reduced sentence and to finish the second half of the sentence performing community service).
- 116 Combs, *Copping a Plea to Genocide*, at 142.
- 117 See *Missouri v. Frye*, 132 S. Ct. 1399 (2012) (duty to convey to client any offers of a plea agreement presented by the prosecution).
- 118 See e.g., Vetri, *Guilty Plea Bargaining*, at 866.
- 119 In some jurisdictions this will not be necessary because the charging instrument/indictment includes the list of evidence and witnesses that support the charges and that are to be produced at trial.
- 120 *Prosecutor v. Kabligi*, ¶ 21, ICTR (No. ICTR-98-41-T) (Oct. 19, 2006) ("It is difficult to imagine a statement taken in violation of the fundamental right... would not require its exclusion under Rule 95 as being 'antithetical to, and would seriously damage, the integrity of the proceedings.'")
- 121 See ICCPR Arts. 9, 14(3)(c). This provision has been interpreted to signify the right to a trial that produces a final judgment and, if appropriate, a sentence without undue delay. The time limit "begins to run when the suspect (accused, defendant) is informed that the authorities are taking specific steps to prosecute him." The International Committee of the Red Cross (ICRC) has compiled a lengthy list of provisions in international law and various countries that discuss due process and speedy trial rights. See ICRC, Customary IHL database, available at http://www.icrc.org/customary-ihl/eng/docs/v2_cha_chapter32_rule100_sectionf.
- 122 *Collins v. Jamaica*, Communication No. 240/1987, U.N. Doc. C.CPR/C/43/D/240/1987, HRC (Nov. 1, 1991) (the HRC noted that "in all cases, and especially in capital cases, the accused is entitled to trial and appeal proceedings without undue delay, whatever the outcome of the judicial proceedings may turn out to be."); Frederic Edel, *The Length of Civil and Criminal Proceedings in the case-law of the European Court of Human Rights*, Council of Europe Publishing, Human Rights Files No. 16 (2007). In Portugal and some other countries, there is the possibility to file a "motion"/request to "accelerate" the procedure if the legal deadlines for each stage are exceeded.
- 123 *Pedersen & Baadsgaard v. Denmark*, App. No. 49017/99, ECtHR (Dec. 17, 2004). See also H. v. France, ¶¶ 50, 58, ECtHR (Oct. 24, 1989).
- 124 The HRC has held that when a state violates an individual's due process rights under the ICCPR, it may not carry out his execution. See, e.g., *Johnson v. Jamaica*, ¶ 89, Communication No. 588/1994, HRC (1996) (finding delay of 51 months between conviction and dismissal of appeal to be violation of ICCPR Article 14, paragraphs 3(c) and 5, and reiterating that imposition of a death sentence is prohibited where the provisions of the ICCPR have not been observed).
- 125 See, e.g., UDHR Arts. 7, 10; ICCPR, Arts. 2(1), 3, 26; CEDW Arts. 2, 15; ICERD Arts. 2, 5, 7; ACHPR Arts. 2, 3; ACHR, Arts. 1, 8(2), 24; ECHR, Arts. 6, 14; ADRDM, Arts. II, XVIII.
- 126 See UDHR, Art. 10; ICCPR, Art. 14(1); ACHR, Arts. 8(1) and 27(2); ADHR Art. XXVI; ECHR Art. 6(1); ACHPR, Arts. 7(1), 26. See also Basic Principles on the Independence of the Judiciary ("BPIJ"), ¶¶ 1-2. The Human Rights Committee has held that "[t]he right to be tried by an independent and impartial tribunal is an absolute right that may suffer no exception." *Gonzales del Rio v. Peru*, ¶ 5.2, Communication No. 263/1987 (1992). Moreover, in *Richards v. Jamaica*, ¶ 7.2, Communication No. 535/1993 (1997), the Human Rights Committee found a violation of article 14 in a capital case involving extensive pretrial publicity, and ruled that Jamaica could not lawfully carry out the execution. *Id.*
- 127 For example, BPIJ ¶ 5 provides that "Everyone shall have the right to be tried by ordinary courts or tribunals using established legal procedures." At a minimum, the right to a fair hearing, established in ICCPR Article 14(1), encompasses the procedural and other guarantees laid down in paragraphs 2 to 7 of Article 14 and Article 15. But in truth, a defendant's fair trial rights are even broader in scope, since Article 14(3) refers to the specific rights enumerated as "minimum guarantees." Therefore, a trial may not meet the fairness standard envisaged in Article 14(1), even where the proceedings are technically in compliance with paragraphs 2-7 of Article 14 and the provisions of Article 15.
- 128 Lawyers Committee for Human Rights, *WHAT IS A FAIR TRIAL? A Basic Guide to Legal Standards and Practice*, p. 12, March 2000 [hereinafter, LCHR FAIR TRIAL Manual].
- 129 See BPIJ, principle 2: "The judiciary shall decide matters before them impartially, on the basis of facts and in accordance with the law, without any restrictions, improper influences, inducements, pressures, threats or interferences, direct or indirect, from any quarter or for any reason." When deciding whether a tribunal is independent, the European Court on Human Rights considers: (1) the manner of appointment of its members; (2) the duration of their office; (3) the existence of guarantees against outside pressures; and (4) the question whether the body presents an appearance of independence. See, e.g., *Campbell and Fell v. the United Kingdom*, App. Nos. 7819/77, 7878/77, ¶ 78, ECtHR (June 28, 1984).
- 130 *Ringeisen v. Austria*, App. No. 2614/65, ¶ 95, ECtHR (July 16, 1971).
- 131 *Le Compte, Van Leuven and De Meyere v. Belgium*, App. Nos. 6878/75, 7238/75, ¶ 57, ECtHR, (June 23, 1981). See also International Commission of Jurists, *International Principles on the Independence and Accountability of Judges, Lawyers, and Prosecutors, Practitioners' Guide No. 1*, p. 5 (2007).
- 132 See, e.g., ECHR, Art. 6(2); ICCPR, Art. 14(2). See also ACHR Art. 8(2).
- 133 See Draft Third Optional Protocol to the ICCPR, *Aiming at Guaranteeing Under All Circumstances the Right to a Fair Trial and a Remedy*, Annex I, in: "The Administration of Justice and the Human Rights of Detainees, The Right to a Fair Trial: Current Recognition and Measures Necessary for Its Strengthening," Final Report, Commission on Human Rights, Sub-Commission on Prevention of Discrimination and Protection of Minorities, 46th Session, E/CN.4/Sub.2/1994/24, p. 76, n.10 (June 3, 1994) [hereinafter *The Final Report*].
- 134 See Hassan, A. The Administration of Criminal Justice in Malaysia: The Role And Function of Prosecution. *Resource Material Series No. 53*. Available at: https://www.unafei.or.jp/publications/pdf/RS_No53/No53_25PA_Hassan.pdf
- 135 *Id.*
- 136 *Gopi Kumar Subramaniam v PP* [2019] 1 LNS 807; *PP v Denish a/I Madhavan* [2009] MLJ 194
- 137 ICCPR Art. 14(3)(d); ICTY Statute Art. 21(4)(d); ICTR Statute Art. 20(4)(d); ICC Statute Art. 67(1)(d). Although the right to be present at trial is not expressly mentioned in the European Convention, the European Court has stated that the object and the purpose of Article 6 mean that a person charged with a criminal offence is entitled to take part in the trial hearing. See *Colozza and Rubinat*, App. Nos. 9024/80, 9317/81, ¶ 27, ECtHR (February 12, 1985).
- 138 See Art. 14(3)(f).
- 139 For example, the Inter-American Commission considers the right to translation of documents as fundamental to due process. See Report on the Situation of Human Rights of a Segment of the Nicaraguan Population of Miskito Origin, OEA/SerL/V/11.62, Doc.10, rev. 3, IACHR (1983).
- 140 ECHR Art. 6(3)d; ICCPR Art. 14(3)(e). ACHR Art. 8(2)(f) recognizes the right of defendants to examine witnesses against them and those testifying on their behalf, under the same conditions as the State, with the purpose of defending themselves.
- 141 <https://www.amerbon.com/media/judges-duty-bound-to-provide-grounds-for-judgments-say-lawyers>
- 142 *J. L. García Fuenzalida v. Ecuador*, ¶ 95, Communication No. 480/1991, U.N. Doc. GAOR/A/51/40/vol. II, HRC (July 12, 1996) (finding violations of Articles 14(3)(e) & (5) where a court had refused to order such expert testimony).
- 143 [1993] 2 AMR 3351
- 144 [1955] AC 197
- 145 *Delta Case v. France*, ¶ 36, Series A, No. 191-A, ECtHR (Dec. 19, 1990) (analyzing the rights afforded by Article 6(3)(d) of the European Convention on Human Rights). See also *Castillo Petruzzi et al. case v. Peru*, ¶ 154, Series C No. 52, IACtHR (May 30, 1999) ("[O]ne of the prerogatives of the accused must be the opportunity to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf, under the same conditions as witnesses against him").
- 146 *Delta Case v. France*, ¶ 37, Series A, No. 191-A, ECtHR (Dec. 19, 1990) (right to a fair trial under ECHR Arts. 6(1) and (3)(d) was violated where a party was convicted based on testimony witnesses provided to investigators and where the accused and his counsel were not afforded the opportunity to challenge the credibility of those witnesses).
- 147 See generally American Bar Ass'n, *ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases* (rev. ed. Feb. 2003), 31 HOFSTRA L. REV. 913 (2003), available at: <http://www.abanet.org/legalservices/downloads/sclaid/deathpenaltyguidelines2003.pdf>.
- 148 *Kigula & Others v. Attorney Gen.*, 2006 S. Ct. Const. App. No. 03 (Uganda 2009), At 43
- 149 *Mulla & Anr. v. State of U.P.*, Crim. App. No. 396 of 2008, at 53-59 (India 2010).
- 150 *Id.* at 65.
- 151 For examples of mitigating circumstances considered relevant by courts when deciding on the imposition of a death sentence, see *Williams v. Taylor*, 529 U.S. 362 (2000); *Wiggins*

- v. *Smith*, 539 U.S. 510 (2003); *Porter v. McCollum*, 130 S. Ct. 447 (2009); *Manohar Lal alias Mannu & Another v. State*, 2 SRC 92 (India 2000); *Mulla & Another v. State of Uttar Pradesh*, Crim. App. No. 396 of 2008 (India 2010); *Reyes v. The Queen*, UKPC, 2 AC 235, Judgment on Sentencing (2002) (appeal taken from Belize); *Pipersburgh v. R.*, UKPC, 33, 72 WIR 108 (2008) (appeal taken from Belize); *DPP v. Wycliffe Liburd*, Suit No. SKBHCR 2009/0007, (Eastern Caribbean Supreme Court, Saint Christopher and Nevis, Crim.Cir. 2009); *George v. The Queen*, Suit No. HCRAP 2009/005 (Eastern Caribbean Supreme Court, Court of Appeal of Saint Lucia 2011).
- 152 Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, 65, U.N. Doc. A/HRC/4/20/2007/18 (Jan. 29, 2007).
- 153 *Bachan Singh v. State of Punjab*, 2 SCC 684 (India 1980). In February 2010, the Indian Supreme Court reiterated that the death may be imposed only in cases of “extreme culpability.” *Mulla & Anr. v. State of UP.*, Crim. App. No. 396 of 2008, at 49 (India 2010).
- 154 See, e.g., *Manohar Lal alias Mannu & Another v. State*, 2 SCC 92 (India 2000) (death sentence set aside for murder of four youths in front of their mother because the defendants were “on a rampage” triggered by the “murder of Indira Ghandi” and had lost all reason).
- 155 Press Trust of India, *SC saves man who murdered wife, 3 kids from the gallows*, Times of India, Feb. 29, 2012, at: <http://timesofindia.indiatimes.com/city/delhi/SC-saves-man-who-murdered-wife-3-kids-from-the-gallows/articleshow/12085626.cms>.
- 156 *S. v. Makwanyane*, ¶ 46, 3 SA 391 (South Africa 1995).
- 157 Venkatesan Chinnasami v PP [2011] 1 LNS 1736
- 158 *Republic v Richard Maulidi and Julius Khanawa*, Sentence Rehearing Cause No. 65 of 2015 (unreported).
- 159 See, e.g., *Kigula & Others v. Attorney Gen.*, 2006 S. Ct. Const. App. No. 03, at 56–57 (Uganda 2009); *Pratt v. Jamaica*, Communication Nos. 210/1986, 225/1987, U.N. Doc. A/44/40, at 222, HRC (1989); *Pratt & Others v. Attorney Gen. of Jamaica & Others* 2 AC 1 (1994); *Soering v. United Kingdom*, ¶ 111, App. No. 14038/88, 11 ECtHR (1989).
- 160 *Republic v Chiliko Senti*, Sentence Rehearing Cause No. 25 of 2015 (unreported).
- 161 S 307, CPC
- 162 S 281, CPC
- 163 See, e.g., ICCPR Art. 14(5); ACHR Art. 7(1)(a); ACHR Art. 8(2)(h); U.N. Safeguards, ¶ 6, E.S.C. Res. 164 HRC General Cmt. 32, ¶ 51, U.N. Doc. CCPR/C/GC/32 (July 26, 2007).
- 165 *LaVende v. The State*, 30 WIR 460 (Trin. & Tobago) (1979); *LaVende v. Trinidad and Tobago* (No.554/1993), U.N. Doc. CCPR/C/61/D/554/1993 (Nov. 11 1997).
- 166 *Benedetto v. The Queen*, Privy Council, [2003] UKPC 27, 1 WLR 1545, 1569–70.
- 167 *Isaac, Cannonier, Williams & Gardiner v. The Queen*, Crim Apps No. 2 of 2008, Nos. 19, 20, 21, 22 of 2008, E Carib Ct App (21 March 2012) (appeal from St. Christopher and Nevis).
- 168 *Benedetto v. The Queen*, Privy Council, [2003] UKPC 27, 1 WLR 1545, 1569–70.
- 169 *Johnson v. Jamaica*, (No. 588/1994), U.N. Doc. CCPR/C/56/D/588/1994 (Mar. 22 1996) (finding a delay of four years and three months in hearing an appeal in a capital case is, barring exceptional circumstances, unreasonably long and incompatible with the right to a fair trial); *McLawrence v. Jamaica*, (No. 702/1996), U.N. Doc. CCPR/C/60/D/702/1996 (July 18 1997) (finding a delay of 31 months between conviction and appeal violated Article 14 of the ICCPR); *Ashby v. Trinidad and Tobago*, (No. 580/1994), U.N. Doc. CCPR/C/74/D/580/1994 (March 21 2002) (finding a four and a half year delay in the adjudication of the appeal was violated article 14 of the ICCPR and specifically noting that inadequate staffing or general administrative backlog is not sufficient justification for the delay).
- 170 See Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Aug. 27– Sept. 7, 1990, *Basic Principles on the Role of Lawyers*, ¶ 21, U.N. Doc. A/CONF.144/28/Rev.1 (“It is the duty of competent authorities to ensure lawyers access to appropriate information, files and documents in their possession or control in sufficient time to enable lawyers to provide effective legal assistance to their clients.”).
- 171 See *id.*; Amnesty Int’l, *The International Criminal Court: Making the Right Choices Part II—Organizing the Court and Ensuring a Fair Trial* 53–54 (Position Paper No. 2 IOR 40/011/1997) (“An essential component of the principle of equality of arms is that procedural rights, such as inspection of records or submission of evidence, must be dealt with in a manner equal for both parties.” (internal quotation omitted)).
- 172 3 All ER 633, later approved by the House of Lords in *R v Pandleton* [2002] 1 WLR 72
- 173 *Pitman v. The State*, Privy Council, [2008] UKPC 16, paras. 26–32.
- 174 <https://www.kehakiman.gov.my/en/filing-appeal#:~:text=After%20the%20judge%20or%20magistrate,appeal%20to%20a%20higher%20court.&text=The%20prosecution%20may%20appeal%20against,you%20were%20found%20not%20guilty>
- 175 ICCPR, Art. 6(2).
- 176 Human Rights Committee, General Comment 6(16), para. 7.
- 177 See, e.g., *Chisanga v. Zambia*, Communication No. 1132/2002, para. 5.4.
- 178 E.S.C. res. 1984/50; GA Res. 39/118.
- 179 United Nations, Report of the Special Rapporteur on Extrajudicial, Summary, or Arbitrary Executions, UN Doc. CCPR/C/79/Add.85, 19 Nov. 1997, para. 13.
- 180 See, e.g., *Ram Anup Singh & Ors. v. State of Bihar*, 2002(3) RCR Criminal 7856 (Supreme Court of India).
- 181 *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).
- 182 See, e.g., *Pratt and Morgan v. The Attorney General of Jamaica* [1993], 3 SLR 995, 2 AC 1, 4 All ER 769 (P.C.) (en banc); *Soering v. United Kingdom*, 11 Eur. H.R. Rep. (ser. A) 439 (1989).
- 183 2 A.C. at 33.
- 184 *Id.*
- 185 *Soering v. United Kingdom*, 11 Eur. H.R. Rep. (ser. A) 439 (1989).
- 186 161 Eur. Ct. H.R. (ser. A) at 42 (1989).
- 187 *Minister of Justice v. Burns and Rafay*, 2001 SCC 7 (S.C. Canada, 22 March 2001) (at para. 122)
- 188 *Id.*
- 189 *Id.*
- 190 See Proclamation of Tehran, Final Act of the International Conference on Human Rights, Tehran, 22 April to 13 May 1968, 23 GAOR, U.N. Doc. A/CONF. 32/41, at 4 (May 13, 1968) (noting status of Universal Declaration of Human Rights, including prohibition against cruel, inhuman or degrading treatment, as customary international law). *Accord. De Sanchez v. Banco Central de Nicaragua*, 770 F.2d 1385, 1397 (5th Cir. 1985) (noting that the right not to be subjected to cruel, inhuman, and degrading treatment constitutes universally accepted international law).
- 191 United Nations Safeguards Guaranteeing Protection of the Rights of Those Facing the Death Penalty, ¶ 3, available at: <http://www2.ohchr.org/english/law/protection.htm>.
- 192 U.N. ECOSOC, Implementation of the Safeguards Guaranteeing Protection of Rights of those Facing the Death Penalty, p. 51, para. 1(d), U.N. Doc. E/1989/91, May 24, 1989.
- 193 See, e.g., U.N. Office of the High Commissioner for Human Rights, The Question of the Death Penalty, E/CN.4/RES/2003/67, Apr. 25, 2003.
- 194 EU Memorandum on the Death Penalty (Feb. 25, 2000).
- 195 *Francis v. Jamaica* (No. 606/1994), U.N. Doc. CCPR/C/54/D/606/1994 (Aug. 3, 1995).
- 196 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).
- 197 Article 36(1)(b) of the Vienna Convention on Consular Relations
- 198 2004 I.C.J. 12 (2004)
- 199 UDHR, Art. 11 ¶ 2.
- 200 ICCPR, Art. 15(1); ACHRPR, Art. 7(2); ECHR, Art. 7(1); Charter of Fundamental Rights of the European Union, Art. 49(1); Arab Charter on Human Rights, Art. 6.
- 201 ICCPR, Art. 15(1) (“If, subsequent to the commission of the offense, provision is made by law for the imposition of [a] lighter penalty, the offender shall benefit thereby.”). The same provision can be found in the Charter of Fundamental Rights of the European Union, Art. 49(1).
- 202 Another international legal argument that might be raised—at least in a country party to the ACHR—is that Article 4.2 of the ACHR prohibits the extension of capital punishment to crimes to which it did not apply at the time of the country’s accession to the Convention. In *Raxcacó Reyes v. Guatemala*, where the defendants had been sentenced to death for kidnapping not resulting in death, the IACTHR found a violation of Article 4.2 ACHR because, at the time Guatemala ratified the Convention, kidnapping not resulting in death was not punishable by capital punishment (only kidnapping resulting in death was). Part XIV, Series C, No. 133, IACTHR (Sept. 15, 2005). The legislation increasing the number of crimes punished by death had been amended after Guatemala’s ratification of the ACHR. The Court ruled that Guatemala should ensure that no crime is death-eligible if it was not so at the time of the country’s accession to the Convention. So, if a crime was not punished with death by the time the Convention was ratified by the state party, sentencing a defendant to death would violate international law (the ACHR).
- 203 Pascoe, Daniel, *Clemency in Southeast Asian Death Penalty Cases* (June 26, 2014). (2014) Centre for Malaysian Law Islam and Society Policy Paper Series 4, Available at SSRN: <https://ssrn.com/abstract=2459414> or <http://dx.doi.org/10.2139/ssrn.2459414>
- 204 Karpal Singh v Sultan of Selangor (1985) 1 MLJ 64
- 205 ACHR, Art. 4(6); ICCPR, Art. 6(4); U.N. ECOSOC, Safeguards guaranteeing protection of the rights of those facing the death penalty, principle 7, Resolution 1996/15, July 23, 1996 available at: <http://www2.ohchr.org/english/law/protection.htm>; Arab Charter on Human Rights, Art. 6, 18 Hum. Rts. L.J. 151, September 15, 1994.

- 206 *Rudolph Baptiste v. Grenada*, Case 11.743, Report N° 38/00 (April 13, 2000), ANNUAL REPORT OF THE IACHR 1999, para. 120.
- 207 *Id.* at paras. 118, 121.
- 208 Federal Court of Malaysia, *Asean Security Paper Mills Sdn Bhd v. Mitsui Sumitomo Insurance* (Malaysia) Bhd [2008] 6 CLJ 1
- 209 Safeguard No.4 of the UN Safeguards guaranteeing protection of the rights of those facing the death penalty
- 210 <https://www.amerbon.com/media/life-death-and-the-in-between>
- 211 This manual is available at <https://www.amnesty.org/fr/documents/pol30/002/2014/en/>
- 212 The website of the UN High Commissioner on Human Rights is available at: <http://www2.ohchr.org/english/bodies/chr/special/index.htm>
- 213 Amicus Brief filed by Louise Arbour, UN High Commissioner on Human Rights, In the Matter of Sentencing of Taha Yassin Ramadan, 8 Feb. 2007.

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