

# Article

## **HUMAN RIGHTS IN THE CONTEXT OF CRIMINAL JUSTICE: IDENTIFYING INTERNATIONAL PROCEDURAL PROTECTIONS AND EQUIVALENT PROTECTIONS IN NATIONAL CONSTITUTIONS**

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### **I. INTRODUCTION**

International protections of human rights have increased dramatically in the last century,<sup>1</sup> due in part to the increased recognition that a number of nations share many fundamental legal values and expectations.<sup>2</sup> One crucial commonality is the acknowledgement that

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1. For example, the United Nations has implemented a number of instruments protecting human rights. See *HUMAN RIGHTS: A COMPILATION OF INTERNATIONAL INSTRUMENTS*, U.N. Doc. ST/HR/1/Rev. 3, U.N. Sales No. E.88.XIV.1 *passim* (1988); *COUNCIL OF EUROPE, HUMAN RIGHTS IN INTERNATIONAL LAW: BASIC TEXTS* *passim* (1985); *BASIC DOCUMENTS ON HUMAN RIGHTS* (Ian Brownlie ed., 2d ed. 1980).

2. See generally JACK DONNELLY & RHODA E. HOWARD, *INTERNATIONAL HANDBOOK OF HUMAN RIGHTS* 4-6 (1987) (asserting the universality of human rights); MYRES S. McDOUGAL ET AL., *HUMAN RIGHTS AND WORLD PUBLIC ORDER* 6 (1980) (noting that the world public order can tolerate differences as long as they are "accommodated in terms of common interest"); A.H. ROBERTSON & J.G. MERRILLS, *HUMAN RIGHTS IN THE WORLD* 1 (1989) (noting increased international concern about the protection of human rights); Karen Parker & Lyn B. Neylon, *Jus Cogens: Compelling the Law of Human Rights*, 12 *HASTINGS INT'L & COMP. L. REV.* 411, 414-16 (1989) (explanation of *jus cogens*, which are generally recognized peremptory norms, as the basis for international human rights); Louis B. Sohn, *The New International Law: Protection of the Rights of Individuals Rather Than States*, 32 *AM. U. L. REV.* 1, 1-17 (1982)

individuals must be protected from certain depredations against their person, and that international laws are needed to protect people from policies which ultimately affect the global community.<sup>3</sup> The present discussion will focus on the protections afforded persons in the context of the administration of criminal justice. These safeguards are important protections against abuses of power which affect the life, liberty, and physical integrity of individuals.<sup>4</sup> Without these protections and limitations on the potential abusive exercise of power by states, democracy could not exist. Thus, there is an inseparable link between the protection of individual and collective human rights and democracy. The field of battle in which democracy and human rights are tested is the administration of criminal justice, which encompasses all processes and practices by which a state affects, curtails, or removes basic rights.<sup>5</sup>

There are no current conceptual frameworks for developing and enforcing internationally recognized human rights.<sup>6</sup> Indeed, there are

(historical overview of the rise in human rights awareness and enforcement since World War II). But see Etienne-Richard Mbaya, *The Compatibility of Regional Human Rights Systems with International Standards*, in HUMAN RIGHTS IN PERSPECTIVE 66 (Asbjørn Eide & Bernt Hagtvet eds., 1992) (arguing that there has been a decrease in the recognition and observance of human rights around the world).

3. See LUNG-CHU CHEN, AN INTRODUCTION TO CONTEMPORARY INTERNATIONAL LAW 204-05 (1989); Yoram Dinstein, *Human Rights in Armed Conflict: International Humanitarian Law*, reprinted in 2 THEODOR MERON, HUMAN RIGHTS IN INTERNATIONAL LAW 356-57 (1984); Imre Szabo, *Historical Foundations of Human Rights and Subsequent Developments*, in INTERNATIONAL DIMENSIONS OF HUMAN RIGHTS 11, 21 (Karel Vasak ed., 1982); see generally HUMANITARIAN INTERVENTION AND THE UNITED NATIONS (Richard B. Lillich ed., 1973) (discussing humanitarian intervention as the imposition of international human rights standards by one nation on the citizens of another).

4. See *International Covenant on Civil and Political Rights*, G.A. Res. 2200 (XXI), U.N. GAOR, 21st Sess., Supp. No. 16, at 52, U.N. Doc. A/6316 (1966) [hereinafter ICCPR]; *Universal Declaration on Human Rights*, G.A. Res. 217A (III), U.N. GAOR, 3d Sess., at 71, U.N. Doc. A/810 (1948) [hereinafter *Universal Declaration*]. See, e.g., Haji N.A. Noor Muhammad, *Due Process of Law for Persons Accused of Crime*, in THE INTERNATIONAL BILL OF RIGHTS: THE COVENANT ON CIVIL AND POLITICAL RIGHTS 138, 140 (Louis Henkin ed., 1981) (protection against arbitrary arrest forms the central feature of any system of guarantees of the liberty of the individual).

5. It should be noted that the state's policies and practices are conducted and carried out by individuals. See generally M. CHERIF BASSIOUNI, CRIMES AGAINST HUMANITY IN INTERNATIONAL CRIMINAL LAW, 235-47 (1992) (discussing the imputability of individual action to the state).

6. See Richard B. Bilder, *An Overview of International Human Rights Law*, in GUIDE TO INTERNATIONAL HUMAN RIGHTS PRACTICE 3, 13 (Hurst Hannum ed., 1984) (international human rights laws are most effective if each nation makes these rules part of its own domestic legal system); Louis Henkin, *Introduction*, in THE INTERNATIONAL BILL OF RIGHTS: THE COVENANT ON CIVIL AND POLITICAL RIGHTS 1, 15-16 (Louis Henkin ed., 1981) (international instruments require and induce states to protect human rights and do not operate directly to grant

no formal rankings or classifications of rights for purposes of enforcement.<sup>7</sup> Because of the absence of these rankings and classifications, recognition of international norms and standards has emerged and developed, gaining increased adherence throughout the world irrespective of the legally binding nature of the norms.<sup>8</sup> Some of these rights may be systemized into a series of stages through which they pass in gaining universal recognition.<sup>9</sup> This system of classification does not purport to be a rigid theory, but merely an observation based on empirical analysis.<sup>10</sup> The different stages reflect the evolution of the rights from their beginnings in the intellectual ferment of various elite circles to their formulation in international instruments of varying types, culminating in their enforcement through international criminalization. Although only some rights will pass through all of these stages of evolution, the evidence seems to support the existence of a process that can be viewed as a general method of analyzing the life of human rights norms and instruments.<sup>11</sup> Social values shape the articulation of legal principles which eventually find their way into general or specific civil prescriptions, and are finally embodied in penal proscriptions.<sup>12</sup>

Most human rights take a similar path to international recognition. At first the rights are enunciated in nonbinding international instruments.<sup>13</sup> Next the rights are more specifically defined in international instruments which have some legally binding effect.<sup>14</sup> These rights are then included in a specialized international instrument, and lastly they are the object of a binding international instrument which criminalizes violations of that right and provides for some enforcement

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individual rights); see also Karel Vasak, *The Distinguishing Criteria of Institutions*, in 1 THE INTERNATIONAL DIMENSIONS OF HUMAN RIGHTS 215, 218 (Karel Vasak ed., 1982) (five functions of human rights institutions are information, investigation, conciliation, decision, and sanction).

7. See MCDUGAL ET AL., *supra* note 2, at 63-66; Bilder, *supra* note 6, at 16 (questioning whether so many diverse states can agree to the content of any rights and enforce them).

8. See ROBERTSON & MERRILLS, *supra* note 2, at 27 (the Universal Declaration has been quoted or reproduced in at least forty constitutions and regional human rights treaties of the Americas, Africa, and Europe); Henkin, *supra* note 6, at 1 (the Universal Declaration has been adopted by most of the world's countries).

9. See M. Cherif Bassiouni, *The Proscribing Function of International Criminal Law in the Processes of International Protection of Human Rights*, 9 YALE J. WORLD PUB. ORD. 193, 195 (1982).

10. *Id.*

11. *Id.*

12. *Id.* at 196.

13. *Id.*

14. *Id.*

of that right.<sup>15</sup> At present, some protections for the individual within the criminal process have risen to the level of "general principles" of international law,<sup>16</sup> while other protections have been incorporated into international instruments which criminalize the violations of the protected right.<sup>17</sup>

The present discussion will analyze the level of international protections given to a person within the criminal process with respect to various types of rights which have been delineated in Appendix II.<sup>18</sup> The methodology used in this study is empirically-based and rather straightforward. It has grown out of the recognition that traditional sovereignty-based arguments against the recognition or application of internationally protected human rights are no longer valid because of the vast array of applicable treaties, the customary practices of states, and the legally binding nature of general principles of international law which, in this context, represent the convergence of treaties, customs, national legislation,<sup>19</sup> and *jus cogens*.<sup>20</sup> Therefore, international human rights law can penetrate into areas that in the past have been deemed to be wholly within the realm of domestic law.<sup>21</sup> Part II will review issues concerning national sovereignty and its relation to international legal norms. The discussion will lay the foundation for the determination of whether a certain right is

15. See *id.*

16. See, e.g., M. Cherif Bassiouni & Daniel Derby, *The Crime of Torture*, in 1 INTERNATIONAL CRIMINAL LAW 363, 379-82 (M. Cherif Bassiouni ed., 1986).

17. Bassiouni, *supra* note 9, at 195; see generally Muhammad, *supra* note 4, at 139 (regarding the binding and nonbinding nature of the Universal Declaration and the ICCPR). For example, the Universal Declaration contains many nonbinding principles that nations "should" observe as well as other rights which have become binding through their incorporation into national constitutions. See ROBERTSON & MERRILLS, *supra* note 2, at 27.

18. Those rights include the right to life, liberty, and security of the person; the right to recognition before the law and equal protection of the law; the right to be free from arbitrary arrest and detention; the right to freedom from torture and cruel, inhuman, and degrading treatment or punishment; the right to be presumed innocent; the right to a fair trial and corresponding subrights; the right to assistance of counsel and corresponding subrights; the right to a speedy trial; the right to appeal; the right to be protected from double jeopardy; and the right to be protected from *ex post facto* laws. Appendix II, *infra*.

19. See ROBERTSON & MERRILLS, *supra* note 2, at 27 (discussing the almost complete international acceptance of the Universal Declaration); Henkin, *supra* note 6, at 1-2; BIN CHENG, GENERAL PRINCIPLES OF LAW AS APPLIED BY INTERNATIONAL COURTS AND TRIBUNALS (1953); M. Cherif Bassiouni, *A Functional Approach to "General Principles of International Law,"* 11 MICH. J. INT'L L. 768 (1990).

20. See Gordon A. Christenson, *Jus Cogens: Guarding Interests Fundamental to International Society*, 28 VA. J. INT'L L. 585 (1988).

21. See Henkin, *supra* note 6, at 2.

sufficiently universal to rise to the level of an internationally recognized general principle.

This study uses an inductive method of inquiry in Part III to identify internationally protected human rights and the existence of their counterparts in national constitutions. Both international instruments<sup>22</sup> and domestic constitutions<sup>23</sup> provide the data for comparison. Part IV sets out the instruments used in the study and how they are applied in the inductive method of comparative research. The rights found in the instruments evidence their international recognition, while their counterparts in the national constitutions evidence national legal recognition. The congruence of both indicate the existence of a "general principle." Clearly, international instruments and national constitutions do not use identical language and drafting styles, if for no other reason than the fact that national constitutions reflect different legal systems and drafting approaches as well as different cultures and languages. Precisely because there are so many reasons to warrant linguistic and theoretical diversity, however, the existence of strong similarities is more convincing evidence that these rights are contained in "general principles" of law. It should be added that the practices of states in applying these commonly recognized rights vary significantly. This study uses a purely empirical model of searching for repetition and similarity among the various rights to prove that similar rights evidence the

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22. Ten international conventions have been surveyed for the current discussion: *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, 39 U.N. GAOR, 39th Sess., Supp. No. 51, at 197, U.N. Doc. A/RES/39/46 (1984) [hereinafter *Convention Against Torture*]; *International Convention on the Elimination of All Forms of Racial Discrimination*, opened for signature Mar. 7, 1966, 660 U.N.T.S. 195 [hereinafter *Convention on Racial Discrimination*]; ICCPR, *supra* note 4, at 52; *Convention for the Protection of Human Rights and Fundamental Freedoms* [and Accompanying Protocols], Nov. 4, 1950, 213 U.N.T.S. 221 [hereinafter *Fundamental Freedoms*]; *Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment*, G.A. Res. 43/173, U.N. GAOR, 43rd Sess., Supp. No. 49, at 297, U.N. Doc. A/43/173 (1988) [hereinafter BOP]; *Universal Declaration*, *supra* note 4, at 71; *United Nations Standard Minimum Rules for the Treatment of Prisoners* at 67, U.N. Doc. A/CONF/6/1, Annex I, A, U.N. Sales No. 1956.IV.4 (1956) [hereinafter SMRTP]; *European Convention on the Protection of Detainees from Torture and from Cruel, Inhuman or Degrading Treatment or Punishment*, signed Nov. 26, 1987, reprinted in 27 I.L.M. 1152 [hereinafter *European Convention on Protection of Detainees*]; *African Charter on Human and Peoples' Rights*, adopted June 27, 1981, O.A.U. Doc. CAB/LEG/67/3/Rev. 5 (1981), reprinted in 21 I.L.M. 58 (1982) [hereinafter *Banjul*]; *American Convention on Human Rights*, Nov. 22, 1969, O.A.S. Treaty Series No. 36, at 1, O.A.S. Off. Rec. OEA/Ser. A/16 [hereinafter AMCHR]. These instruments are also listed in Appendix I, *infra*.

23. See Appendix III *infra* for a list of the constitutions and countries used in the current survey.

existence of principles common to international law and national law, and that they are binding "general principles of law."

The first step in identifying to what extent a right is protected under international law is deciding whether it exists as an international, or as a merely national, right. Once a right may be addressed on an international level, it remains to be seen whether it is similarly addressed in that manner on the national level.

## II. NATIONAL SOVEREIGNTY AND INTERNATIONAL LAW NORMS

Historically, the notion of sovereignty has been a bar to the application of international substantive legal norms to national criminal justice processes.<sup>24</sup> Procedural international norms have had even less success penetrating national procedures.<sup>25</sup> Over the course of time, however, the increasing influence of international regulation of armed conflicts and the development of international criminal law have broken through national sovereignty barriers. Subsequently, international legal principles, norms, and standards of human rights protections have been increasingly applied to national criminal justice processes, resulting in a higher level of international law penetration into the national legal context.

The erosion of the sovereignty barrier effectively began after World War II. This process developed along two paths. The first involved the development of international criminal law, particularly international humanitarian law,<sup>26</sup> and the second through the development of international human rights law.

### A. The Effect of International Criminal Law

Under international criminal law, individuals are subject to criminal responsibility for international crimes irrespective of national

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24. This is true for human rights norms as well as international criminal law norms. See Ethan A. Nadelmann, *The Role of the United States in the International Enforcement of Criminal Law*, 31 HARV. INT'L L.J. 37, 40 (1990) (recognizing sovereignty as the fundamental problem confronting international criminal law enforcement).

25. See Sohn, *supra* note 2, at 8-9 (restrictive interpretations of the United Nations Charter, particularly Articles 2-4, prevent interference in the domestic affairs of another state).

26. See Denise Bindschedler-Robert, *Problems of the Law of Armed Conflicts*, in 1 A TREATISE ON INTERNATIONAL CRIMINAL LAW 297-98 (M. Cherif Bassiouni & Ved P. Nanda eds., 1973).

law.<sup>27</sup> For some of these crimes, the prohibited activity is clearly linked to an internationally regulated activity such as war. In these instances, international criminal law includes international humanitarian law, which is part of the international law of war. Sometimes there does not need to be an international element present to constitute an international crime, such as in cases where conduct is inherently shocking to fundamental values of humanity. For example, apartheid and torture were once considered purely domestic matters. However, the international community has prohibited them even though neither impacts the peace and security of humanity in the traditional sense. The traditional test under the United Nations' Draft Code of Offences looked to an action's impact on peace and security as a guideline for whether to designate it an international crime or whether to allow it to remain wholly within the domestic jurisdiction of a given state.<sup>28</sup>

## B. International Human Rights and Humanitarian Law

International human rights law, which has traditionally been referred to as the international law of peace, has also influenced the erosion of national sovereignty with respect to practices within the context of the administration of criminal justice. There are a number

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27. CHEN, *supra* note 3, at 78 (discussing the Nuremberg Trials, where individuals were held responsible for violations of international law carried out on behalf of their country and legitimized by national laws).

28. See *Draft Code of Offenses Against the Peace and Security of Mankind*, 9 U.N. GAOR Supp. No. 9, at 11, U.N. Doc. A/2693 (1954), reprinted in 45 AM. J. INT'L L. 123 (1954); Leo Gross, *Some Observations on the Draft Code of Offenses Against the Peace and Security of Mankind*, 15 ISR. Y.B. HUM. RTS. 224 (1985); Sharon Williams, *The Draft Code of Offenses Against the Peace and Security of Mankind*, in 1 INTERNATIONAL CRIMINAL LAW, *supra* note 16, at 109; Kenneth C. Randall, *Universal Jurisdiction Under International Law*, 66 TEX. L. REV. 785, 829 (1988); Michael P. Scharf, *The Jury Is Still Out on the Need for an International Criminal Court*, 1991 DUKE J. COMP. & INT'L L. 135, 140 (1991). Torture constitutes an interesting example of the evolution of international norms. Several international and regional conventions provide substantive as well as procedural norms directly applicable to national criminal justice in the area of torture. See ICCPR, *supra* note 4, arts. 7, 9-11, 14-15, at 53-55; *Fundamental Freedoms*, *supra* note 22, 213 U.N.T.S. at 226-230, arts. 5-7; AMCHR, *supra* note 22, art. 8, at 4. These instruments not only prohibit torture, but also preclude the admissibility of evidence produced by torture in criminal proceedings. See, e.g., AMCHR, *supra* note 22, arts. 5(2), 8(3), at 2, 4. The Convention Against Torture, *supra* note 22, at 197, art. 2, prevents torture under any circumstances and requires positive action by states to prohibit torture; when combined with the actions of the United Nations Committee against Torture, it provides the best and most far-reaching example of penetration of international law into national criminal justice processes. See J. HERMAN BURGERS & HANS DANIELIUS, *THE UNITED NATIONS CONVENTION AGAINST TORTURE* (1988).

of instruments which identify certain rights but which differ as to their binding legal effect. They must therefore be considered individually as well as cumulatively to determine whether there is an obligation by a state to conform to the requirements of those rights. A binding legal norm may take one of three forms: a given convention or treaty; a general or particular international custom (as evidenced by consistent practice and *opinio juris*); and a general principle of law (as evidenced by other perfected and unperfected sources of international law or by principles derived from the major legal systems of the world).<sup>29</sup>

All too frequently, human rights advocates overlook these important legal distinctions and attempt the *de jure condendo* extrapolation of legal rights or binding obligations from international instruments which do not have legally binding effects.<sup>30</sup> In fact, human rights advocates frequently cross into the realm of *lex desirata* with the argument that the moral and ethical merits of a given proposition are sufficient to overcome technical legal arguments.<sup>31</sup> Jurists, however, must rely on appropriate legal techniques to effectively advocate human rights in all legal contexts, whether the jurists are working at the international, regional, or national level. One such technique is the attempt to identify as "general principles" of international law those human rights protections applicable to the criminal process which are articulated in the major international human rights instruments. The initial step in this process, the identification of these rights in the national constitutions of the world, constitutes Part V of this Article.

A historical distinction that is now eroding separates international human rights law from international humanitarian law.<sup>32</sup> While human rights law is known as the law of peace, international humani-

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29. See LOUIS HENKIN ET AL., *INTERNATIONAL LAW: CASES AND MATERIALS* 35 (2d ed. 1987).

30. See generally ALLISON D. RENTELN, *INTERNATIONAL HUMAN RIGHTS: UNIVERSALISM VERSUS RELATIVISM* 39-60 (1990) (arguing that the legitimacy of human rights derives from moral authority).

31. See generally *id.* (discussing the conceptual and theoretical underpinnings of human rights; arguing for a broader conceptual basis, and challenging the idea that Western notions of human rights are universal).

32. Dietrich Schindler, *Human Rights and Humanitarian Law: Interrelationship of the Laws*, 31 AM. U. L. REV. 935, 935 (1982). The International Committee of the Red Cross coined the phrase "international humanitarian law" in the 1950s to refer to the Geneva Conventions, previously considered part of the law of war. *Id.*; see also ROBERTSON & MERRILLS, *supra* note 2, at 263 (discussing the development of international humanitarian law through the Red Cross: caring for the wounded on the battlefield, and the care and exchange of those held as prisoners of war).



tarian law has developed as part of the international regulation of armed conflict, otherwise referred to as the law of war.<sup>33</sup> Somehow these distinctions have not been totally eliminated, and thus international humanitarian law applies only in the context of armed conflicts, whether of an international or noninternational character.<sup>34</sup>

### III. DETERMINING GENERAL PRINCIPLES OF INTERNATIONAL LAW<sup>35</sup>

The inductive method is the technique by which "general principles of international law" are extracted from domestic legal principles or norms discovered in the major legal systems of the world.<sup>36</sup> This approach is the most appropriate means of comparative law research and must be particularized with respect to each subject or specific inquiry.<sup>37</sup> Thus, if the principle which is being researched is one of great generality, it is usually easier to identify its existence in the various national legal systems. If, however, the principle being investigated is narrow or specific, then the research must be equally narrow and should focus on the more relevant or particularized sources of law within the various national legal systems.

The research methodology used to identify "general principles" can be analogized to the methods used in establishing international law. Thus, one author notes that "a law which is frequently applied carries greater weight than a law which is never or seldom applied; any kind of State practice carries greater weight if it involves an element of repetition."<sup>38</sup> It can be concluded, therefore, that the more a given principle appears in national legislation and in international instruments, the more it deserves deference.<sup>39</sup> Similarly, the existence of the same legal prohibition in a number of legal systems evidences the

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33. Schindler, *supra* note 32, at 35.

34. Although this subject is of significant interest, it is beyond the scope of the current discussion and therefore will not be addressed.

35. Bassiouni, *supra* note 19, at 768.

36. On the methodology of research to ascertain "general principles" see Rudolph Schlesinger, *Research on the General Principles of Law Recognized by Civilized Nations*, 51 AM. J. INT'L L. 134 (1957); CHENG, *supra* note 19, at 1. On the history and development of the relationship between international and national law, see HERSCH LAUTERPACHT, *PRIVATE LAW SOURCES AND ANALOGIES OF INTERNATIONAL LAW* (1927).

37. Schlesinger, *supra* note 36, at 134.

38. Michael Akehurst, *Custom as a Source of International Law*, 47 BRIT. Y.B. INT'L L. 1, 9 (1974-75).

39. See Samuel A. Bleicher, *The Legal Significance of Re-Citation of General Assembly Resolutions*, 63 AM. J. INT'L L. 444, 454 (1969).

existence of the principle which embodies the social interest sought to be protected and whose transgression is sanctioned in the prohibition.

There are, however, obvious differences between national and international legal systems. National legal systems may have similar traits or share a common historical background.<sup>40</sup> A survey of the world's major legal systems reveals that they may be grouped in five major families of national legal systems.<sup>41</sup> They are: the French Romanist-Civilist, the Germanic, the Common Law, the Marxist-Socialist, and the Islamic.<sup>42</sup> It should be stated that such a classification is overly general and that many contemporary systems are a hybrid of more than one of these systems. Each legal family shares at least certain fundamental conceptual similarities which distinguish it from other systems.<sup>43</sup> This research focuses on all national legal systems which have a written constitution irrespective of their inclusion in any one of the major families of legal systems. In addition, this research focuses on a select number of major international instruments and compares the provisions of the latter with their counterpart, if they exist, in national constitutions.

40. See RENÉ DAVID & JOHN E.C. BRIERLEY, *MAJOR LEGAL SYSTEMS IN THE WORLD TODAY: AN INTRODUCTION TO THE COMPARATIVE STUDY OF LAW* 19 (1978); Shmuel N. Eisenstadt, *Human Rights in Comparative Civilizational Perspective*, in *HUMAN RIGHTS IN PERSPECTIVE*, *supra* note 2, at 93-105.

41. See DAVID & BRIERLEY, *supra* note 40, at 21-29. The three primary families are the Romano-Germanic, the Common Law, and the Socialist families. *Id.* at 21. In addition, there is a Muslim, Hindu, and Jewish legal family, a Far Eastern legal family, and a Black African and Malagasy Republican legal family. *Id.* at 27-29.

42. With the dramatic legal reforms undertaken recently in the former Soviet Union, Eastern Europe, and other Marxist states, the Marxist-Socialist family of legal systems has been radically altered. As to whether it ever did constitute a genuinely different legal family, see John Quigley, *Socialist Law and the Civil Law Tradition*, 37 *AM. J. COMP. L.* 781, 781-808 (1989). For information on the reform of Socialist law, see generally Rett R. Ludwowski, *Searching for a New Constitutional Model for East-Central Europe*, 17 *SYRACUSE J. INT'L L. & COM.* 91 (1991) (considering Polish, Soviet, and other Soviet Bloc constitutional traditions and suggesting the form new constitutions might take in the successor states); Inga Markovits, *Last Days*, 80 *CAL. L. REV.* 55 (1992) (exploring the change from socialist to capitalist legal systems as Germany reunifies and its impact on individual judges, prosecutors, and parties as revealed through interviews and observations).

43. See DAVID & BRIERLEY, *supra* note 40, at 19 (comparativists do not look to particular laws but to general characteristics in classifying laws into legal families). Each of the three major legal families have different identifying characteristics. The Romano-Germanic family was initially based on rules of conduct which were linked to justice and morality, with an emphasis on legal doctrine. *Id.* at 21. The Common Law family was influenced by judge-made laws created as solutions to individual trials. *Id.* at 23. In addition, where the Romano-Germanic traditions developed as private law, the common law developed as public law. *Id.* at 21, 23. The Socialist family was originally based on Romano-Germanic legal systems but acquired an emphasis on revolution and the creation of a new social and economic order. *Id.* at 25.

This inductive research methodology is widely recognized and relied upon in connection with the identification of customary international law<sup>44</sup> and "general principles of international law as recognized by civilized nations."<sup>45</sup> The Permanent Court of International Justice (PCIJ)<sup>46</sup> used this inductive approach as early as 1927 in the *Lotus* case.<sup>47</sup> In that case both Turkey and France relied on this comparative law procedure to argue their points. In particular, Turkey brought together procedural and jurisdictional practices of France and Italy to create a principle of jurisdiction.<sup>48</sup>

The International Court of Justice (ICJ), like its predecessor the PCIJ, also examines national legal systems to derive the existence of a custom or "general principle." Two significant cases use identical methods of empirical research. In the *Nottebohm* case<sup>49</sup> the ICJ examined national legal provisions on nationality law, and in the *North Sea Continental Shelf*<sup>50</sup> case the Court looked for relevant national laws on exploration of continental shelves.<sup>51</sup> Governments have also recognized and used the inductive method to ascertain the existence of customary international law.<sup>52</sup> For example, the British Foreign Office recognized the validity of this approach, particularly with respect to criminal matters, as early as 1877.<sup>53</sup> The Office instructed the British Minister in Rio de Janeiro that "Her Majesty's Government

44. See, e.g., ANTHONY A. D'AMATO, *THE CONCEPT OF CUSTOM IN INTERNATIONAL LAW* (1971) (arguing that customary law is the objective manifestation of international consensus); Akehurst, *supra* note 38, at 1-53 (analyzing and summarizing the elements necessary for forming customary international law).

45. Statute of the International Court of Justice, *opened for signature* June 26, 1945, art. 38, 59 Stat. 1055, 1060 [hereinafter Statute of the ICJ]; see CHENG, *supra* note 19, at 1; Bassiouni, *supra* note 19, at 773.

46. The Permanent Court of International Justice (PCIJ) was approved by the League of Nations in 1920, established in 1921, and opened in 1922. See Francis A. Boyle, *American Foreign Policy Toward International Law and Organizations: 1898-1970*, 6 LOY. L.A. INT'L & COMP. L.J. 185, 233-39 (1983). The PCIJ was the predecessor to the International Court of Justice, which came into being April 18, 1946. See NAGENDRA SUIGLE, *THE ROLE AND RECORD OF THE INTERNATIONAL COURT OF JUSTICE* 10-12 (1989).

47. See S.S. "Lotus" (Fr. v. Turk.), 1927 P.C.I.J. (ser. A) No. 10, at 21 (Sept. 7) ("[B]efore ascertaining whether there may be a rule of international law expressly allowing Turkey to prosecute a foreigner for an offence committed by him outside Turkey, it is necessary to begin by establishing . . . that the system is well founded. . .").

48. See *id.* at 8-9 (reproducing an abridged version of the Turkish government's arguments).

49. *Nottebohm Case* (Liech. v. Guat.), 1955 I.C.J. 4, 21-24 (Apr. 6).

50. See *North Sea Continental Shelf Cases* (F.R.G. v. Den.; F.R.G. v. Neth.), 1969 I.C.J. 4 (Feb. 20).

51. *Id.* at 128-30, 174-76, 225-29.

52. See Akehurst, *supra* note 38, at 8-10 (discussing national laws and judgments).

53. See *id.* at 8.

. . . would not be justified in protesting against a law extending the jurisdiction of Brazilian criminal courts because the law was similar to the laws of several other countries."<sup>54</sup> Here, the similarities of various national laws provided a basis for international action.

The United States has also used the inductive method in its diplomatic relations since the late nineteenth century.<sup>55</sup> The *Cutting* incident between the United States and Mexico is indicative of this point.<sup>56</sup> Although the United States and Mexico both relied on the laws of different countries to establish the existence of a principle or custom, the case should be noted for the emphasis each country placed on the number of representative countries whose laws supported each side of the dispute.<sup>57</sup>

National courts resort to this method as well. Courts in both the United States<sup>58</sup> and Italy,<sup>59</sup> for example, have relied on the inductive reasoning in reaching decisions.

#### A. Application of the Inductive Method

The inductive method is most easily understood through its judicial application. This method is often used in extradition cases, particularly those involving the issue of dual criminality, which may

54. 2 ARNOLD DUNCAN MCNAIR, *INTERNATIONAL LAW OPINIONS* 153 (1956) (giving the opinion of the British government on the application of Brazilian law to British subjects).

55. See Letter from Mr. Connery to Mr. Bayard (Nov. 16, 1887), enclosing Letter from Mr. Connery to Mr. Mariscal (Nov. 15, 1887), in 1887 FOREIGN RELATIONS OF THE UNITED STATES 844, 849 (1888) ("[M]y Government considers that the arrest, imprisonment, trial, and sentence of Cutting, as well as the denial to him of the sanctions of justice recognized by all civilized countries were violative of the rules of international law, binding upon Mexico in spite of any domestic enactments conflicting therewith. . . .").

56. See Letter from Mr. Bayard to Mr. Connery (Nov. 1, 1887), *id.* at 751-52 ("[B]y the law of nations, no punishment can be inflicted by a sovereign on citizens of other countries 'unless in conformity with those sanctions of justice which all civilized nations hold in common.'").

57. See *id.* at 753-55, 781-817 (surveying the legislation of various countries in regard to the provision for punishment of their own citizens for acts committed by citizens outside of their national borders); see also *id.* at 761-64 (translation of Mexican court proceedings in *Cutting*).

58. See, e.g., *The Paquete Habana*, 175 U.S. 677, 708 (1900) ("This review of the precedents and authorities on the subject appears to us abundantly to demonstrate that at the present day, by the general consent of the civilized nations of the world . . . it is an established rule of international law. . . ."); *The Scotia*, 14 Wallace 170, 187 (1871) ("Like all the laws of nations, [the law of the sea] rests upon the common consent of civilized communities. It is of force, not because it was prescribed by any superior power, but because it has been generally accepted as a rule of conduct.").

59. *Lagos v. Baggianini*, 22 I.L.R. 533, 534-38 (Tribunal of Rome 1953) (examining the custom and practice of states in determining the "generally accepted rules" regarding diplomatic immunity).

thus serve as a good example of the inductive approach.<sup>60</sup> The principle of double or dual criminality requires that a state which has received an extradition request determine whether the crime for which the person was accused also constitutes a crime under its domestic laws. There are two methods of inquiry: *in concreto* and *in abstracto*.<sup>61</sup> The *in concreto* approach, which has been rarely used since the late nineteenth century, inquires into the elements of the crime in the laws of the requested state to ascertain whether they are substantially similar to the elements of the crime in the laws of the requesting state. The inquiry thus entails a high level of specificity with respect to the terminology and required elements of the crime in question. The *in abstracto* approach, which is the more widely used method, inquires into the underlying facts of the criminal charge in the requesting state in order to ascertain whether they would give rise to the same or similar charge in the requested state.<sup>62</sup>

The principle of dual criminality reflects the modern trend in comparative criminal research which is applied in this study. That is, the identification of principles of criminal justice procedures is done by identifying and then comparing basic criminal procedure rights in various national legal systems in order to determine the existence of "general principles" common to the major legal systems of the world.

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60. See M. CHERIF BASSIOUNI, *INTERNATIONAL EXTRADITION IN U.S. LAW AND PRACTICE* (2d rev. ed. 1987).

61. See generally 39 *REVUE INTERNATIONALE DE DROIT PÉNAL* 371-784 (1968) (dedicated to national reports on extradition from Austria, Belgium, Brazil, Chile, Czechoslovakia, Finland, France, the Federal Republic of Germany, Greece, Hungary, Italy, Japan, Poland, Sweden, Switzerland, the United States, and Yugoslavia).

62. This is a necessary requirement for European cooperation in penal matters. See 1 EKKEHART MÜLLER-RAPPARD & M. CHERIF BASSIOUNI, *EUROPEAN INTER-STATE CO-OPERATION IN CRIMINAL MATTERS: THE COUNCIL OF EUROPE'S LEGAL INSTRUMENTS* (2d rev. ed. 1992). For different modalities of international cooperation in penal matters, see Heinrich Grützner, *International Judicial Assistance and Cooperation in Criminal Matters*, in 2 *A TREATISE ON INTERNATIONAL LAW* 189-249 (M. Cherif Bassiouni & Ved P. Nanda eds., 1973); Ekkehart Müller-Rappard, *The European System*, in *INTERNATIONAL CRIMINAL LAW: PROCEDURE* 95-132 (M. Cherif Bassiouni ed., 1986). For a survey of recent mutual legal assistance treaties between the United States and other countries, see Ethan A. Nadelmann, *Negotiations in Criminal Law Assistance Treaties*, 33 *AM. J. COMP. L.* 467-504 (1985); Bruce Zagaris & David Simonetti, *Judicial Assistance Under U.S. Bilateral Treaties*, in 2 *LEGAL RESPONSES TO INTERNATIONAL TERRORISM: U.S. PROCEDURAL ASPECTS* 219-30 (M. Cherif Bassiouni ed., 1987). For a socialist perspective, see D. Krapac, *An Outline of the Recent Development of the Yugoslav Law of International Judicial Assistance and Co-operation in Criminal Matters*, 34 *NETH. INT'L L. REV.* 324-42 (1987); Lech Gardocki, *The Socialist System*, in *INTERNATIONAL CRIMINAL LAW: PROCEDURE*, *supra*, at 133-49; Valery Shupilov, *Legal Assistance in Criminal Cases and Some Important Questions of Extradition*, 15 *CASE W. RES. J. INT'L L.* 127-36 (1983) (describing the concepts of legal assistance and extradition as viewed by socialist states, especially the U.S.S.R.).

This approach, however, requires a distinction to be made between broad and narrow legal principles as this will often dictate the choice of legal sources consulted. For example, the first question may be whether the major legal systems of the world recognize a right to life. The second question may be whether the taking of the life of one person by another without legal justification constitutes a crime or, even more specifically, what crime it constitutes.

The first query posited, the right to life, is a broad principle so the research would involve a general inquiry, possibly beginning with the higher law background of positive law. For example, Christianity and Islam form the moral basis of the positive law of many countries of the world. At the very least, their values inspire those laws or constitute the higher law background upon which positive legal systems are developed. Buddhist and Confucian philosophies hold a similar position of influence in Asian countries. A second step in this general inquiry might be a comparison of principles or rights enunciated in provisions of national constitutions.<sup>63</sup> A third step might involve research in criminal procedure laws, and a fourth might inquire into judicial decisions and practice to ascertain whether the principle or right enunciated in national constitutions, sometimes found in general and abstract terms, corresponds to its normative form in criminal procedure laws, and, finally, whether and how it is interpreted and applied.

No two legal systems are alike, and certainly the legal provisions of different countries on any given subject are not likely to be identical. The question therefore is whether sameness should be defined as: (i) identical normative formulation; (ii) identical legal elements; or (iii) a merely substantial similarity of norms or elements. In short, it must be decided whether it is necessary to seek sameness of normative provisions or only a comparative equivalence of normative provisions. The answer will depend on whether the inquiry involves a broad "general principle" of law or a specific one. By its very nature a broad "general principle" does not require sameness in terms of its specific normative formulation, but a narrower or specific principle will require greater similarity.

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63. See generally Linda J. Maki, *General Principles of Human Rights Law Recognized by All Nations: Freedom From Arbitrary Arrest and Detention*, 10 CAL. W. INT'L L.J. 272, 301-02 (1980) (explaining methods of determining general principles of human rights law by analyzing comparable standards of individual protection as provided by the laws of various countries).

## B. International Instruments and Comparative National Research<sup>64</sup>

1. *International instruments.* In order to determine whether a given international instrument has binding legal effect, the source of the instrument must first be determined with respect to Article 38 of the Statute of the International Court of Justice. Article 38 states the sources of international law, which include conventions, customary law (composed of *opinio juris* and state practice), "general principles of law," and the writings of publicists.<sup>65</sup>

An international instrument in the nature of an agreement is binding only upon the signatory states. However, when a significant number of states representing the major legal systems of the world have adhered to a given convention, it may become part of customary international law<sup>66</sup> and therefore become binding upon nonsignatory states under Article 38(1)(b).<sup>67</sup> In some cases, the reiteration and reaffirmation of certain principles embodied in nonbinding international instruments may cause them to rise to the level of "general principles" of international law.<sup>68</sup> Furthermore, principles which have become universally accepted may also rise to the level of peremptory norms of international law known as *jus cogens*.<sup>69</sup>

The empirical method of inductive research by which one identifies repetitive patterns of legal pronouncements can be used in ascertaining both customary rules of international law and "general principles of law." Although the interpretation of the research will vary with respect to establishing the existence of a custom as compared to the identification of a given principle, the methodology is largely the same.<sup>70</sup> The similarity between customs and principles does not,

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64. See *supra* notes 22-23 and accompanying text.

65. Statute of the ICJ, *supra* note 45, art. 38, 59 Stat. at 1060.

66. See Anthony D'Amato, *The Concept of Human Rights in International Law*, 82 COLUM. L. REV. 1110, 1127-31 (1982) (describing the creation of customary law from treaties).

67. Statute of the ICJ, *supra* note 45, art. 38(1)(b), 59 Stat. at 1060.

68. See Bleicher, *supra* note 39, at 477. This type of general principle is another source of international law under Article 38. Bassiouni, *supra* note 19, at 768-69.

69. See Vienna Convention on the Law of Treaties, *opened for signature* May 23, 1969, pt. V, § 3, art. 64, 1155 U.N.T.S. 331, 347 (1969) (entered into force Jan. 27, 1980); Christenson, *supra* note 20, at 592-94; Mark W. Janis, *Jus Cogens: An Artful Not A Scientific Reality*, 3 CONN. J. INT'L LAW 370, 370 (1985).

70. The difference in appraisals will depend on the nature of the custom and the principle, which in some cases could be the same. This is indeed an overlap between sources of international law. Professor D'Amato looks at treaties as evidence of custom and practice. See D'AMATO, *supra* note 44, at 103-66. Professor Akehurst uses national laws as evidence of

however, end there because customs draw on principles and principles may derive from customs.

2. *Types of international instruments.* Since World War II, the United Nations and its specialized agencies, the Council of Europe, the Organization of American States, and the Organization of African Unity, have actively sponsored international instruments for the protection of human rights. A number of these instruments are in the form of international or regional multilateral conventions.<sup>71</sup> Other instruments developed by these organizations, particularly those of the United Nations, are in the nature of resolutions. The labels of these resolutions vary and include such terms as "principles," "guiding principles," "codes of conduct," and "declarations."<sup>72</sup>

Other legally enforceable decisions originate from the courts in the European and inter-American systems, the Commissions in all three systems (European, American, and African), and the Committee of Ministers of the Council of Europe.<sup>73</sup> Council of Europe instruments vary as to their legal standing based on the different categories of instruments. Some instruments include resolutions of the Council of Ministers and resolutions by various technical committees of the Legal Directorate. The two most important bodies concerned with criminal justice questions are the Human Rights Directorate and the Crime Problems Division.

What is of particular interest is that the language describing human rights in international instruments and the language employed to describe the fundamental rights of individuals in the criminal process are remarkably similar. In fact, the eleven categories of rights discussed in this Article are defined in similar terms in the instruments surveyed (see Appendix II); furthermore, the language used in

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practice, as does the PCIJ and its successor the ICJ. See Akehurst, *supra* note 38, at 8-10; see also *supra* text accompanying notes 44-54 discussing the use of national laws to evidence practice.

71. See, e.g., ICCPR, *supra* note 4.

72. Some of the relevant United Nations instruments applicable to national criminal justice processes are the BOP, *supra* note 22; *Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power*, G.A. Res. 40/34, 40 U.N. GAOR, 40th Sess., Supp. No. 53, at 213, U.N. Doc. A/40/34 (1985) [hereinafter *Basic Principles of Justice*]; *Basic Principles on the Independence of the Judiciary* (excerpts), U.N. GAOR 40/32 of 29 Nov. 1985 and 40/146 of 13 Dec. 1985 [hereinafter *Principles on the Independence of the Judiciary*]; *Principles of Medical Ethics*, G.A. Res. 37/194, 37 U.N. GAOR, Supp. No. 51, at 210, U.N. Doc. A/37/51 (1982); *Code of Conduct for Law Enforcement Officials*, G.A. Res. 34/169, 34 U.N. GAOR, Supp. No. 46, at 185, U.N. Doc. A/34/46 (1980); SMRTP, *supra* note 22.

73. See Burns H. Weston et al., *Regional Human Rights Regimes: A Comparison and Appraisal*, 20 VAND. J. TRANSNAT'L L. 585, 585-637 (1987).



international instruments and the language employed to describe these rights in national constitutions is also similar. This similarity supports the belief that there is indeed an interactive relationship between constitutionalism and internationalism.<sup>74</sup>

#### IV. INSTRUMENTS AND RIGHTS SURVEYED

As has been said previously, this Article seeks to identify common principles, standards, and norms enunciated in certain international instruments concerning the criminal process and their concordance in national constitutions. Some are considered as fundamental or basic rights<sup>75</sup> of the criminal defendant in most major legal systems, and include eleven specifically delineated procedural rights.<sup>76</sup>

In the following section each of the enumerated rights will be correlated with ten selected international instruments, and with 139 national constitutions.<sup>77</sup> However, the enunciation of a given right

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74. Since the inception of the United Nations, the United States has been a world leader in the development of human rights norms. Its influence in this field has been unparalleled by any other country. See HAROLD BLAUSTEIN, *THE INFLUENCE OF THE UNITED STATES CONSTITUTION ABROAD* (1986); CONSTITUTIONALISM AND RIGHTS: *THE INFLUENCE OF THE UNITED STATES CONSTITUTION ABROAD* (Louis Henkin & Albert J. Rosenthal eds., 1989); Richard B. Lillich, *The United States Constitution and International Human Rights Law*, 3 HARV. HUM. RTS. J. 53, 59-61 (1990); Richard B. Lillich & Hurst Hannum, *Linkages Between International Human Rights and U.S. Constitutional Law*, 79 AM. J. INT'L L. 158, 158-63 (1985). United States constitutional approaches and terminology are clearly evidenced in the ICCPR, *supra* note 4, the International Covenant on Economic, Social and Cultural Rights, G.A. Res. 2200A, 21 U.N. GAOR, Supp. No. 16, at 49, U.N. Doc. A/6316 (1966), and the Universal Declaration, *supra* note 4. These three major instruments have come to be known as the "International Bill of Rights," a term reminiscent of the United States' Bill of Rights. See RICHARD B. LILlich, *INTERNATIONAL HUMAN RIGHTS: PROBLEMS OF LAW, POLICY AND PRACTICE* 175-76 (1991). "International Bill of Rights" is also the commonly used general title in specialized United Nations publications for these three instruments. See Louis Henkin, *Rights: American and Human*, 79 COLUM. L. REV. 405, 415 (1979); Anthony Lester, *The Overseas Trade in the American Bill of Rights*, 88 COLUM. L. REV. 537, 538 (1988). It should also be noted that American Constitutionalism, as Professor Henkin describes it, has influenced other multilateral conventions, particularly the Fundamental Freedoms, *supra* note 22, and the AMCHR, *supra* note 22.

75. See *infra* notes 83-272 and accompanying text.

76. For a complete listing of the rights in numerical order, see Appendix II, *infra*.

77. The empirical research involved in correlating the rights to the national constitutions was carried out under this writer's direction and was based on the texts of the constitutions as found in *CONSTITUTIONS OF THE COUNTRIES OF THE WORLD* (Albert P. Blaustein & Gisbert H. Flanz eds., 1992). A study correlating the enumerated rights, the surveyed instruments, and the national constitutions was also carried out under this writer's direction in 1980. See Sandra Hertzberg & Carmela Zammuto, 4 *Nouvelles Études Pénales*, *THE PROTECTION OF HUMAN RIGHTS IN THE CRIMINAL PROCESS UNDER INTERNATIONAL INSTRUMENTS AND NATIONAL CONSTITUTIONS* (1981).

and its inclusion in a given international instrument does not imply its effective application in the domestic law of the parties to that instrument. Similarly, the existence of a given right in a national constitution does not necessarily mean that it is protected in practice or uniformly and effectively observed.

Derogation from some of the rights relating to criminal trials is allowed under the International Covenant on Civil and Political Rights (ICCPR) in cases of declared emergencies, but with restrictions.<sup>78</sup> Derogation is also permitted under the European Convention for the Protection of Human Rights and Fundamental Freedoms (Fundamental Freedoms) and the American Convention on Human Rights (AMCHR). Similar derogation clauses also exist in most of the world's constitutions.<sup>79</sup> Furthermore, human rights relating to the criminal process which may be guaranteed by national constitutions are frequently violated in many countries, even in the absence of an official declaration of a national emergency (often required by constitutional provision prior to a derogation from enumerated rights). This type of misuse and abuse of power is often the result of political control of legal institutions by the ruling elites.<sup>80</sup>

On the other hand, the absence of explicit protection of any of the enumerated rights in a national constitution does not mean that those rights are not protected in that particular country. Indeed, some countries without constitutions have good records in respecting the rights of the accused in the criminal process.<sup>81</sup> Many countries have

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78. ICCPR, *supra* note 4, art. 4(1), (2), at 53. On the question of derogations to the ICCPR by means of establishing states of emergency, see U.N. Doc. E/CN.4/Sub.2/1992/23/Rev. 1 (1992) revising U.N. Doc. E/CN.4/Sub.2/1992/23 (1992); Symposium, *Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights*, 7 HUM. RTS. Q. 1.

79. See, e.g., ICCPR, *supra* note 4, pt. II, art. 4, at 53; *Fundamental Freedoms*, *supra* note 22, § I, art. 15, at 232; AMCHR, *supra* note 22, pt. I, ch. IV, art. 27(1), at 9; ITALY CONST. pt. I, tit. I, arts. 13, 21; JAM. CONST. ch. III, §§ 20(9), 24(4)(c); KENYA CONST. ch. V, § 83(1); KIRIBATI CONST. ch. II, § 16(5); KOREA (REPUBLIC OF) CONST. ch. II, art. 37(2); MAURITANIA CONST. ch. II, art. 18(1).

80. See Amnesty International, *Torture as Policy*, in HUMAN RIGHTS IN THE WORLD COMMUNITY, 79, 79 (Richard Pierre Claude & Burns H. Weston eds., 2d ed. 1992) (noting that emergency legislation and martial law often facilitate gross human rights abuses, including torture, detention, and brutal criminal sentences). In some cases, violations of rights to life, liberty, and personal security are often perpetrated indirectly by states through the sanction or clandestine organization of death squads, disappearances, and other forms of violations against the security of the individual. The United States' Department of State reports on such cases in its annual report. See Country Reports on Human Rights Practices for 1992, DEPT. OF STATE (1993).

81. For example, the United Kingdom does not have a constitution, yet strives to enforce only just laws. Cf. P.A. Stone, *Some Aspects of Fundamental Rights in the English Conflict of Laws*, in FUNDAMENTAL RIGHTS, 232, 232-33 (J.W. Bridge et al. eds., 1973) (stating English

judicial decisions which protect criminal defendants in a far more significant way than constitutional pronouncements in other countries.<sup>82</sup> As a result, the only way to determine the extent to which each of the articulated rights is actually protected is to scrutinize the actual practices of criminal law enforcement in the streets, police stations, jails, and courts of a given country, and the degree of judicial control over transgressions. However, this degree of specificity is not required for purposes of identifying the existence of a "general principle of law."

## V. RIGHTS AND CLUSTERS OF RIGHTS

### A. Identifying the Fundamental Rights

Appendix II lists eleven different rights, or clusters of rights, that are associated with the protections afforded an individual in the criminal process. Each of these rights has been found to exist in a number of international instruments and national constitutions. More importantly, each of these rights has been found to be basic to fairness in the criminal process. Without these rights, the criminal process can be abused and manipulated to curtail individual liberties and thus ultimately to deny democracy. The link between individual human rights, which are most susceptible to abuse during the criminal process, and democracy is beyond question. Neither democracy nor human rights can exist without one another—and neither can exist without the

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courts apply conflict of laws rules loosely so as to avoid injustice and to avoid importing oppression from foreign regimes).

82. For example, the right to be presumed innocent, the inadmissibility of evidence obtained through illegitimate means, the right to an impartial and independent tribunal, the right to equality of arms, the right to be tried in one's own presence, the right to counsel of one's own choice, the right to an appointment of counsel in cases of indigency, the right to represent oneself, the right to the assistance of an interpreter, the right to have counsel present at all stages of criminal proceedings, and the right to an appeal are all guaranteed in the United States through judicial interpretations of the Bill of Rights. *See, e.g.,* *Douglas v. California*, 372 U.S. 353 (1963) (right to counsel on appeal for indigents); *Gideon v. Wainwright*, 372 U.S. 335 (1963) (right to counsel for every indigent accused of felony); *Mapp v. Ohio*, 367 U.S. 643 (1961) (exclusion of illegally obtained evidence). Many individual states have constitutions which also protect those rights as well. *See, e.g.,* MASS. CONST. pt. I, art. I (equality and natural rights of all persons); MICH. CONST. art. I, § 2 (equal protection of the laws); MO. CONST. art. I, § 18(a) (right of accused to appear and defend, in person and by counsel); N.H. CONST. pt. I, art. 14 (legal remedies to be free, complete, and prompt); WASH. CONST. art. I, § 22 (right to appear and defend in person; right to appeal in all cases); WIS. CONST. art. I, § 7 (right to speedy public trial by an impartial judge).

individual protection of persons brought into the criminal process, because it is in that arena where most human rights violations occur.

1. *The Right to Life, Liberty, and Security of the Person.* The inherent and inalienable right to life, liberty, and security of the person is a cornerstone of international human rights law and of civil rights in all countries which recognize the supremacy of the rule of law. This right has its roots in natural law and was first articulated in positive law in the English Magna Carta of 1215.<sup>83</sup> It was also embodied in the Bill of Rights of the United States Constitution in 1791.<sup>84</sup> As enunciated in these early definitions, the protection of human life, liberty, and personal security is basic to any system based on the rule of law. The procedural safeguards which make up the bulk of the rights discussed in this Article can be viewed as strengthening these basic rights of life, liberty, and personal security.

The right to life, liberty, and personal security is found in seven of the instruments surveyed.<sup>85</sup> Although all three components of this important right are guaranteed by Article 3 of the Universal Declaration, the right to life is treated separately in the ICCPR, the Fundamental Freedoms, and the AMCHR. The AMCHR makes the exceptional guarantee of the right to life from the time of conception.<sup>86</sup> This extension of the right to life is based on natural law principles which assume fundamental rights to exist from birth.<sup>87</sup>

Each of the instruments also provides for explicit exceptions to the right to life. In the ICCPR and the AMCHR the death penalty is allowed for the most serious crimes, if the sentence is pronounced by

83. Chapter 39 of the Magna Carta sets forth that "[no] free man shall be taken, imprisoned, disseised, outlawed, banished, or in any way destroyed, nor will We proceed against or prosecute him, except by the lawful judgment of his peers and by the law of the land." A.E. DICK HOWARD, *MAGNA CARTA: TEXT AND COMMENTARY* 43 (1964) [hereinafter *MAGNA CARTA*]. See also Symposium, *La phase préparatoire du proces pénal en droit comparé*, *REVUE INT'L DE DROIT PÉNAL* *passim* (1985) (discussing pretrial protections in different legal systems).

84. "No person shall . . . be deprived of life, liberty or property without due process of law." U.S. CONST. amend. V.

85. *Convention on Racial Discrimination*, *supra* note 22, pt. I, art. 5, 660 U.N.T.S. at 220; ICCPR, *supra* note 4, pt. III, arts. 6(1), 9(1), at 53, 54; *Fundamental Freedoms*, *supra* note 22, § I, arts. 2(1), 5(1), 213 U.N.T.S. at 224, 226; *Universal Declaration*, *supra* note 4, art. 3, at 72; SMRTP, *supra* note 22, pt. II, art. 57, at 71; Banjul, *supra* note 22, pt. I, ch. I, arts. 4, 6, at 60; AMCHR, *supra* note 22, pt. I, ch. II, arts. 4(1), 7(1), 7(2), at 2, 3.

86. AMCHR, *supra* note 22, pt. I, ch. II, art. 4(1), at 2.

87. For example, the American Declaration of Independence states that "all men are created equal, that they are endowed by their Creator with certain inalienable rights, that among these are life, liberty and the pursuit of happiness. . . ." THE DECLARATION OF INDEPENDENCE para. 2, reprinted in GEORGE ANASTAPLO, *THE CONSTITUTION OF 1787: A COMMENTARY* 239 (1989).

a competent court.<sup>88</sup> Exceptions in the Fundamental Freedoms are for self-defense and killings in the course of a lawful arrest or the quelling of a riot or insurrection.<sup>89</sup> The death penalty was originally allowed in the Fundamental Freedoms as an exception to the right to life, but has been substantially abolished by Protocol 6 to that Convention.<sup>90</sup> The right to life is also addressed in the African Charter on Human and Peoples' Rights (Banjul Charter) where it is coupled with the protection of the inviolability and integrity of the person, but exceptions to the right are merely implied through the proscription of the arbitrary deprivation of this right.<sup>91</sup>

In the ICCPR, the Banjul Charter, the Fundamental Freedoms, and the AMCHR, the right to liberty and security of the person are addressed concurrently with the provisions guaranteeing the freedom from arbitrary arrest and detention.<sup>92</sup> The United Nations Standard Minimum Rules for the Treatment of Prisoners (SMRTP) provides for detailed rules to protect the right to liberty only within the context of imprisonment, including protection from torture and other forms of degrading treatment and punishment.<sup>93</sup>

The right to life, liberty, and security of the person are explicitly embodied, (in whole or in part) sometimes together and sometimes separately, in fifty-one of the national constitutions surveyed.<sup>94</sup>

88. ICCPR, *supra* note 4, pt. III, art. 6(2), at 53; AMCHR, *supra* note 22, pt. I, ch. II, art. 4(2), at 2. In neither instrument may the death penalty be imposed upon anyone who was under eighteen years of age at the time of the commission of the crime, or upon pregnant women. ICCPR, *supra* note 4, pt. III, art. 6(5), at 53; AMCHR, *supra* note 22, pt. I, ch. II, art. 4(5), at 2. Additionally, under the AMCHR the death penalty may not be imposed on anyone over seventy years of age. AMCHR, *supra* note 22, pt. I, ch. II, art. 4(5), at 2. In 1990 the United Nations General Assembly passed Optional Protocol 2 to the ICCPR abolishing the death penalty, but it has not yet taken effect. U.N. DEP'T OF PUB. INFO., RESOLUTIONS AND DECISIONS ADOPTED BY THE GENERAL ASSEMBLY DURING THE FIRST PART OF ITS FORTY-FOURTH SESSION at 406-09, Press Release GA/7977 (1990).

89. *Fundamental Freedoms*, *supra* note 22, § I, art. 2(2), 213 U.N.T.S. at 224.

90. Protocol No. 6 to the Convention for the Protection of Human Rights and Fundamental Freedoms Concerning the Abolition of the Death Penalty, *opened for signature* Apr. 28, 1983, art. 1, *reprinted in* 22 I.L.M. 539 (1983). The death penalty is still permitted in time of war, *id.* art. 2, 22 I.L.M. at 539, and pursuant to the Fundamental Freedoms, *supra* note 22, § I, art. 2(1), 213 U.N.T.S. at 224, in those countries which have not yet ratified Protocol 6, *supra*.

91. Banjul, *supra* note 22, pt. I, ch. I, art. 4, at 60.

92. *See infra* text accompanying note 106.

93. SMRTP, *supra* note 22, pt. I, arts. 27, 29, 30(1), at 69; *id.*, pt. II, § A, art. 65, at 71.

94. ANGOLA CONST. pt. II, art. 17; ANT. & BARB. CONST. ch. II, § 3(a); BAH. CONST. ch. III, art. 15(a); BANGL. CONST. pt. III, art. 32; BARB. CONST. ch. III, § 11(a); BELIZE CONST. ch. II, § 3(a); BOL. CONST. pt. 1, tit. 1, arts. 6, 7(a); BOTS. CONST. ch. II, § 3(a); BRAZ. CONST. tit. II, ch. I, art. 5; CAN. CONST. pt. I, § 7; CAPE VERDE CONST. tit. II, art. 31(1), (2); CHILE CONST. ch. III, art. 19(1), (7); DOMINICA CONST. ch. I, § 1(a); FIJI CONST. ch. II, § 4(a); FIN. CONST. tit.

Specifically, the right to life is mentioned in sixty-five national constitutions,<sup>95</sup> the right to security of the person, which is defined as physical integrity in some documents, also occurs in sixty-five national constitutions.<sup>96</sup> The inviolability of the person is guaranteed in thirteen

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II, art. 6; GAM. CONST. ch. III, § 13(a); F.R.G. CONST. § I, art. 2(2); GREECE CONST. pt. II, arts. 5(2), 5(3); GREN. CONST. ch. I, § 1(a); GUAT. CONST. tit. II, ch. I, art. 3; GUY. CONST. pt. I, ch. III, art. 40(1)(a); HOND. CONST. pmbl.; *id.* at tit. III, ch. I, art. 61; HUNG. CONST. ch. XII, §§ 54(1), 55(1); JAM. CONST. ch. III, § 13(a); KENYA CONST. ch. V, § 70(a); KIRIBATI CONST. ch. II, § 3(a); LIBER. CONST. ch. III, arts. 11(a), 20(a); MALTA CONST. ch. IV, § 32(a); MAURITIUS CONST. ch. II, § 3(a); NAURU CONST. pt. II, § 3(a); PAK. CONST. pt. I, arts. 4(2)(a), 9; PARA. CONST. ch. V, pt. I, art. 50; PHIL. CONST. art. IV, §§ 1, 3; POL. CONST. ch. VIII, art. 87(1); PORT. CONST. pt. I, § II, ch. I, arts. 24(1), 25(1), 27(1); ROM. CONST. tit. II, ch. II, arts. 22(1), 23(1); ST. CHRIS.-NEVIS CONST. ch. II, § 3(a); SIERRA LEONE CONST. ch. III, § 15(a); SOLOM. IS. CONST. ch. II, § 3(a); SOMAL. CONST. ch. I, § 3, arts. 25(1), 26; SPAIN CONST. tit. I, ch. II, § 1, arts. 15, 17(1); SURIN. CONST. ch. V, § 4, arts. 14, 16; SWAZ. CONST. ch. II, § 3(a); TRIN. & TOBAGO CONST. ch. I, pt. I, § 4(a); TURK. CONST. ch. II, § 1, arts. 17, 19; TUVALU CONST. pt. II, div. II, § 11(1)(a)-(c); UGANDA CONST. ch. III, § 8(2)(a); U.S. CONST. amends. IV, XIV, § 1; ZAIRE CONST. tit. II, arts. 13, 15; ZAMBIA CONST. pt. III, § 13(a); ZIMB. CONST. ch. III, § 11(a).

95. AFG. CONST. ch. 3, art. 39; ANGOLA CONST. pt. II, art. 17; ANT. & BARB. CONST. ch. II, § 3(a); BAH. CONST. ch. III, art. 15(a); BANGL. CONST. pt. III, art. 32; BARB. CONST. ch. III, § 11(a); BELIZE CONST. ch. II, § 3(a); BOL. CONST. pt. 1, tit. 1, arts. 6, 7(a); BOTS. CONST. ch. II, § 3(a); BRAZ. CONST. tit. II, ch. I, art. 5; BULG. CONST. ch. II, art. 28; CAN. CONST. pt. I, § 7; CAPE VERDE CONST. tit. II, art. 31(1), (2); CHILE CONST. ch. III, art. 19(1), (7); DOMINICA CONST. ch. I, § 1(a); FIJI CONST. ch. II, § 4(a); FIN. CONST. tit. II, art. 6; GAM. CONST. ch. III, § 13(a); F.R.G. CONST. tit. I, art. 2(2); GREECE CONST. pt. II, art. 5(2), (3); GREN. CONST. ch. I, § 1(a); GUAT. CONST. tit. II, ch. I, art. 3; GUY. CONST. pt. I, ch. III, art. 40(1)(a); HOND. CONST. pmbl.; *id.* at tit. III, ch. I, art. 61; HUNG. CONST. ch. XII, § 54(1); INDIA CONST. pt. III, art. 21; JAM. CONST. ch. III, § 13(a); JAPAN CONST. ch. III, art. 13; KENYA CONST. ch. V, § 70(a); KIRIBATI CONST. ch. II, § 3(a); LIBER. CONST. ch. III, arts. 11(a), 20(a); MALAY. CONST. pt. II, art. 5(1); MALTA CONST. ch. IV, § 32(a); MAURITIUS CONST. ch. II, § 3(a); MEX. CONST. tit. I, ch. I, art. 14; NAMIB. CONST. ch. III, art. 6; NAURU CONST. pt. II, § 3(a); NICAR. CONST. tit. IV, ch. I, art. 23; NIG. CONST. ch. IV, art. 32(1); PAK. CONST. pt. I, arts. 4(2)(a), 9; PAPUA N.G. CONST. pt. III, div. 3, subdiv. B; PARA. CONST. ch. V, pt. I, art. 50; PERU CONST. tit. I, ch. I, art. 2(1); PHIL. CONST. art. IV, § 1; PORT. CONST. pt. I, § II, ch. I, art. 24(1); ROM. CONST. tit. II, ch. II, art. 22(1); ST. CHRIS.-NEVIS CONST. ch. II, § 3(a); SIERRA LEONE CONST. ch. III, § 15(a); SING. CONST. pt. IV, § 9(1); SOLOM. IS. CONST. ch. II, § 3(a); SOMAL. CONST. ch. I, § 3, arts. 25(1), 26; SPAIN CONST. tit. I, ch. II, art. 15; SURIN. CONST. ch. V, § 4, art. 14; SWAZ. CONST. ch. II, § 3(a); TANZ. CONST. § III, arts. 14, 15(1); TRIN. & TOBAGO CONST. ch. 1, pt. 1, § 4(a); TURK. CONST. pt. II, ch. 2, § 1, art. 17; TUVALU CONST. pt. II, div. II, § 11(1)(a); UGANDA CONST. ch. III, art. 8(2)(a); U.S. CONST. amend. XIV, § 1; VENEZ. CONST. tit. III, ch. III, art. 58; VIETNAM CONST. ch. 5, art. 70; ZAIRE CONST. tit. II, art. 13; ZAMBIA CONST. pt. III, art. 13(a); ZIMB. CONST. ch. III, § 11(a).

96. ANGOLA CONST. pt. II, art. 17; ANT. & BARB. CONST. ch. II, § 3(a); BAH. CONST. ch. III, art. 15(a); BARB. CONST. ch. III, § 11(a); BELIZE CONST. ch. II, § 3(a); BOL. CONST. pt. 1, tit. 1, arts. 6, 7(a); BOTS. CONST. ch. II, § 3(a); BRAZ. CONST. tit. II, ch. I, art. 5; BULG. CONST. ch. II, art. 30; CAMEROON CONST. pmbl. para. 7; CAN. CONST. pt. I, § 7; CAPE VERDE CONST. tit. II, art. 31(1), (2); CHILE CONST. ch. III, art. 19(1), (7); COMOROS CONST. pmbl. para. 3(2); CONGO CONST. pt. I, tit. II, art. 7; CUBA CONST. ch. VI, art. 57; DOMINICA CONST. ch. I, § 1(a); ECUADOR CONST. pt. I, tit. II, § I, art. 19(1), (17); FIJI CONST. ch. II, § 4(a); FIN. CONST. tit. II, art. 6; GAM. CONST. ch. III, § 13(a); F.R.G. CONST. tit. I, art. 2(2); GREECE CONST. art. 5(2), (3);

constitutions,<sup>97</sup> and it could reasonably be argued that this term includes all three of the designated rights. Finally, in another sixteen constitutions the right to liberty or freedom is secured,<sup>98</sup> usually within the context of protections accorded in the right to freedom from arbitrary arrest and detention.

The death penalty has been abolished in a total of forty-eight countries; at least fifteen countries have done so through constitutional enactments, with three additional countries constitutionally restricting the death penalty to time of war.<sup>99</sup> Of the approximately forty-five

GREN. CONST. ch. I, § 1(a); GUAT. CONST. tit. II, ch. I, art. 3; GUY. CONST. pt. I, ch. III, § 40(1)(a); HOND. CONST. pmbi.; *id.* at tit. III, ch. I, art. 61; HUNG. CONST. ch. XII, § 55(1); JAM. CONST. ch. III, § 13(a); KENYA CONST. ch. V, § 70(a); KIRIBATI CONST. ch. II, § 3(a); LIBER. CONST. ch. III, arts. 11(a), 20(a); MALTA CONST. ch. IV, § 32(a); MAURITIUS CONST. ch. II, § 3(a); MEX. CONST. tit. I, ch. I, art. 16; MONACO CONST. tit. III, art. 19; MONG. CONST. ch. II, art. 16(13); MYANMAR CONST. ch. XI, art. 159; NAURU CONST. pt. II, § 3(a); NICAR. CONST. tit. IV, ch. I, art. 25(1), (2); PAK. CONST. pt. I, arts. 4(2)(a), 9; PARA. CONST. ch. V, pt. 1, art. 50; PERU CONST. tit. I, ch. I, art. 2(1), (20); PHIL. CONST. art. IV, § 3; PORT. CONST. pt. I, § II, ch. I, arts. 25(1), 27(1); ROM. CONST. tit. II, ch. II, art. 23(1); ST. CHRIS.-NEVIS CONST. ch. II, § 3(a); SIERRA LEONE CONST. ch. III, § 15(a); SOLOM. IS. CONST. ch. II, § 3(a); SOMAL. CONST. ch. II, arts. 25(1), 26; SPAIN CONST. tit. I, ch. II, art. 17; SUDAN CONST. pt. III, art. 21; SURIN. CONST. ch. V, § 4, art. 16(1); SWAZ. CONST. ch. II, § 3(a); SYRIA CONST. ch. I, pt. 4, art. 25(1); TRIN. & TOBAGO CONST. ch. I, pt. I, § 4(a); TURK. CONST. pt. 2, ch. 2, § 3, art. 19; TUVALU CONST. pt. II, div. 2, § 11(1)(c); UGANDA CONST. ch. III, art. 8(2)(a); U.S. CONST. amend. IV; VENEZ. CONST. tit. III, ch. III, art. 60; VIETNAM CONST. ch. 5, art. 69; ZAIRE CONST. tit. II, arts. 13; ZAMBIA CONST. pt. III, art. 13(a); ZIMB. CONST. ch. III, § 11(a).

97. ALB. CONST. pt. 1, ch. I(C), art. 56; ALG. CONST. tit. I, ch. 4, art. 33; CAMBODIA CONST. ch. III, art. 35; CENT. AFR. REP. CONST. pmbi., para. 16; P.R.C. CONST. ch. 2, art. 37; ETH. CONST. pt. 2, ch. 7, art. 43(1); ITALY CONST. art. 2; KOREA (DEMOCRATIC PEOPLE'S REPUBLIC OF) CONST. ch. IV, art. 64; MADAG. CONST. tit. II, art. 42; NETH. CONST. ch. 2, art. 11; POL. CONST. ch. 8, art. 87(1); SEN. CONST. tit. II, art. 6; TUNIS. CONST. ch. I, art. 5.

98. BELG. CONST. tit. II, art. 7; BENIN CONST. ch. VIII, art. 136; P.R.C. CONST. ch. II, art. 37; DEN. CONST. pt. VIII, § 71(1); EGYPT CONST. pt. 3, art. 41; ITALY CONST. pt. I, tit. I, art. 13; JORDAN CONST. ch. II, § 7; KOREA (REPUBLIC OF) CONST. ch. II, art. 12(1); KUWAIT CONST. pt. III, art. 30; LIECH. CONST. ch. IV, art. 32; LUX. CONST. ch. II, art. 12; RWANDA CONST. ch. II, art. 12; TAIWAN CONST. ch. II, art. 8; THAIL. CONST. ch. III, § 28; U.A.E. CONST. pt. III, art. 26; YEMEN CONST. tit. II, art. 32-A.

99. For the most recent listing of countries which have eliminated the death penalty, see Amnesty International, Press Release of the International Secretariat, Feb. 1993. At least fifteen countries have legally (constitutionally or otherwise) eliminated the death penalty, with a wartime crimes exception. *Id.* Those countries which have abolished the death penalty by constitutional means are: AUS. CONST. ch. III(B), art. 85; BOL. CONST. pt. 1, tit. 2, art. 17; BRAZ. CONST. tit. II, ch. I, art. 5(XLVII)(a) (ban limited to peacetime); CAMBODIA CONST. ch. III, art. 35; CAPE VERDE CONST. tit. II, art. 31(4); COLOM. CONST. tit. II, ch. I, art. 11; DOM. CONST. tit. II, § I, art. 8(1); ECUADOR CONST. pt. I, tit. II, § I, art. 19(1); F.R.G. CONST. tit. IX, art. 102; HOND. CONST. tit. III, ch. II, art. 66; ITALY CONST. pt. I, tit. I, art. 27 (ban limited to peacetime); MONACO CONST. tit. III, art. 20; NETH. CONST. ch. 6, art. 114; NICAR. CONST. tit. IV, ch. I, art. 23; PERU CONST. tit. IV, ch. IX, art. 235 (ban excludes treason in case of foreign war); PORT. CONST. pt. I, § II, ch. I, art. 24(2); SWED. CONST. ch. 2, art. 4; VENEZ. CONST. tit. III, ch. III, art. 58.

constitutions which specifically provide for the death penalty, twenty-four (virtually all former British colonies) also provide for other exceptions to the right to life, such as killings committed in the course of lawful defense of self or property, a lawful arrest, suppressing a riot or mutiny, preventing the commission of a crime, or lawfully declared wars.<sup>100</sup> Only one country which provides for the death penalty does not also constitutionally guarantee the right to life.<sup>101</sup>

*2. The Right to Recognition Before the Law and Equal Protection of the Law.* By insuring the nondiscriminatory protection and application of the laws, this right is another of the cornerstone protections of human rights in the criminal process. It includes the recognition of the individual as a legal personality who enjoys equal protection and application of the law. The right appears in six of the instruments surveyed in this Article.<sup>102</sup> Although the protection against discrimination is implicit, the Fundamental Freedoms include an express nondiscrimination clause with respect to the rights and freedoms it guarantees.<sup>103</sup> The right to recognition before the law and/or equal protection of the law is protected in over 108 national constitutions.<sup>104</sup> There are also a number of specialized international

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100. (An asterisk indicates those constitutions which provide further exceptions to the right to life in addition to the death penalty.) ANT. & BARB. CONST.\* ch. I, § 4; BAH. CONST.\* ch. III, § 16; BANGL. CONST. pt. III, art. 32; BARB. CONST.\* ch. III, § 12; BELIZE CONST.\* ch. II, § 4; BOTS. CONST.\* ch. II, § 4; CHILE CONST. ch. III, art. 19(1); DOMINICA CONST.\* ch. 1, § 2; EQ. GUINEA CONST. tit. III, ch. I, art. 20(1); FIJI CONST.\* ch. II, § 5; GAM. CONST.\* ch. III, § 14; GREECE CONST. pt. II, art. 7(3); GREN. CONST.\* ch. I, § 2; GUAT. CONST.\* tit. II, ch. I, art. 18; GUY. CONST.\* pt. 2, tit. 1, art. 138; INDIA CONST. pt. III, art. 21; JAM. CONST.\* ch. III, § 14; JAPAN CONST. ch. III, art. 31; KENYA CONST.\* ch. V, § 71; KIRIBATI CONST.\* ch. II, § 4; LIBER. CONST. ch. III, art. 20(a); MALAY. CONST. pt. II, art. 5(1); MALTA CONST.\* ch. IV, § 33; MAURITIUS CONST.\* ch. II, § 4; MEX. CONST. tit. I, ch. I, art. 14; MONG. CONST. ch. II, art. 16(1); NAURU CONST.\* pt. II, § 4; NIG. CONST.\* ch. IV, § 32; PAK. CONST. pt. II, ch. 1, art. 9; PAPUA-N.G. CONST.\* pt. III, div. III, subdiv. B, § 35(1); PARA. CONST. ch. V, pt. 1, art. 65; PHIL. CONST. art. III, § 1; ST. CHRIS.-NEVIS CONST.\* ch. II, § 4; SIERRA LEONE CONST.\* ch. III, § 16; SING. CONST. pt. IV, art. 9(1); SOLOM. IS. CONST. ch. II, § 4; SOMAL. CONST. ch. 2, art. 25; SRI LANKA CONST. ch. III, art. 13(4); TRIN. & TOBAGO CONST. ch. 1, pt. 1, § 4(a); TURK. CONST.\* pt. 2, ch. 2, art. 17; UGANDA CONST.\* ch. III, § 9; U.S. CONST. amends. V, XIV; ZAIRE CONST. tit. II, art. 13; ZAMBIA CONST.\* pt. III, art. 14; ZIMB. CONST. ch. III, § 12.

101. See SRI LANKA CONST. ch. III.

102. *Convention on Racial Discrimination*, *supra* note 22, pt. I, art. 5(a), 660 U.N.T.S. at 220; ICCPR, *supra* note 4, pt. III, arts. 16, 26, at 55; *Universal Declaration*, *supra* note 4, arts. 6, 7, at 73; SMRTP, *supra* note 22, pt. I, art. 6(1), at 67; Banjul, *supra* note 22, pt. I, ch. I, arts. 3, 5, at 60; AMCHR, *supra* note 22, pt. I, ch. II, arts. 3, 24, at 2, 8.

103. *Fundamental Freedoms*, *supra* note 22, § 1, art. 14, 213 U.N.T.S. at 232.

104. AFG. CONST. ch. 3, art. 38; ALB. CONST. pt. I, ch. II, art. 40; ALG. CONST. tit. I, ch. 4, art. 28; ANGOLA CONST. pt. II, art. 18; ANT. & BARB. CONST. ch. II, § 3(a); ARG. CONST. pt. I,



instruments that deal with the prohibition of discrimination, but they are not covered by this survey.<sup>105</sup>

3. *The Right to be Free from Arbitrary Arrest and Detention.* The right to liberty is not absolute and can be lawfully and reasonably curtailed. The right to be free from arbitrary arrest and detention seeks to delineate appropriate exceptions to the right of liberty.<sup>106</sup> The protection against the arbitrary deprivation of freedom is

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art. 16; AUS. CONST. ch. I, art. 7(1); BAH. CONST. ch. III, art. 15(a); BANGL. CONST. pt. III, art. 27; BARB. CONST. ch. III, § 11(c); BELG. CONST. tit. II, art. 6; BELIZE CONST. ch. II, § 6(1); BENIN CONST. ch. VIII, art. 122; BOTS. CONST. ch. II, § 3(a); BRAZ. CONST. tit. II, ch. I, art. 5; BULG. CONST. ch. I, art. 6(2); CAMBODIA CONST. ch. III, art. 30; CAN. CONST. sched. B, pt. I, § 15(1); CAPE VERDE CONST. tit. II, art. 22; CENT. AFR. REP. CONST. pmbi.; CHILE CONST. ch. III, art. 19(2),(3); P.R.C. CONST. ch. II, art. 33; COMOROS CONST. tit. I, art. 3; CONGO CONST. pt. I, tit. II, art. 11; COSTA RICA CONST. tit. IV, art. 33; CÔTE D'IVOIRE CONST. tit. I, art. 6; DOMINICA CONST. ch. I, § 1(a); ECUADOR CONST. pt. I, tit. II, § I, art. 19(5); EGYPT CONST. pt. III, art. 40; EQ. GUINEA CONST. tit. III, ch. I, art. 20(3); ETH. CONST. pt. II, ch. VII, art. 35, para. 1; FIJI CONST. ch. II, § 4(a); FIN. CONST. pt. II, art. 5; GAM. CONST. ch. III, § 13(a); F.R.G. CONST. ch. I, art. 3; GREECE CONST. art. 4(1); GREN. CONST. ch. I, § 1(a); GUY. CONST. pt. I, ch. III, art. 40(1)(a); HOND. CONST. tit. III, ch. I, arts. 60, 61; HUNG. CONST. ch. XII, §§ 56-57(1); INDIA CONST. pt. III, art. 14; IRAQ CONST. ch. III, art. 19; IR. CONST. art. 40; ITALY CONST. art. 3; JAM. CONST. ch. III, art. 13(a); JAPAN CONST. ch. III, art. 14; JORDAN CONST. ch. II, art. 6(i); KENYA CONST. ch. V, art. 70(a); KIRIBATI CONST. ch. II, § 3(a); KOREA (REPUBLIC OF) CONST. ch. II, art. 11(1); KUWAIT CONST. pt. III, art. 29; LIBER. CONST. ch. III, art. 11(c); LIBYA CONST. ch. I, art. 5; LIECH. CONST. ch. IV, art. 31, para. 1; LUX. CONST. ch. II, art. 11, para. 1; MALAY. CONST. pt. II, § 8(1); MALDIVES CONST. § 5; MALI CONST. tit. I, art. 1, para. 5; MALTA CONST. ch. IV, § 32(a); MAURITIUS CONST. ch. II, § 3(a); MEX. CONST. tit. I, ch. I, art. 4, para. 1; MONACO CONST. tit. III, art. 17; MOROCCO CONST. tit. I, art. 5; MYANMAR CONST. ch. II, art. 22(a); NAMIB. CONST. ch. III, art. 10(1); NAURU CONST. pt. II, § 3(a); NEPAL CONST. pt. 3, § 11(1); NETH. CONST. ch. I, art. 1; NICAR. CONST. tit. IV, ch. I, art. 27, para. 1; PAK. CONST. pt. I, art. 4(1); PAPUA N.G. CONST. pt. III, div. III, subdiv. B, § 37(1); PARA. CONST. ch. V(1), art. 54; PERU CONST. tit. I, ch. I, art. 2(2); PHIL. CONST. art. IV, § 1; POL. CONST. ch. 8, art. 67(2); PORT. CONST. pt. I, § I, arts. 13(1), 20(1); ROM. CONST. tit. II, ch. I, art. 16(1); RWANDA CONST. ch. II, art. 16; St. CHRIS.-NEVIS. CONST. ch. II, § 3(a); SÃO TOMÉ & PRINCIPE CONST. ch. II, art. 9(1); SING. CONST. pt. IV, art. 12(1); SOLOM. IS. CONST. ch. II, § 3(a); SOMAL. CONST. ch. I, § 1, art. 67; SPAIN CONST. tit. I, ch. II, art. 14; SRI LANKA CONST. ch. III, § 12(1); SUDAN CONST. pt. III, art. 17(1); SWAZ. CONST. ch. II, § 3(a); SWED. CONST. ch. I, art. 9; SWITZ. CONST. ch. I, art. 4; SYRIA CONST. ch. 1, pt. 4, art. 25(3); TAIWAN CONST. ch. II, art. 7; TANZ. CONST. § III, art. 13(1); THAIL. CONST. ch. I, § 4; TRIN. & TOBAGO CONST. ch. 1, pt. I, § 4(b); TUNIS. CONST. ch. I, art. 6; TURK. CONST. pt. I, § X, art. 10; TUVALU CONST. pt. II, div. II, § 11(1)(d); UGANDA CONST. ch. III, art. 8(1), (2)(a); U.A.E. CONST. pt. III, art. 25; U.S. CONST. amend. XIV, § 1; VIETNAM CONST. ch. V, art. 55; YEMEN CONST. tit. II, art. 27; ZAIRE CONST. tit. II, art. 12; ZAMBIA CONST. pt. III, art. 13(a); ZIMB. CONST. ch. III, §§ 11(a), 18(1); see MADAG. CONST. tit. I, art. 6; NETH. CONST. ch. I, art. 1; VENEZ. CONST. tit. III, ch. I, art. 49.

105. For example, see the *Convention on the Elimination of All Forms of Discrimination against Women*, G.A. Res. 34/180, 34 U.N. GAOR, Supp. No. 46, U.N. Doc. A/34/46 (1979).

106. See PREVENTIVE DETENTION: A COMPARATIVE AND INTERNATIONAL LAW PERSPECTIVE (Stanislaw Frankowski & Dinah Shelton eds., 1992).

expressed in the Magna Carta,<sup>107</sup> the Bill of Rights of the United States Constitution,<sup>108</sup> and the French Declaration of the Rights of Man.<sup>109</sup> It is an essential element of the due process protections which provide safeguards for any person from abuse of power.<sup>110</sup>

The right to be free from arbitrary arrest and detention is protected in six of the instruments surveyed.<sup>111</sup> In some instruments the right is expressed as a general exception to the right to personal liberty, as in the right to be free from arbitrary arrest and detention.<sup>112</sup> In other instruments exceptions to the right itself are specifically noted. For example, Article 5 of the Fundamental Freedoms lists the following exceptions: (a) detention after conviction by a competent court; (b) lawful arrest for noncompliance with a lawful order of the court; (c) lawful arrest on suspicion of having committed a crime or to prevent the commission of a crime; (d) detention of minors; (e) detention of the mentally ill, vagrants, addicts, or those infected with contagious diseases; and (f) detention of aliens to prevent illegal entry into a country or for the purposes of deportation or extradition.<sup>113</sup> Both Article 5 of the Fundamental Freedoms and the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment (BOP) also include a list of procedural rights following an arrest which are designed to insure judicial control over unlawful deprivations of personal liberty. A person has the right to be informed of the reasons for his or her

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107. MAGNA CARTA, *supra* note 83, ch. 38.

108. U.S. CONST. amends. I-X.

109. Article 7 provides that "no individual shall be accused, arrested or detained, except in the cases prescribed by legislation, and according to the procedures it has laid down." THE DECLARATION OF THE RIGHTS OF MAN AND THE CITIZEN (Aug. 26, 1789) reprinted in HUMAN RIGHTS SOURCEBOOK 744 (Albert P. Blaustein et al. eds., 1987).

110. See *supra* text accompanying note 83.

111. ICCPR, *supra* note 4, pt. III, art. 9(1), at 54; *Fundamental Freedoms*, *supra* note 22, § I, art. 5(1), 213 U.N.T.S. at 226; BOP, *supra* note 22, princ. 2, at 298; *Universal Declaration*, *supra* note 4, art. 9, at 73; Banjul, *supra* note 22, pt. I, ch. I, art. 6, at 60; AMCHR, *supra* note 22, pt. I, ch. II, art. 7(3), at 3.

112. ICCPR, *supra* note 4, pt. III, art. 9(1), at 54; *Fundamental Freedoms*, *supra* note 22, § I, art. 5(1), 213 U.N.T.S. at 226; *Universal Declaration*, *supra* note 4, art. 9, at 73; Banjul, *supra* note 22, pt. I, ch. I, art. 6, at 60; AMCHR, *supra* note 22, pt. I, ch. II, art. 7(3), at 3.

113. *Fundamental Freedoms*, *supra* note 22, art. 5(1)(a)-(f), 213 U.N.T.S. at 226.

arrest,<sup>114</sup> to be granted a speedy trial,<sup>115</sup> and to challenge the lawfulness of his or her arrest before a judge.<sup>116</sup>

The right to be free from arbitrary arrest and detention is protected in at least 119 national constitutions.<sup>117</sup> The right may be

114. *Fundamental Freedoms*, *supra* note 22, § I, art. 5(2), 213 U.N.T.S. at 226; BOP, *supra* note 22, princ. 10, at 298.

115. *Fundamental Freedoms*, *supra* note 22, § I, art. 5(3), 213 U.N.T.S. at 226.

116. *Fundamental Freedoms*, *supra* note 22, § I, art. 5(4), 213 U.N.T.S. at 226; BOP, *supra* note 22, princ. 11(1), at 298.

117. AFG. CONST. ch. 3, art. 41, para. 2; ALB. CONST. pt. 1, ch. II, art. 56; ALG. CONST. ch. IV, art. 44; ANGOLA CONST. pt. II, art. 23; ANT. & BARB. CONST. ch. II, § 5(1), (5); ARG. CONST. 1st pt., art. 18; BAH. CONST. ch. III, art. 19(1); BANGL. CONST. pt. III, art. 32; BARB. CONST. ch. III, § 13(1); BELG. CONST. tit. II, art. 7; BELIZE CONST. ch. II, § 5(1); BENIN CONST. ch. VIII, art. 136, para. 2; BOL. CONST. pt. 1, tit. 2, art. 9; BRAZ. CONST. tit. II, ch. I, art. 5(LXI); BULG. CONST. ch. II, art. 30(2); CAMBODIA CONST. ch. III, art. 35; CAMEROON CONST. pmbl., para. 12; CAN. CONST. sched. B, pt. I, §§ 9, 10; CAPE VERDE CONST. tit. II, art. 31(2); CHILE CONST. ch. III, art. 19(7)(b), (c); P.R.C. CONST. art. 37, paras. 2, 3; COLOM. CONST. tit. II, ch. 1, art. 29; COMOROS CONST. tit. IV, art. 43; CONGO CONST. pt. I, tit. II, arts. 7, 10; COSTA RICA CONST. tit. IV, art. 37; CÔTE D'IVOIRE CONST. tit. VII, art. 62; CUBA CONST. ch. VI, art. 57; DEN. CONST. pt. VIII, § 71(2); DOMINICA CONST. ch. I, § 3(1); DOM. REP. CONST. tit. II, § I, art. 8(2); ECUADOR CONST. pt. I, tit. II, § I, art. 19(17)(h); EGYPT CONST. pt. III, art. 41; EQ. GUINEA CONST. tit. III, ch. 1, arts. 20(1), para. 4, 20(15); ETH. CONST. pt. 2, ch. 7, art. 44(1); FIJI CONST. ch. II, § 6(1); FR. CONST. tit. VIII, art. 66; GABON CONST. tit. VII, art. 59; GAM. CONST. ch. III, § 15(1); F.R.G. CONST. ch. IX, art. 104(1); GREECE CONST. pt. II, arts. 5(3), 6; GREN. CONST. ch. I, § 3(1); GUAT. CONST. tit. II, ch. I, art. 6; GUINEA CONST. tit. II, art. 9; GUY. CONST. pt. II, tit. I, art. 139(1); HOND. CONST. tit. III, ch. II, arts. 69, 84; HUNG. CONST. ch. XII, § 55(1); ICE. CONST. ch. VII, art. 65; IRAQ CONST. ch. III, art. 22(b); IR. CONST. art. 40(4)(1); ITALY CONST. pt. I, tit. I, art. 13, para. 2; JAM. CONST. ch. III, art. 15(1); JAPAN CONST. ch. III, arts. 33, 34; JORDAN CONST. ch. II, § 8; KENYA CONST. ch. V, § 72(1); KIRIBATI CONST. ch. II, § 5(1); KOREA (REPUBLIC OF) CONST. ch. II, art. 12(1), (3); KOREA (DEMOCRATIC PEOPLE'S REPUBLIC OF) CONST. ch. IV, art. 64; KUWAIT CONST. pt. III, art. 31, para. 1; LIBER. CONST. ch. III, art. 20(a); LIECH. CONST. ch. IV, art. 32; LUX. CONST. ch. II, art. 12; MALAY. CONST. pt. II, art. 5(1); MALI CONST. tit. II, art. 7; MALTA CONST. ch. IV, § 34(1); MAURITIUS CONST. ch. II, § 5(1); MEX. CONST. tit. 1, ch. I, art. 16; MONACO CONST. tit. III, art. 19; MOROCCO CONST. tit. I, art. 10; MYANMAR CONST. ch. XI, art. 159 (b); NAMIB. CONST. ch. III, art. 11(1); NAURU CONST. pt. II, § 5(1); NEPAL CONST. pt. 3, § 14(5); NETH. CONST. ch. 1, art. 15(1); NICAR. CONST. tit. IV, ch. I, art. 33; NIGER CONST. tit. XII, art. 84; NIG. CONST. ch. IV, § 34(1); NOR. CONST. pt. E, art. 99; PAPUA N.G. CONST. pt. III, div. III, subdiv. C, § 42(1); PARA. CONST. ch. V, art. 59; PERU CONST. tit. I, ch. I, art. 2(20)(g); PHIL. CONST. art. IV, § 3; POL. CONST. ch. 8, art. 87(1); PORT. CONST. pt. I, § II, ch. I, art. 27(2); ROM. CONST. tit. II, ch. II, art. 23(2); RWANDA CONST. ch. II, art. 12, para. 2; ST. CHRIS.-NEVIS CONST. ch. II, § 5(1); SIERRA LEONE CONST. ch. III, § 17(1); SOLOM. IS. CONST. ch. II, § 5(1); SOMAL. CONST. ch. II, art. 26(2); SPAIN CONST. tit. I, ch. II, § I, art. 17; SRI LANKA CONST. ch. III, art. 13(1); SUDAN CONST. pt. III, art. 21; SURIN. CONST. ch. V, art. 16(2); SYRIA CONST. ch. 1, pt. 1, art. 28(2); TAIWAN CONST. ch. II, art. 8; TANZ. CONST. § 3, art. 15(2); THAIL. CONST. ch. III, art. 28; TRIN. & TOBAGO CONST. ch. 1, pt. 1, § 5(2)(a); TURK. CONST. pt. 1, ch. 2, § 3, art. 19, para. 2; TUVALU CONST. pt. II(1), arts. 17(1)(f)-(g), 18(2); UGANDA CONST. ch. III, art. 10(1); U.A.E. CONST., art. 26; U.S. CONST. amends. IV, V, XIV, § 1; VENEZ. CONST. tit. III, ch. III, art. 60(1), para. 1; VIETNAM CONST. ch. 5, art. 69; YEMEN CONST. tit. II, art. 32-B; ZAIRE CONST. tit. II, art. 15, para. 2; ZAMBIA CONST. pt. III, § 15(1); ZIMB. CONST. ch. III, § 13(1).

expressed negatively, as in the prohibition of arbitrary deprivations of liberty, or it may be expressed as a specific exception to the general right of liberty, which is listed as a procedural protection. This second method is used by the majority of the constitutions of countries which adopted the common law of England, as well as by the Fundamental Freedoms.

4. *The Right to Freedom from Torture and Cruel, Inhuman, and Degrading Treatment or Punishment.* A more concrete interpretation of the right to life, liberty, and the security of the person, this right protects the dignity and physical and psychological integrity of a person. Its roots are found in the prohibition against "cruel and unusual punishments" in the English Bill of Rights of 1688 and in the Eighth Amendment of the United States Constitution.<sup>118</sup> The modern right extends not only to punishment, but also to other cruel, inhuman, and degrading treatments and is therefore far broader than its antecedents. The proscription of torture, for example, is also aimed at the use of techniques prevalent in some of the inquisitorial systems of Europe well into the nineteenth century which elicited information from detainees and confessions from suspects.<sup>119</sup>

This right is found in all of the surveyed instruments.<sup>120</sup> Unlike the Universal Declaration and the Fundamental Freedoms, the ICCPR and the AMCHR explicitly provide protection of the dignity of a detained person.<sup>121</sup> The ICCPR further solidifies the right by providing for the segregation of juveniles from adults and convicted prisoners from those awaiting trial to whatever extent possible.<sup>122</sup> The AMCHR expands on the concept of personal dignity by protecting the

118. See 1 Wm. & M. Sess. 2, c.2 (1688) (Eng.); U.S. CONST. amend. VIII.

119. See BURGERS & DANIELIUS, *supra* note 28, at 10; see also *Convention Against Torture*, *supra* note 22, pt. I, art. 11, at 198 ("Each State Party shall keep under systematic review interrogation rules, instructions, methods and practices as well as arrangements for custody . . . with a view to preventing any cases of torture.").

120. *Convention Against Torture*, *supra* note 22, pt. I, art. 1, at 197, pt. I, art. 16, at 198; *Convention on Racial Discrimination*, *supra* note 22, pt. I, art. 5(b), 660 U.N.T.S. at 220; ICCPR, *supra* note 4, pt. III, art. 7, at 53; *Fundamental Freedoms*, *supra* note 22, § I, art. 3, 213 U.N.T.S. at 224; BOP, *supra* note 22, princ. 6, at 298; *Universal Declaration*, *supra* note 4, art. 5, at 73; SMRTP, *supra*, note 22, pt. I, arts. 31, 32(1),(2), at 69; *European Convention on Protection of Detainees*, *supra* note 22, ch. I, art. 1, at 1154; Banjul, *supra* note 22, pt. I, ch. I, art. 5, at 60; AMCHR, *supra* note 22, ch. II, art. 5(2), at 2.

121. ICCPR, *supra* note 4, pt. II, art. 10(1), at 54; AMCHR, *supra* note 22, ch. II, art. 5(2), at 2.

122. ICCPR, *supra* note 4, pt. III, art. 10(2)(a), (b), at 54.

"physical, mental and moral integrity" of the person.<sup>123</sup> The Banjul Charter entitles an individual to "respect for his life and the integrity of his person" along with the core language of this right.<sup>124</sup> It protects against "all forms of exploitation" and "degradation" and specifically mentions slavery and the slave trade as examples.<sup>125</sup> A number of international instruments prohibit slavery and related practices.<sup>126</sup> In addition, prohibitions against apartheid and genocide may be included within the ambit of this right, while the ICCPR includes protection against unconventional medical or scientific experimentation on human beings.<sup>127</sup>

The right to be free from torture and cruel and degrading treatment or punishment is provided for in at least eighty-one national constitutions.<sup>128</sup> Although the death penalty is not historically

123. AMCHR, *supra* note 22, pt. I, ch. II, art. 5(1), at 2.

124. Banjul, *supra* note 22, pt. I, ch. I, art. 4, at 60.

125. *Id.* pt. I, ch. I, art. 5, at 60.

126. ICCPR, *supra* note 4, pt. III, art. 8, at 54; *Fundamental Freedoms*, *supra* note 22, § I, art. 4(1), 213 U.N.T.S. at 224; *Universal Declaration*, *supra* note 4, art. 4, at 73; AMCHR, *supra* note 22, pt. I, ch. II, art. 6, at 3; *see also* M. Cherif Bassiouni, *Enslavement as an International Crime*, 23 N.Y.U. J. INT'L L. & POL. 445-517 (1991).

127. ICCPR, *supra* note 4, pt. III, art. 7, at 53.

128. AFG. CONST. ch. 3, art. 42; ANT. & BARB. CONST. ch. II, § 7(1); ARG. CONST. 1st pt., art. 18; BAH. CONST. ch. III, art. 17(1); BANGL. CONST. pt. III, art. 35(5); BARB. CONST. ch. III, § 15(1); BELIZE CONST. ch. II, § 7; BOL. CONST. pt. 1, tit. 2, art. 12; BOTS. CONST. ch. II, § 7(1); BRAZ. CONST. tit. II, ch. I, art. 5(III), (XLVII (e)); CAMBODIA CONST. ch. III, art. 35; CAN. CONST. pt. I, § 12; CAPE VERDE CONST. tit. II, art. 31(3); CHAD CONST. tit. V, art. 40; COLOM. CONST. tit. II, ch. I, art. 12; COSTA RICA CONST. tit. IV, art. 40; DOMINICA CONST. tit. I, art. 5; DOM. REP. CONST. tit. II, § I, art. 8(1); ECUADOR CONST. pt. I, tit. II, § I, art. 19(1); EGYPT CONST. pt. 3, art. 42; EQ. GUINEA tit. 3, ch. I, art. 20(1); FIJI CONST. ch. 2, § 8; GAM. CONST. ch. III, § 17(1); F.R.G. CONST. ch. IX, art. 104(1); GREECE CONST. pt. II, art. 7(2); GREN. CONST. ch. I, § 5(1); GUAT. CONST. tit. II, ch. I, art. 19(a); GUY. CONST. pt. 2, tit. 1, art. 141(1); HOND. CONST. tit. III, ch. II, art. 68; HUNG. CONST. ch. XII, § 54(2); IRAQ CONST. ch. III, art. 22(a); ITALY CONST. pt. 1, tit. 1, art. 13, para. 4; JAM. CONST. ch. III, § 17; JAPAN CONST. ch. III, art. 36; KUWAIT CONST. pt. III, arts. 31, 34; LIBER. CONST. ch. III, art. 21(e); LIBYA CONST. ch. II, art. 31(c); MALDIVES CONST. § 7; MALTA CONST. ch. IV, § 36(1); MAURITIUS CONST. ch. II, § 7(1); MEX. CONST. tit. I, ch. I, art. 22, para. 1; MONACO CONST. tit. III, art. 20; MYANMAR CONST. ch. II, art. 24; NAMIB. CONST. ch. III, art. 8(2)(b); NAURU CONST. pt. II, § 7; NEPAL CONST. pt. III, art. 14(4); NICAR. CONST. tit. IV, ch. I, art. 36; NIG. CONST. ch. IV, § 33(1)(a); NOR. CONST. pt. I, art. 96; PAK. CONST. pt. II, ch. I, art. 14(2); PAPUA N.G. CONST. pt. III, div. III, subdiv. A, § 36(1); PARA. CONST. ch. V, pt. I, art. 65; PERU CONST. tit. IV, ch. IX, art. 234, para. 1; PHIL. CONST. art. IV, § 21; PORT. CONST. pt. I, § II, ch. I, art. 25(2); ROM. CONST. tit. II, ch. II, art. 22(2); ST. CHRIS.-NEVIS CONST. ch. II, § 7; SIERRA LEONE CONST. ch. III, § 20(1); SOLOM. IS. CONST. ch. II, § 7; SOMAL. CONST. ch. II, art. 27; SPAIN CONST. ch. II, § 1, art. 15; SRI LANKA CONST. ch. III, § 11; SUDAN CONST. pt. III, art. 29; SURIN. CONST. ch. V, art. 9(2); SWAZ. CONST. ch. II, § 7(1); SWED. CONST. ch. 2, art. 5; SWITZ. CONST. ch. I, art. 65(2); SYRIA CONST. ch. I, pt. IV, art. 28(3); TANZ. CONST. § 3, art. 13(6)(e); TRIN. & TOBAGO CONST. ch. 1, pt. 1, § 5(2)(b); TURK. CONST. pt. II, ch. II, § I, art. 17, para. 3; TUVALU CONST. pt. II, div. 3, subdiv. A, § 19(c), (d); UGANDA CONST. ch. III, art. 12(1); U.A.E. CONST. pt. 3, arts. 26, 28; U.S. CONST.

considered to constitute "cruel and unusual punishment"<sup>129</sup> and is still in practice in a majority of the countries of the world, an increasing number of countries have either abolished it, restricted it to time of war, or have completely refrained from practicing it.<sup>130</sup> This trend is evinced by the adoption of Protocol 6 to the Fundamental Freedoms<sup>131</sup> and the passage of Optional Protocol 2 of the ICCPR by the United Nations General Assembly.<sup>132</sup>

The protections from torture and similar practices are particularly important during pretrial interrogations<sup>133</sup> and therefore encompass a privilege against self-incrimination.<sup>134</sup> Two of the instruments examined protect the privilege against self-incrimination, as does the Fifth Amendment of the United States Constitution.<sup>135</sup> The ICCPR asserts the right not to be compelled to testify against oneself as well as the right not to confess guilt; the AMCHR includes the same protections, although it uses the term "plead guilty" instead of "confess."<sup>136</sup> The BOP has explicit provisions against the practice of

amend. VIII; VENEZ. CONST. tit. III, ch. III, art. 60(3), (7); VIETNAM CONST. ch. 5, art. 69, para. 3; YEMEN CONST. tit. II, arts. 32-B, 33; ZAIRE CONST. tit. II, art. 13, para. 2; ZAMBIA CONST. pt. III, § 17(1); ZIMB. CONST. ch. III, § 15(1).

129. The death penalty was commonplace at the time of the enactment of the English and American Bills of Rights, *see, e.g.*, JAMES AVERY JOYCE, *CAPITAL PUNISHMENT: A WORLD VIEW* 119-93 (1961) (tracing the development of the abolitionist movements in England and America), and is still not considered to violate the Eighth Amendment of the United States Constitution, *Gregg v. Georgia*, 428 U.S. 153, 169 (1976).

130. *See supra* note 99. The European Court on Human Rights, in interpreting the ECHR, decided that the Death Row Syndrome in the United States violated its provision on cruel treatment. In an unprecedented decision, the *Soering Case*, 161 Eur. Ct. H.R. (ser. A) at 3945 (1989), the Court held that a person sought for extradition from the United Kingdom to the United States could not be so extradited as it would violate that person's human rights. *See also* Stephan Breitenmoser, et al., *Human Rights v. Extradition: The Soering Case*, 11 MICH. J. INT'L L. 845, 845 (1990); Michael Shea, *Expanding Judicial Scrutiny of Human Rights in Extradition Cases After Soering*, 17 YALE J. INT'L L. 85, 86 (1992).

131. *See supra* text accompanying note 90.

132. *See supra* note 90.

133. Some of the national constitutions surveyed specifically refer to the protections in this context. For example, *see* EGYPT CONST. pt. 3, art. 42 (protections apply only after arrest, detainment, or restriction of freedom); LIBYA CONST. ch. II, art. 31(c) (protections apply during incarceration); NOR. CONST. art. 96 (no interrogation by torture); PAK. CONST. pt. II, ch. 1, § 14(2) (no torture to extract evidence).

134. *See* M. Cherif Bassiouni, *The Privilege Against Self-Incrimination: A Historical Analysis and Contemporary Appraisal*, in *LAW IN THE UNITED STATES OF AMERICA IN SOCIAL AND TECHNOLOGICAL REVOLUTION* 655 (John N. Hazard & Wenceslas J. Wagner eds., 1974).

135. U.S. CONST. amend. V; ICCPR, *supra* note 4, pt. III, art. 14(3)(g), at 54; AMCHR, *supra* note 22, pt. I, ch. II, art. 8(2)(g), at 4.

136. AMCHR, *supra* note 22, pt. I, ch. II, art. 8(2)(g), at 4. The Fifth Amendment of the United States Constitution has also been interpreted to apply to both aspects of the privilege. *See* *United States v. Jackson*, 390 U.S. 570, 581 (1968) (recognizing defendants' Fifth Amendment

detaining prisoners *incommunicado*, a crucial element in the practice of coercive interrogations.<sup>137</sup> No less than forty-eight national constitutions provide for a privilege against self-incrimination,<sup>138</sup> but in over half of these instruments the privilege is explicitly articulated only in relation to the giving of testimony at trial.<sup>139</sup>

5. *The Right to be Presumed Innocent.* The presumption of innocence is inextricably linked to fairness in criminal due process and is intrinsically related to the protection of human dignity. Above all, it guarantees against abuse of power by those in authority and ensures the preservation of the basic concepts of justice and fairness. However, the meaning of the presumption varies as between adversary-accusatorial systems of criminal justice and inquisitorial ones. Furthermore, many legal systems distinguish between the presumption of innocence and proof of guilt. Finally, the standard of proof of guilt also varies as between adversary-accusatorial models of criminal justice and inquisitorial ones. The former frequently relies on the standard of proof of guilt beyond a reasonable doubt, the latter on the personal conviction of the judge beyond his or her subjective moral doubt. The

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right not to plead guilty).

137. BOP, *supra* note 22, princ. 11(2), at 298.

138. ARG. CONST. 1st pt., art. 18; ANT. & BARB. CONST. ch. II, § 15(7); BAH. CONST. ch. III, § 20(7); BANGL. CONST. pt. III, art. 35(4); BARB. CONST. ch. III, § 18(7); BELIZE CONST. ch. II, § 6(6); BOTS. CONST. ch. II, § 10(7); CAN. CONST. pt. I, § 11(c); CHILE CONST. ch. III, art. 19(7)(f); COLOM. CONST. tit. II, ch. 1, art. 33; COSTA RICA CONST. tit. IV, art. 36; DOMINICA CONST. ch. I, § 8(7); DOM. REP. CONST. tit. II, § 1, art. 8(2)(i); ECUADOR CONST. tit. II, § I, art. 19(17)(f) (limited to matters involving criminal guilt); EQ. GUINEA CONST. tit. 3, ch. 1, art. 20(18); ETH. CONST. pt. 2, ch. 7, art. 45, para. 4; FIJI CONST. ch. 2, § 11(7); GAM. CONST. ch. III, § 20(7); GREN. CONST. ch. I, § 8(7); GUY. CONST. pt. II, ch. II, art. 144(7); INDIA CONST. pt. III, art. 20(3); JAPAN CONST. ch. III, art. 38; KENYA CONST. ch. V, § 77(7); KIRIBATI CONST. ch. II, § 10(7); LIBER. CONST. ch. III, art. 21(c); MALTA CONST. ch. IV, § 39(10); MAURITIUS CONST. ch. II, § 10(7); MEX. CONST. tit. 1, ch. 1, art. 20, para. 2; NAMIB. CONST. ch. 3, art. 12(1)(f); NAURU CONST. pt. II, § 10(8); NEPAL CONST. pt. 3, § 14(3); NICAR. CONST. tit. IV, ch. I, art. 34(7); NIG. CONST. ch. IV, §§ 34(2), 35(10); PAK. CONST. pt. II, ch. I, § 13(b); PAN. CONST. tit. III, ch. 1, art. 24; PAPUA N.G. CONST. pt. III(3)(B), § 37(10); PARA. CONST. ch. V, pt. 1, art. 62; PERU CONST. tit. 1, ch. 1, art. 2(20)(k); PHIL. CONST. art. IV, § 20; ST. CHRIS.-NEVIS. CONST. ch. II, § 10(7); SOLOM. IS. CONST. ch. II, § 10(7); SPAIN CONST. tit. 1, ch. II, art. 24(2); TUVALU CONST. pt. II(3)(A), § 22(10); UGANDA CONST. ch. III, § 15(7); U.S. CONST. amend. V; YEMEN CONST. tit. II, art. 32(B); ZAMBIA CONST. pt. III, § 20(7); ZIMB. CONST. ch. III, § 18(8).

139. This is the case in many of the former British colonies. Guatemala further restricts the right by providing the privilege at trial in Article 16, but making an exception in Article 8 that a prisoner may be compelled if before a "competent judicial authority." GUAT. CONST. tit. II, ch. I, arts. 8, 16.

differences in the rules of evidence are also quite significant.<sup>140</sup> The basis of this right lies in the Anglo-Saxon rejection of the inquisitorial mode of criminal procedure in favor of an adversarial mode with the burden of proof placed on the state.<sup>141</sup>

The right to be presumed innocent is guaranteed in five of the instruments surveyed,<sup>142</sup> as well as in sixty-seven of the surveyed constitutions.<sup>143</sup> Several other constitutions guarantee that an

140. See *La preuve en procédure pénale comparée/Evidence in Comparative Criminal Procedure*, 63 REVUE INT'L DE DROIT PÉNAL *passim* (1992).

141. This model is now strongly gaining favor in traditionally inquisitorial-based states such as Italy, which reformed its Code of Criminal Procedure in 1989 and adopted, in part, this approach. William T. Pizzi & Luca Marafioti, *The New Italian Code of Criminal Procedure: The Difficulties of Building an Adversarial Trial System on a Civil Law Foundation*, 17 YALE J. INT'L L. 1 (1992); Ennio Amodio & Eugenio Selvaggi, *An Accusatorial System in a Civil Law Country: The 1988 Italian Code of Criminal Procedure*, 62 TEMPLE L. REV. 1211 (1989). For a comparative analysis of the two models, see John H. Langbein & Lloyd L. Weinreb, *Continental Criminal Procedure: "Myth" and Reality*, 87 YALE L. J. 1549 (1978); Herbert L. Packer, *Two Models of the Criminal Process*, 113 U. PA. L. REV. 1 (1964).

142. ICCPR, *supra* note 4, pt. III, art. 14(2), at 54; *Fundamental Freedoms*, *supra* note 22, § 1, art. 6(2), 213 U.N.T.S. at 228; SMRTP, *supra* note 22, pt. II, § C, art. 84(2), at 73; Banjul, *supra* note 22, pt. I, ch. I, art. 7(1)(b), at 60; AMCHR, *supra* note 22, pt. I, ch. II, art. 8(2), at 4.

143. AFG. CONST. ch. III, art. 41; ALG. CONST. ch. IV, art. 42; ANT. & BARB. CONST. ch. II, § 15(2)(a); BAH. CONST. ch. III, § 20(2)(a); BARB. CONST. ch. III, § 18(2)(a); BELIZE CONST. ch. II, § 6(3)(a); BOL. CONST. pt. 1, tit. 2, art. 16; BOTS. CONST. ch. II, § 10(2)(a); BULG. CONST. ch. 2, art. 31(3); CAMBODIA CONST. ch. III, art. 35; CAN. CONST. pt. I, § 11(d); COLOM. CONST. tit. II, ch. I, art. 29; COMOROS CONST. tit. IV, art. 43; CÔTE D'IVOIRE CONST. tit. VII, art. 62; DOMINICA CONST. ch. I, § 8(2)(a); ECUADOR CONST. tit. II, § I, art. 19(17)(g); EGYPT CONST. pt. III, art. 67; EQ. GUINEA CONST. tit. III, ch. 1, art. 20(17); FIJI CONST. ch. II, § 11(2)(a); GABON CONST. tit. VII, art. 59; GREN. CONST. ch. I, § 8(2)(a); GUAT. CONST. tit. III, ch. I, art. 14; GUY. CONST. pt. II, tit. II, art. 144(2)(a); HOND. CONST. tit. III, ch. II, art. 89; HUNG. CONST. ch. XII, § 57(2); IRAQ CONST. ch. III, art. 20(a); JAM. CONST. ch. III, § 20(5); KENYA CONST. ch. V, § 77(2)(a); KIRIBATI CONST. ch. II, § 10(2)(a); KOREA (REPUBLIC OF) CONST. ch. II, art. 27(4); KUWAIT CONST. pt. III, art. 34; LIBER. CONST. ch. III, art. 21(h); LIBYA CONST. art. 31(c); MALTA CONST. ch. IV, § 39(5); MAURITIUS CONST. ch. II, § 10(2)(a); NAMIB. CONST. ch. III, art. 12(1)(d); NAURU CONST. pt. II, § 10(3)(a); NICAR. CONST. tit. IV, ch. I, art. 34(1); NIGER CONST. tit. XII, art. 84; NIG. CONST. ch. IV, § 35(4); PAPUA N.G. CONST. pt. III (3)(B), § 37(4)(a); PARA. CONST. ch. V, pt. 1, art. 63; PERU CONST. tit. I, ch. I, art. 20(2)(f); PHIL. CONST. art. IV, § 19; PORT. CONST. pt. I, § II, ch. I, art. 32(2); QATAR CONST. pt. III, art. 11; ROM. CONST. tit. II, ch. II, art. 23(8); RWANDA CONST. ch. II, art. 12; ST. CHRIS.-NEVIS CONST. ch. II, § 10(2)(a); SIERRA LEONE CONST. ch. III, § 23(4); SOLOM. IS. CONST. ch. II, § 10(2)(a); SOMAL. CONST. ch. II, art. 33(2); SPAIN CONST. tit. 1, ch. 11, art. 24(2); SRI LANKA CONST. ch. III, art. 13(5); SUDAN CONST. pt. III, § 28; SWAZ. CONST. ch. II, § 10(2)(a); SYRIA CONST. pt. IV, art. 28(1); THAIL. CONST. ch. III, § 27; TRIN. & TOBAGO CONST. ch. 1, pt. I, § 5(2)(f)(i); TUNIS. CONST. ch. 1, art. 12; TUVALU CONST. pt. II(3)(a), § 22(3)(a); U.A.E. CONST. pt. 3, art. 28; UGANDA CONST. ch. III, § 15(2)(a); YEMEN CONST. tit. II, art. 31; ZAIRE CONST. tit. II, art. 15; ZAMBIA CONST. pt. III, § 20(2)(a); ZIMB. CONST. ch. III, § 18(3)(a).



accused will not be presumed guilty;<sup>144</sup> however, this latter guarantee is narrower than the presumption of innocence.

6. *The Right to a Fair Trial.* The array of safeguards which make up the right to a fair trial serve to protect against the arbitrary deprivation of the right to life, liberty, and the enjoyment of all other civil, political, economic, and cultural rights.<sup>145</sup> The specific elements which compose procedural fairness in a criminal trial are discussed *infra* in parts (a) through (j) in this section.

The right to a fair trial is declared as a general principle of law in four of the instruments surveyed,<sup>146</sup> while three other instruments contain a list of the elements of procedural fairness.<sup>147</sup> Provisions which explicitly guarantee the right to a fair trial or hearing in criminal cases exist in no less than thirty-eight national constitutions.<sup>148</sup> Other constitutions contain language which could be construed to generally guarantee this right.<sup>149</sup> For example, seven national constitutions guarantee the right to a procedure with all safeguards necessary for a

144. See, e.g., ETH. CONST. ch. VII, art. 45(1) ("No person criminally accused of violating the law shall be considered guilty unless it is so determined by a court.")

145. See Symposium, *supra* note 83.

146. ICCPR, *supra* note 4, pt. III, art. 14(1), at 54; *Fundamental Freedoms*, *supra* note 22, § 1, art. 6(1), 213 U.N.T.S. at 228; *Universal Declaration*, *supra* note 4, art. 10, at 73; AMCHR, *supra* note 22, pt. I, ch. II, art. 8(1), at 4.

147. ICCPR, *supra* note 4, pt. III, art. 14(3), at 54; *Fundamental Freedoms*, *supra* note 22, § 1, art. 6(3), at 228; AMCHR, *supra* note 22, pt. I, ch. II, art. 8(2), at 4.

148. ANT. & BARB. CONST. ch. II, § 15(1); BAH. CONST. ch. III, § 20(1); BARB. CONST. ch. III, § 18(1); BELIZE CONST. ch. II, § 6(2); BOL. CONST. pt. 1, tit. 2, art. 16; BOTS. CONST. ch. II, § 10(1); CAMEROON CONST. pmbl.; CAN. CONST. pt. I, § 11(d); DOMINICA CONST. ch. I, § 8(1); DOM. REP. CONST. tit. II, § I, art. 8(2)(j); FIJI CONST. ch. II, § 11(1); GAM. CONST. ch. III, § 20(1); GREN. CONST. ch. I, § 8(1); GUY. CONST. pt. II, tit. II, art. 144(1); HUNG. CONST. ch. XII, § 57(1); JAM. CONST. ch. III, § 20(1); KENYA CONST. ch. V, § 77(1); KIRIBATI CONST. ch. 11, § 10(1); LIBER. CONST. ch. III, § 21(h); MALTA CONST. ch. IV, § 39(1); MAURITIUS CONST. ch. II, § 10(1); NAMIB. CONST. ch. 3, art. 12(1)(a); NAURU CONST. pt. II, § 10(2); NIG. CONST. ch. IV, § 35(3); PAPUA N.G. CONST. pt. III(3)(B), § 37(3); QATAR CONST. pt. III, art. 11; ST. CHRIS.-NEVIS CONST. ch. II, § 10(1); SIERRA LEONE CONST. ch. III, § 23(1); SOLOM. IS. CONST. ch. II, § 10(1); SRI LANKA CONST. ch. II, § 13(3); SUDAN CONST. pt. II, § 28; SWAZ. CONST. ch. II, § 10(1); TRIN. & TOBAGO CONST. ch. I, pt. I, § 5(2)(f)(ii); TUVALU CONST. pt. 2(3)(A), § 22(2); UGANDA CONST. ch. III, § 15(1); U.A.E. CONST. pt. 3, art. 28; ZAMBIA CONST. pt. III, § 20(1); ZIMB. CONST. ch. II, § 18(2).

149. For instance, the guarantee of due process in the Fifth and Fourteenth Amendments of the United States Constitution is generally considered to include this concept. U.S. CONST. amends. V, XIV. Although due process is interpreted to include a fair trial, it was originally intended to guarantee procedures established by law. See *infra* text accompanying notes 173-87 for a discussion of due process and procedures established by law. See also BULG. CONST. ch. 2, art. 31(4) (the rights of the accused may not be restricted beyond what is necessary for the administration of justice).

defense.<sup>150</sup> The right to a defense is related to the right to a fair trial and is dealt with in conjunction with this right. The "right to defense," without more, is guaranteed in twenty-one national constitutions,<sup>151</sup> but the specific interpretation attached to this rubric is not evident from the constitutional text alone. It could imply the right to a fair trial, but also the right to counsel,<sup>152</sup> or even simply the right to defend oneself.<sup>153</sup> In ten additional constitutions the right to defense is guaranteed in terms such as "at every level of the proceedings,"<sup>154</sup> which seems to designate a right to counsel or self-representation.<sup>155</sup> The elusiveness of this term is exemplified by the constitution of São Tomé and Príncipe which guarantees the "right of defense . . . to accuser and accused."<sup>156</sup> The Banjul Charter guarantees every individual the "right to have his cause heard,"<sup>157</sup> and includes within this right the "right to defense, including the right to be defended by counsel of his choice."<sup>158</sup> The concept of procedural fairness is otherwise not mentioned, so the language of the Banjul Charter does little to clarify the definition of the right to defense.

The emergence of concerns about the rights of victims of crime and about the abuse of power by the state has led the United Nations

150. BRAZIL CONST. tit. II, ch. I, art. 5 (XXXVIII)(a) (right to a full defense); CÔTE D'IVOIRE CONST. tit. VII, art. 62; GABON CONST. tit. VII, art. 59; KUWAIT CONST. pt. III, art. 34; LIBYA CONST. ch. 2, art. 31(c); PORT. CONST. § II, ch. I, art. 32(1); TUNIS. CONST. ch. I, art. 12.

151. ALG. CONST. ch. III, art. 142 (right to defense is recognized in general and guaranteed criminal matters); BULG. CONST. ch. VI, art. 122(1); CAMBODIA CONST. ch. III, art. 35; CAPE VERDE CONST. tit. II, § 31(2); CHILE CONST. ch. II, art. 19(3) (right to legal counsel and defense); CONGO CONST. tit. VI, art. 111; CUBA CONST. ch. VI, art. 58; EGYPT CONST. pt. IV, art. 67; GUAT. CONST. tit. II, ch. I, art. 12; GUINEA CONST. tit. IX, art. 86; HOND. CONST. tit. III, ch. II, art. 82; KOREA (DEMOCRATIC PEOPLE'S REPUBLIC OF) CONST. ch. X, art. 138; LIECH. CONST. ch. IV, art. 33; MOZAM. CONST. pt. II, art. 35; MYANMAR CONST. ch. VII, art. 101(g); NIGER CONST. tit. XII, art. 84; PARA. CONST. ch. V(1), art. 62; ROM. CONST. ch. II, art. 24(1); SÃO TOMÉ & PRÍNCIPE CONST. ch. III, art. 45; SYRIA CONST. pt. III, art. 28(4); TOGO CONST. pt. III, art. 28(4).

152. See *infra* text accompanying notes 219-24.

153. See *infra* text accompanying notes 231-34.

154. EQ. GUINEA CONST. tit. III, ch. I, art. 20(20); HUNG. CONST. ch. XII, § 57(3); IRAQ CONST. ch. III, art. 20(b); ITALY CONST. pt. I, tit. I, art. 24; MADAG. CONST. tit. II, art. 42; NICAR. CONST. tit. IV, ch. I, art. 34(4); PERU CONST. ch. IX, art. 233(9); RWANDA CONST. ch. II, art. 14; SEN. CONST. tit. II, art. 6; VENEZ. CONST. ch. III, art. 60(1).

155. See *infra* text accompanying notes 219-24. See also the Hungarian Constitution which provides for a "right to defense at all stages of the procedure. The defense attorney cannot be held liable for his or her opinions held/statements made during the procedure." HUNG. CONST. ch. XII, § 57(3). Hungary additionally guarantees the right to a fair trial. *Id.* ch. XII, § 57(1).

156. SÃO TOMÉ & PRÍNCIPE CONST. ch. III, art. 45.

157. Banjul, *supra* note 22, pt. I, ch. I, art. 7(1), at 60.

158. *Id.* pt. I, ch. I, art. 7(1)(c), at 60.

to adopt the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power,<sup>159</sup> wherein the victim is given the right to be represented by counsel in proceedings against the accused.<sup>160</sup> This is equivalent to the right of the *partie civile* in civil legal systems, where the victim is represented by counsel in the criminal proceedings against the accused because that record forms the basis for subsequent civil legal actions for compensation of damages.

a. *The right to the inadmissibility of certain evidence.* In some states, evidence obtained as a result of a violation of a person's protected rights will be admissible against him or her in a criminal trial.<sup>161</sup> Indeed, in many jurisdictions the remedy for such illegitimate actions lies in a right to civil damages or in the prosecution of the officials who violated the person's rights, while the evidence continues to be admitted in the criminal proceeding against the person.<sup>162</sup> In other jurisdictions, the exclusion of evidence obtained in violation of a person's protected rights is considered necessary to deter the illegal conduct of officials and to protect the integrity of the judicial system.<sup>163</sup>

The Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Convention Against Torture) and the AMCHR exclude evidence obtained through torture; the AMCHR further provides that a "confession of guilt by the accused shall be valid only if it is made without coercion of any kind."<sup>164</sup> Among the surveyed constitutions, at least seventeen national constitutions provide for exclusion of evidence obtained in violation of

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159. See *Basic Principles of Justice*, *supra* note 72.

160. See *International Protection of Victims*, in *NOUVELLES ÉTUDES PÉNALES passim* (M. Cherif Bassiouni ed., 1988).

161. The "exclusionary rules" for the fruits of illegal searches and seizures in violation of the Fourth Amendment and the fruits of illegal interrogations in violation of the Fifth Amendment of the United States Constitution were created by the United States Supreme Court, *see* *Miranda v. Arizona*, 384 U.S. 436 (1966); *Escobedo v. Illinois*, 378 U.S. 478 (1964); *Mapp v. Ohio*, 367 U.S. 643 (1961); *Weeks v. United States*, 232 U.S. 383 (1914), and are still the source of considerable controversy in American jurisprudence, *see* *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388, 392 (1971) (Burger, J., dissenting).

162. See, e.g., 42 U.S.C.S. § 1983 (providing a civil cause of action for persons deprived of rights by those acting under state law authority); *Monroe v. Pape*, 365 U.S. 167, 171 (1961) *overruled on other grounds by* *Monell v. Dept. of Social Services of City of N.Y.*, 436 U.S. 658 (1978) (holding that illegal search and seizure by police deprives citizen of constitutional rights).

163. See *Terry v. Ohio*, 392 U.S. 1, 12-13 (1968).

164. *Convention Against Torture*, *supra* note 22, pt. I, art. 15, at 198; AMCHR, *supra* note 22, pt. I, ch. II, art. 8(3), at 4.

one or more of the following rights: the right to be free from torture and/or cruel and unusual punishment; the privilege against self-incrimination; and the right to be free from illegal seizures or illegal violations of the privacy of communications.<sup>165</sup> Similar protections may exist in many other countries even though their constitutions are silent on the issue. For example, exclusionary rules may exist as the result of court decisions, as in the United States, or in legislative enactments in codes of criminal procedure.<sup>166</sup>

b. *The right to an impartial and independent tribunal.* The right to a fair trial axiomatically necessitates that the judges are free from bias or prejudice in order to act impartially and also be institutionally and personally independent from political or administrative control and influence.<sup>167</sup> The right to an impartial and independent tribunal is protected in five of the instruments surveyed<sup>168</sup> and is part of a cluster of rights relating to the criminal trial in the ICCPR, the Fundamental Freedoms, the AMCHR, and the Banjul Charter. The ICCPR, the Fundamental Freedoms, and the AMCHR also specify that the tribunal must be "established by law,"<sup>169</sup> which protects against tribunals of exception established *ad hoc* to try specific cases. The assumption is that tribunals of exception, which are usually

165. BRAZIL CONST. tit. II, ch. I, art. 5(LVI); CAMBODIA CONST. ch. III, art. 35; CAN. CONST. pt. I, § 24(2); COSTA RICA CONST. tit. IV, art. 40; CUBA CONST. ch. VI, art. 58; EGYPT CONST. pt. III, art. 42; ETH. CONST. pt. II, ch. VII, art. 45(4); GUAT. CONST. tit. II, ch. I, arts. 9, 24; HOND. CONST. tit. III, ch. II, art. 88; JAPAN CONST. ch. III, art. 38; KOREA CONST. ch. II, art. 12(7); LIBER. CONST. ch. III, art. 21(c); NAMIB. CONST. ch. III, art. 12(1)(f); PARA. CONST. ch. V, art. 62; PERU CONST. tit. IV, ch. IX, art. 233(12); PHIL. CONST. art. IV, §§ 4(2), 20; PORT. CONST. pt. I, § 2, ch. I, art. 32(6).

166. See, e.g., CAL. CONST. art. 1, § 13 (prohibiting unreasonable seizures and searches); ILL. ANN. STAT. ch. 725, para. 5/108-1 (Smith-Hurd 1992) (prohibiting search without a warrant, with some exceptions).

167. See *Principles on the Independence of the Judiciary*, *supra* note 72; *Draft Principles on the Independence of the Judiciary and on the Independence of the Legal Profession*, NOUVELLES ÉTUDES PÉNALES *passim* (1982). In certain legal systems, as was the case in the pre-perestroika Soviet Union, the independence of the court from local government and the ruling party may be just as much a concern as independence from the traditional arms of law enforcement. See Mark R. Beissinger, *The Party and the Rule of Law*, 28 COLUM. J. TRANSNAT'L L. 41, 50-61 (1989); Fali S. Nariman, *Judges & Lawyers in the USSR: Changing Perceptions*, INT'L COMMISSION OF JURISTS 53, 54 (1989); John Quigley, *Law Reform and the Soviet Courts*, 28 COLUM. J. TRANSNAT'L L. 59, 66-69 (1989).

168. ICCPR, *supra* note 4, pt. III, art. 14(1), at 54; *Fundamental Freedoms*, *supra* note 22, § 1, art. 6(1), 213 U.N.T.S. at 228; *Universal Declaration*, *supra* note 4, art. 10, at 73; Banjul, *supra* note 22, pt. I, ch. I, art. 7(1)(d), at 60; AMCHR, *supra* note 22, pt. I, ch. II, art. 8(1), at 4.

169. ICCPR, *supra* note 4, pt. III, art. 14(1), at 54; *Fundamental Freedoms*, *supra* note 22, § 1, art. 6(1), 213 U.N.T.S. at 228; AMCHR, *supra* note 22, pt. I, ch. II, art. 8(1), at 4.

military or established by executive decision, tend to be politically motivated and therefore the potential for lack of independence and impartiality is very high.

At least thirty-two national constitutions provide explicitly that a criminal trial be before an independent and impartial tribunal.<sup>170</sup> In another fifty-four constitutions, general provisions are made for an independent judiciary or court system without referring directly to the criminal trial.<sup>171</sup> In some of these countries, where both judges and lay assessors determine questions of law and fact, provision is made for the latter's independence as well.<sup>172</sup>

170. ANT. & BARB. CONST. ch. II, § 15(1); BAH. CONST. ch. III, art. 20(1); BANGL. CONST. pt. III, art. 35(3); BARB. CONST. ch. III, § 18(1); BELIZE CONST. ch. II, § 6(2); BOL. CONST. pt. 2, tit. 2, art. 117; BOTS. CONST. ch. II, § 10(1); CAN. CONST. pt. I, § 11(D); DOMINICA CONST. ch. I, § 8(1); FIJI CONST. ch. II, § 11(1); GAM. CONST. ch. III, § 20(1); GREN. CONST. ch. I, § 8(1); GUY. CONST. pt. II, tit. I, art. 144(1); HUNG. CONST. ch. XII, § 57(1); JAM. CONST. ch. III, § 20(1); JAPAN CONST. ch. III, art. 37; KENYA CONST. ch. V, § 77(1); KIRIBATI CONST. ch. II, § 10(1); MALTA CONST. ch. IV, § 39(1); MAURITIUS CONST. ch. II, § 10(1); NAMIB. CONST. ch. III, art. 12(1)(a); NAURU CONST. pt. II, § 10(2); NIG. CONST. ch. II, § 18(2)(d); PAPUA N.G. CONST. pt. III, (3)(B), § 37(3); ST. CHRIS.-NEVIS CONST. ch. II, § 10(1); SIERRA LEONE CONST. ch. III, § 23(1); SOLOM. IS. CONST. ch. II, § 10(1); SPAIN CONST. tit. VI, art. 117; TRIN. & TOBAGO CONST. ch. I, pt. I, § 5(2)(f)(ii); TUVALU CONST. pt. II(1), § 22(2); UGANDA CONST. ch. III, § 15(1); ZAMBIA CONST. pt. III, § 20(1); ZIMB. CONST. ch. III, § 18(2).

171. AFG. CONST. ch. VIII, art. 107; ALB. CONST. pt. II, ch. V, art. 103; ALG. CONST. tit. II, ch. III, art. 129; ANGOLA CONST. pt. III, ch. VII, art. 76; AUS. CONST. ch. III(B), art. 87(1); BENIN CONST. ch. VII, art. 109; CAPE VERDE CONST. tit. III, ch. IV, art. 85(2); P.R.C. CONST. ch. III, § VII, art. 126; COMOROS CONST. pmbl., para. 3; *id.* at tit. IV, art. 43; CÔTE D'IVOIRE CONST. tit. VII, art. 59; CUBA CONST. ch. X, art. 125; ECUADOR CONST. pt. II, tit. III, § I, art. 96; EGYPT CONST. pt. IV, art. 65; *id.* at pt. V, ch. IV, art. 165; ETH. CONST. pt. III, ch. XIV, art. 104; FIN. CONST. ch. I, art. 2; GABON CONST. tit. VII, art. 57; F.R.G. CONST. ch. IX, art. 97; GUAT. CONST. tit. IV, ch. IV, § 1, arts. 204, 205; GUINEA CONST. tit. IX, art. 82; HOND. CONST. tit. V, ch. XII, arts. 303, 311; IRAQ CONST. ch. IV, § IV, art. 60(a); IR. CONST. art. 35(2); ITALY CONST. pt. II, tit. IV, § 1, arts. 104, 108; JORDAN CONST. ch. VI, § 97; KOREA (DEMOCRATIC PEOPLE'S REPUBLIC OF) CONST. ch. X, art. 140; KOREA (REPUBLIC OF) CONST. ch. V, art. 101; KUWAIT CONST. pt. IV, ch. V, arts. 162, 163; LIECH. CONST. ch. VII(D), art. 99; LIBYA CONST. ch. II, art. 28; MADAG. CONST. tit. VII, art. 83; MALI CONST. tit. VIII, art. 65; MONACO CONST. tit. X, art. 88; MONG. CONST. ch. III(IV), art. 49(1); MOROCCO CONST. tit. 7, art. 80; MOZAM. CONST. pt. III, ch. IV, art. 73; PAK. CONST. pmbl.; PARA. CONST. ch. IX, art. 199; PERU CONST. tit. IV, ch. IX, arts. 233(2), 242(1); POL. CONST. ch. VII, art. 62; PORT. CONST. pt. III, § V, ch. I, art. 206; QATAR CONST. pt. IV, ch. V, art. 72; ROM. CONST. tit. III, ch. VI, § 1, art. 123(2); RWANDA CONST. ch. III(4), art. 81; SEN. CONST. tit. VII, art. 80; SRI LANKA CONST. pmbl.; SUDAN CONST. pt. VIII, § 122(2); SWAZ. CONST. ch. II, § 10(1); SYRIA CONST. ch. III, pt. I, arts. 131, 133(1); TAIWAN CONST. ch. VII, art. 80; THAIL. CONST. ch. VIII, § 173; TUNIS. CONST. ch. IV, art. 65; TURK. CONST. pt. I, ch. IX, art. 9; *id.* at pt. III, ch. I(A), art. 138; VIETNAM CONST. ch. 10, art. 131; YEMEN CONST. tit. IV, art. 120.

172. See, e.g., ETH. CONST. pt. III, ch. XIV, art. 104; MADAG. CONST. tit. VII(1), art. 83; PERU CONST. tit. IV, ch. IX, arts. 233(2), 242(1); VIETNAM CONST. ch. 10, art. 131. The United States Constitution guarantees in explicit terms only the impartiality of the jury. U.S. CONST. amend. VI.

c. *The right to have procedures established by law.* This right ensures that procedures which govern the criminal trial are established by law prior to the commission of the acts which are the subject of the adjudication. The right thus parallels two related concepts, that substantive crimes and punishments must be enacted before the commission of an offense<sup>173</sup> and that the criminal tribunal must be "established by law."<sup>174</sup> The historic precedent for the right to have procedures established by law is the Magna Carta, which declared that "no freeman shall be taken or imprisoned . . . except . . . by the law of the land."<sup>175</sup> The common law concept of due process of law, as understood in the Courts of Common Pleas up until the 1600s, referred to procedural laws in existence prior to the trial.<sup>176</sup> The right serves therefore to protect the accused against the establishment of extraordinary tribunals with summary or expedited procedures.

This procedural right is actually a conceptual framework for a given approach to the conduct of legal proceedings and is guaranteed in four of the surveyed instruments. Because of its conceptual nature, it is referred to in different, albeit equivalent, terms. The Universal Declaration, the ICCPR, and the Fundamental Freedoms provide that a person must be found guilty "according to law,"<sup>177</sup> whereas the AMCHR uses the phrase "with due guarantees."<sup>178</sup> The Banjul Charter provides that "no one may be deprived of his freedom except for reasons and conditions previously laid down by law."<sup>179</sup>

Language guaranteeing procedures established by law in the criminal process is found in ninety-two national constitutions.<sup>180</sup>

173. See *infra* text accompanying notes 263-72.

174. See *supra* text accompanying note 169.

175. MAGNA CARTA, *supra* note 83, ch. 39, at 43.

176. On the original meaning of due process of law in the common law of England as it relates to criminal proceedings, see THEODORE F.T. PLUCKNETT, A CONCISE HISTORY OF THE COMMON LAW 338 (1936). For the criminal procedure implications, see Bassiouni, *supra* note 134, 655-76.

177. ICCPR, *supra* note 4, pt. III, art. 14(2), at 54; *Fundamental Freedoms*, *supra* note 22, art. 6(2), 213 U.N.T.S. at 228; *Universal Declaration*, *supra* note 4, art. 11(1), at 73.

178. AMCHR, *supra* note 22, pt. I, ch. II, art. 8, at 4.

179. Banjul, *supra* note 22, pt. I, ch. I, art. 6, at 60. The Banjul Charter provides protection against *ex post facto* convictions and punishments in pt. I, ch. I, art. 7(2), at 60.

180. AFG. CONST. ch. III, art. 41; ALB. CONST. pt. II, ch. V, art. 101; ALG. CONST. tit. I, ch. IV, art. 42; ANGOLA CONST. pt. II, art. 23; ANT. & BARB. CONST. ch. II, § 5(1); ARG. CONST. pt. I, art. 18; BAH. CONST. ch. III, art. 19(1); BANGL. CONST. pt. III, § 31; BARB. CONST. ch. III, § 13(1); BELG. CONST. tit. II, arts. 7, 9; BELIZE CONST. ch. II, § 5(1); BOTS. CONST. ch. II, § 10(1); BRAZ. CONST. tit. II, ch. I, art. 5 (LIV); BULG. CONST. ch. II, arts. 30, 31; CAMBODIA CONST. ch. III, art. 35; *id.* at ch. VIII, art. 81; CAMEROON CONST. pmb., para. 12; CAN. CONST. pt. I, §§ 7, 11; CAPE VERDE CONST. tit. II, art. 31(2); CHILE CONST. ch. III, art. 19(3), 19(7)(B);

Typically the right is designed to protect against a crime or conviction and all forms of penal sanctions which are not authorized by law and arrived at in accordance with procedures pre-established by law.<sup>181</sup> Several constitutions are less explicit and provide only for the deprivation of freedom when it occurs "under terms of the law,"<sup>182</sup> "in accordance with the law,"<sup>183</sup> "by virtue of law,"<sup>184</sup> as "determined by law,"<sup>185</sup> or pursuant to "guidelines laid down by the law."<sup>186</sup> Much of the confusion in terminology may, however, be due to the difficulty of translating the concept of due process of law in different languages. The very term "due process of law," as found in

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COLOM. CONST. tit. II, ch. I, art. 29; CONGO CONST. tit. II, art. 7; CUBA CONST. ch. VI, arts. 57, 58; DEN. CONST. pt. VII, art. 71(2); DOMINICA CONST. ch. I, § 3(1); DOM. REP. CONST. tit. II, § I, art. 8(2)(J); ECUADOR CONST. pt. I, tit. II, § I, art. 19(17)(E); EGYPT CONST. pt. IV, art. 70; *id.* at pt. V, ch. I, arts. 165, 166; FIJI CONST. ch. II, § 6(1); GAM. CONST. ch. III, § 15(1); F.R.G. CONST. ch. IX, art. 103(1); GREECE CONST. pt. II, arts. 5(3), 6; GREN. CONST. ch. I, § 3(1); GUAT. CONST. tit. II, ch. I, art. 6; GUY. CONST. pt. II, tit. I, art. 139(1); HOND. CONST. tit. IV, ch. I, art. 182; HUNG. CONST. ch. XII, § 55(1); INDIA CONST. pt. III, art. 21; IRAQ CONST. ch. III, art. 21(B); IR. CONST. art. 38(1); ITALY CONST. pt. I, tit. I, art. 13; JAM. CONST. ch. III, § 15(1); JAPAN CONST. ch. III, art. 31; JORDAN CONST. ch. II, § 8; KENYA CONST. ch. V, § 77(1); KIRIBATI CONST. ch. II, § 5(1); KOREA (REPUBLIC OF) CONST. ch. II, arts. 12(1), 27(1); KUWAIT CONST. pt. III, art. 32; LIBER. CONST. ch. III, art. 20(A); LUX. CONST. ch. II, arts. 12, 14; MADAG. CONST. tit. VI, art. 42; MALAY. CONST. pt. II, art. 5(1); MALI CONST. tit. II, art. 8; MALTA CONST. ch. IV, § 34(1); MARITIMUS CONST. ch. II, § 5(1); MEX. CONST. tit. I, ch. I, art. 14; MONACO CONST. tit. III, arts. 19, 20; MOROCCO CONST. tit. I, art. 10; MOZAM. CONST. pt. II, art. 35; NAMIB. CONST. ch. III, art. 12(1)(D); NAURU CONST. pt. II, §§ 5(1), 10(3)(A); NEPAL CONST. pt. III, § 11(1); NICAR. CONST. tit. IV, ch. I, art. 33; NIGER. CONST. tit. XII, art. 84; NIG. CONST. ch. IV, § 34(1); NOR. CONST. pt. E, art. 94; PAK. CONST. pt. I, art. 4(2)(A); *id.* at pt. II, art. 9; PAPUA N.G. CONST. pt. III (3)(B), § 37(3); PARA. CONST. ch. V, art. 61 (trial based upon a law enacted prior to commission); PERU CONST. tit. I, ch. I, art. 2(20); PHIL. CONST. art. IV, §§ 3, 19; ROM. CONST. tit. II, ch. II, art. 23; ST. CHRIS.-NEVIS CONST. ch. II, § 5(1); SIERRA LEONE CONST. ch. III, § 17(1); SING. CONST. pt. IV, art. 9(1); SOLOM. IS. CONST. ch. II, § 5(1); SOMAL. CONST. ch. II, art. 26(2); SPAIN CONST. ch. II, § 1, art. 17(1); SRI LANKA CONST. ch. III, § 13(4); SUDAN CONST. pt. III, § 21; SURIN. CONST. ch. V, art. 16(2); SWAZ. CONST. ch. II, § 5(1); TAIWAN CONST. ch. II, art. 8; TANZ. CONST. § 3, 13(6)(a); TONGA CONST. pt. I, §§ 10, 14; TRIN. & TOBAGO CONST. ch. I, pt. I, § 4(a); TUNIS CONST. ch. I, art. 12; U.A.E. CONST. pt. III, art. 26; UGANDA CONST. ch. II, art. 10(1); U.S. CONST. amends. V, XIV; VENEZ. CONST. tit. III, ch. III, art. 60(5); ZAMBIA CONST. pt. III, art. 15(1); ZIMB. CONST. ch. VI, § 18(3)(D).

181. *See, e.g.*, ANT. & BARB. CONST. ch. II, § 5(1); BAH. CONST. ch. III, art. 19(1); DOMINICA CONST. ch. I, § 3(1); FIJI CONST. ch. II, § 6(1); GAM. CONST. ch. III, art. 15(1); GREN. CONST. ch. I, § 3(1); GUY. CONST. pt. II, tit. I, art. 139(1); JAM. CONST. ch. III, § 15(1); KIRIBATI CONST. ch. II, § 5(1); MALTA CONST. ch. IV, § 34(1); MAURITIUS CONST. ch. II, § 5(1); ST. CHRIS.-NEVIS CONST. ch. II, § 5(1); SIERRA LEONE CONST. ch. III, § 17(1); SOLOM. IS. CONST. ch. II, § 5(1).

182. *See, e.g.*, ANGOLA CONST. pt. II, art. 23.

183. *See, e.g.*, F.R.G. CONST. ch. IX, art. 103(1); SING. CONST. pt. IV, art. 9(1); SUDAN CONST. pt. III, § 21.

184. *See, e.g.*, KUWAIT CONST. pt. III, art. 32; MALI CONST. tit. II, art. 8.

185. *See, e.g.*, SURIN. CONST. ch. V, art. 16(2).

186. *See, e.g.*, TANZ. CONST. § 3, art. 15(2)(a).

the Fifth and Fourteenth Amendments of the United States Constitution is not, as stated earlier, an explicit right but rather a conceptual approach to the conduct of criminal proceedings.<sup>187</sup> Thus, more than any other guarantee or right discussed herein, it is of such a level of generality that its concordance in comparative research can be achieved by a particularized methodology. Such a methodology would necessarily start by identifying the specific rights (as is done here, but with more particularity) and then tracing the application of these rights, essentially through judicial decisions, in the different families of legal systems. Because the Anglo-American adversary-accusatory model is different from the inquisitorial-based model, and both are different from the Islamic model,<sup>188</sup> the occurrence, application, and effectiveness of these rights will differ in the various systems.

d. *The right to a speedy trial.* This right is part of the concept of due process, but it has also been recognized as a separate, identifiable right; therefore, it is discussed separately, *infra*.

e. *The right to a public hearing.* The right to a public hearing is designed to protect the accused from secret trials, as well as to foster public trust in the administration of justice by opening the courts and legal proceedings to public scrutiny. This right is guaranteed in four of the surveyed instruments.<sup>189</sup> Although the right is expressed unconditionally in the Universal Declaration<sup>190</sup> and the Sixth Amendment of the United States Constitution,<sup>191</sup> it is subject to certain exceptions. The AMCHR provides for a general exception "as may be necessary to protect the interests of justice."<sup>192</sup> The ICCPR and the Fundamental Freedoms, on the other hand, enumerate specific exceptions:

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187. U.S. CONST. amends. V, XIV.

188. See THE CRIMINAL JUSTICE SYSTEM OF THE USSR (M. Cherif Bassiouni & V.M. Savitski eds., 1979); THE ISLAMIC CRIMINAL JUSTICE SYSTEM (M. Cherif Bassiouni ed., 1982); M. Cherif Bassiouni, *A Survey of the Major Criminal Justice Systems in the World*, in HANDBOOK OF CRIMINOLOGY 527 (Daniel Glaser ed., 1974).

189. ICCPR, *supra* note 4, pt. III, art. 14(1), at 54; *Fundamental Freedoms*, *supra* note 22, § 1, art. 6(1), 213 U.N.T.S. at 228; *Universal Declaration*, *supra* note 4, art. 10, at 73; AMCHR, *supra* note 22, pt. I, ch. II, art. 8(5), at 4.

190. *Universal Declaration*, *supra* note 4, art. 10, at 73.

191. U.S. CONST. amend. VI.

192. AMCHR, *supra* note 22, pt. I, ch. II, art. 8(5), at 4.



[T]he press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.<sup>193</sup>

The right to a public hearing is guaranteed in no less than seventy-two of the national constitutions surveyed,<sup>194</sup> often with the explicit exceptions found in the Fundamental Freedoms and the ICCPR.<sup>195</sup> In many constitutions the provision guaranteeing public hearings is not among the list of "citizen's rights and guarantees," but is included in the section of the constitution dealing with the judiciary,

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193. *Fundamental Freedoms*, *supra* note 22, § 1, art. 6(1), 213 U.N.T.S. at 228; *see also* ICCPR, *supra* note 4, pt. III, art. 14(1), at 54 (providing for the same exceptions).

194. AFG. CONST. ch. VIII, art. 113; ALB. CONST. pt. II, ch. V, art. 102; ANT. & BARB. CONST. ch. II, § 15(9); AUS. CONST. ch. III, art. 90; BANGL. CONST. pt. III, § 35 (3); BARB. CONST. ch. III, § 18(9); BELG. CONST. tit. III, ch. III, art. 96; BELIZE CONST. ch. II, § 6(8); BENIN CONST. ch. VII, art. 113; BOTS. CONST. ch. II, § 10(10); BULG. CONST. ch. VI, art. 121(3); CAMBODIA CONST. ch. VIII, art. 83; CAN. CONST. pt. I, § 11(D); P.R.C. CONST. ch. III, § VII, art. 125; COMOROS CONST. tit. IV, art. 43; DEN. CONST. pt. VI, § 65(1); DOMINICA CONST. ch. I, § 8(10); DOM. REP. CONST. tit. II, § I, art. 8(2)(j); ECUADOR CONST. pt. II, tit. III, § I, art. 95; EGYPT CONST. pt. V, ch. IV, art. 169; EQ. GUINEA CONST. tit. VIII, ch. IV, art. 144; ETH. CONST. ch. XIV, art. 106; FIJI CONST. ch. II, § 11(9); GAM. CONST. ch. III, § 20(9); GREN. CONST. ch. I, § 8(9); GUINEA CONST. tit. IX, art. 85; GUY. CONST. pt. II, tit. I, art. 144(9); HUNG. CONST. ch. XII, § 57(1); IRAQ CONST. ch. III, art. 20(c); IR. CONST. art. 34(1); JAM. CONST. ch. III, § 20(3); JAPAN CONST. ch. III, art. 37; *id.* at ch. VI, art. 82; JORDAN CONST. ch. VI, § 101(ii); KENYA CONST. ch. V, § 77(10); KIRIBATI CONST. ch. II, § 10 (9); KOREA (DEMOCRATIC PEOPLE'S REPUBLIC OF) CONST. ch. X, art. 138; KOREA (REPUBLIC OF) CONST. ch. II, art. 27 (3); KUWAIT CONST. pt. IV, ch. V, art. 165; LUX. CONST. ch. VI, art. 88; MALTA CONST. ch. IV, § 39(3); MAURITIUS CONST. ch. II, § 10(9); MEX. CONST. tit. I, ch. I, art. 20 (VI); MYANMAR CONST. ch. VII, art. 101(F); NAMIB. CONST. ch. III, art. 12(1)(a); NAURU CONST. pt. II, § 10(10); NETH. CONST. ch. VI, art. 121; NICAR. CONST. tit. IV, ch. I, art. 34(10); NIG. CONST. ch. IV, § 35(12); PAPUA N.G. CONST. pt. III (3)(B), § 37(12); PERU CONST. tit. IV, ch. IX, art. 233(3); PHIL. CONST. art. IV (19); PORT. CONST. pt. III, § V, ch. I, art. 209; ROM. CONST. tit. II, ch. VI, § 1, art. 126; RWANDA CONST. ch. III(4), art. 88; ST. CHRIS.-NEVIS CONST. ch. II, § 10(10); SIERRA LEONE CONST. ch. III, § 22(3); SOLOM. IS. CONST. ch. II, § 10(9); SOMAL. CONST. ch. IV, § 2, art. 99(1); SPAIN CONST. tit. VII, art. 120(1); SRI LANKA CONST. ch. XV, § 106(1); SURIN. CONST. ch. XV, § 2, art. 136(2); SWAZ. CONST. ch. II, § 10(10); SWED. CONST. ch. II, art. 11; TURK. CONST. pt. III, § (D), art. 141; TUVALU CONST. pt. II(3)(A), § 22(12); UGANDA CONST. ch. III, § 15(10); U.S. CONST. amend. VI; VIETNAM CONST. ch. 10, art. 133; YEMEN CONST. tit. IV, art. 125; ZAIRE CONST. tit. II, art. 16; ZAMBIA CONST. pt. III, § 20(10); ZIMB. CONST. ch. III, § 18(10).

195. *See, e.g.*, JORDAN CONST. ch. VI, § 101(ii); NAMIB. CONST. ch. III, art. 12(1)(A); NICAR. CONST. tit. IV, ch. I, art. 34(10); NIG. CONST. ch. IV, § 35(12); RWANDA CONST. ch. III(4), art. 88.

and refers to all court proceedings, not just those involving criminal cases.<sup>196</sup>

The right to a public hearing, unlike other procedural due process rights, involves more than the interests of the defendant. There are additional components such as the public's right to know and the integrity of the judicial process. Thus, a careful balancing of these sometimes competing interests requires specific guidelines for court proceedings which cannot be found in constitutions.<sup>197</sup>

f. *The right to be informed of the charges.* The right to be informed of the charges technically applies to notice of criminal charges already proffered by the accusatory body,<sup>198</sup> and is protected in four of the surveyed instruments.<sup>199</sup> The ICCPR, the Fundamental Freedoms, the AMCHR, and the BOP have further extended the right of notice to the stage of detention and require notice of the cause of arrest as well. Thus, the right as articulated in these instruments is designed to protect against arbitrary arrests and prosecutions and to enable the arrested or accused person to prepare a defense to the charge or an argument against his or her detention.<sup>200</sup> This right is essential to the effective preparation of a defense in any criminal case. It is even more important that notice of the charges be made in a timely manner to allow for sufficient preparation of the defense, and that the charges not be substantially altered shortly before trial commences in order to avoid undue surprise and prejudice to the defense. It is equally important that criminal charges not be changed after a trial commences if the change increases the severity of the charge or alters its nature. The severity of the charge can be decreased unless it would be so prejudicial to the defendant that he or she could not conduct an effective defense. These technicalities are

196. See, e.g., ALB. CONST. pt. II, ch. V, art. 102; AUS. CONST. ch. III, art. 90; COMOROS CONST. tit. IV, art. 43; ECUADOR CONST. pt. II, tit. III, § I, art. 95.

197. See, e.g., AMERICAN BAR ASSOCIATION, ABA STANDARDS FOR CRIMINAL JUSTICE, FAIR TRIAL AND FREE PRESS (1992) (outlining standards of conduct for legal professionals during criminal cases).

198. See, e.g., U.S. CONST. amend. VI (one must be informed of the "nature and cause of the accusation").

199. ICCPR, *supra* note 4, pt. III, arts. 9(2), 14(3)(a), at 54; *Fundamental Freedoms*, *supra* note 22, § 1, arts. 5(2), 6(3)(a), 213 U.N.T.S. at 226, 228; Banjul, *supra* note 22, pt. I, ch. 1, art. 6, at 60; AMCHR, *supra* note 22, pt. I, ch. II, arts. 7(4), 8(2)(b), at 3, 4.

200. See *supra* text accompanying notes 106-17 (discussing the right to be free from arbitrary arrest and detention); *supra* text accompanying notes 151-58 (discussing the right to defense).

not covered by constitutional tests and are usually found in codes of criminal procedure and in judicial decisions.

The right to be informed of the charges is protected in at least forty-seven national constitutions.<sup>201</sup> In many of these, the right to notice also applies at the time of detention as to the cause of arrest, although this is not necessarily binding as to subsequent formal charges for which the defendant may stand trial.

g. *The right to equality of arms.* The right to equality of arms is fundamental to the adversarial nature of modern criminal proceedings. In earlier inquisitorial systems, defense counsel often was not allowed to participate in the actual trial. The human rights instruments examined evince a definite move towards adversarial criminal procedures and away from the inquisitorial mode.<sup>202</sup> The right to equality of arms is guaranteed in three of the instruments surveyed, namely the ICCPR, the AMCHR, and the Fundamental Freedoms.<sup>203</sup> Both the ICCPR and the Fundamental Freedoms express the right to equality of arms<sup>204</sup> in conjunction with the rights of confrontation and compulsory process.<sup>205</sup> Five of the instruments surveyed also

201. ANT. & BARB. CONST. ch. II, § 15(2)(B); BAH. CONST. ch. III, art. 20(2)(B); BANGL. CONST. pt. III, § 33 (1); BARB. CONST. ch. III, § 18(2)(B); BELIZE CONST. ch. II, § 6(3)(B); BOTS. CONST. ch. II, § 10(2)(B); CAN. CONST. pt. I, §§ 10(A), 11(A); DOMINICA CONST. ch. I, § 8(2)(B); ECUADOR CONST. pt. I, tit. II, § 1, art. 19(17)(i); EGYPT CONST. pt. IV, art. 71; FIJI CONST. ch. II, § 11(2)(B); GAM. CONST. ch. III, § 20(2)(B); GREN. CONST. ch. I, § 8(2)(B); GUY. CONST. pt. II, tit. I, art. 144(2)(B); JAM. CONST. ch. III, § 20(6)(A); KENYA CONST. ch. V, § 77(2)(B); KIRIBATI CONST. ch. II, § 10(2)(B); LIBER. CONST. ch. III, art. 21(c); MALAY. CONST. pt. II, art. 5(3); MALTA CONST. ch. IV, § 39(6)(A); MAURITIUS CONST. ch. II, § 10(2)(B); MEX. CONST. tit. I, ch. I, art. 20 (III); NAURU CONST. pt. II, § 10(3)(B); NICAR. CONST. tit. IV, ch. I, art. 33(2)(1); NIG. CONST. ch. IV, § 35(5)(A); PAK. CONST. pt. II, ch. I, art. 10(1); PAPUA N.G. CONST. pt. III (3)(B), § 37(4)(B); PERU CONST. tit. I, ch. I, art. 2(20)(H); PHIL. CONST. art. IV (19); PORT. CONST. pt. I, § II, ch. I, art. 27(4); ROM. CONST. tit. II, ch. II, § 1, art. 23(5); ST. CHRIS.-NEVIS CONST. ch. II, § 10(2)(B); SIERRA LEONE CONST. ch. III, § 17(2); SING. CONST. pt. IV, § 9(3); SOLOM. IS. CONST. ch. II, § 10(2)(B); SOMAL. CONST. ch. II, § 26(4); SPAIN CONST. tit. I, ch. II, arts. 17(3), 24(2); SWAZ. CONST. ch. II, §§ 5(2), 10(2)(B); TONGA CONST. pt. I, § 11; TRIN. & TOBAGO CONST. ch. I, pt. I, § 5(2)(c)(i); TURK. CONST. pt. II, ch. II(3), art. 19; TUVALU CONST. pt. II(3)(A), § 22(3)(B); UGANDA CONST. ch. II, § 15(2)(B); U.S. CONST. amend. VI; VENEZ. CONST. ch. II, art. 60(5); ZAMBIA CONST. pt. III, § 20(2)(B); ZIMB. CONST. ch. III, § 18(3)(B).

202. See *supra* note 141.

203. ICCPR, *supra* note 4, pt. III, art. 14(3)(e), at 54; *Fundamental Freedoms*, *supra* note 22, § 1, art. 6(3)(d), 213 U.N.T.S. at 228; AMCHR, *supra* note 22, pt. I, ch. II, art. 8(2)(f), at 4.

204. "To examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him." ICCPR, *supra* note 4, pt. III, art. 14(3)(e), at 54; see *Fundamental Freedoms*, *supra* note 22, § 1, art. 6(3)(d), 213 U.N.T.S. at 228 (using approximately the same language).

205. See *infra* text accompanying notes 210-13 (discussing the right to compulsory process).

require adequate time and facilities for the preparation of the defense.<sup>206</sup>

The right to equality of arms,<sup>207</sup> as expressed in the ICCPR and the Fundamental Freedoms, is also noted in more than twenty-seven national constitutions.<sup>208</sup> In these constitutions, the specific language of the right incorporates the guarantee in a cluster of rights, which also include the right to adequate time and facilities for preparation of the defense.<sup>209</sup> In large part it can be said that this right is the European counterpart to the common law right of due process. In an inquisitorial system, the need to "equalize arms" between defense and prosecution is critical, while the common law's due process approach inherently presupposes that both sides will be given equality in procedural opportunities to advocate their respective opposing positions. However, if in the due process system the scales of relatively equal procedural opportunities tip too much against the defense, then the right of equality of arms can be invoked to redress such an imbalance.

h. *The right to assistance of counsel.* This right is part of the due process cluster of rights, but like the right to a speedy trial, it has been recognized as a separate fundamental right. Consequently, it is discussed separately, *infra*.

i. *The right to compulsory process.* The right to compulsory process guarantees the help of the court in obtaining the testimony of

206. ICCPR, *supra* note 4, pt. III, art. 14(3)(b), at 54; *Fundamental Freedoms*, *supra* note 22, § 1, art. 6(3)(b), 213 U.N.T.S. at 228; BOP, *supra* note 22, princ. 18, at 299; Banjul, *supra* note 22, pt. I, ch. I, art. 7(1)(c), at 60; AMCHR, *supra* note 22, pt. I, ch. II, art. 8(2)(c), (d), at 4.

207. This phrase itself appears in none of the instruments or national constitutions examined.

208. ANT. & BARB. CONST. ch. II, § 15(2)(e); BAH. CONST. ch. III, § 20(2)(e); BARB. CONST. ch. III, § 18(2)(e); BELIZE CONST. ch. II, § 6(3)(E); BOTS. CONST. ch. II, § 10(2)(e); DOMINICA CONST. ch. I, § 8(2)(e); FIJI CONST. ch. II, § 11(2)(e); GAM. CONST. ch. III, § 202(e); GREN. CONST. ch. I, § 8(2)(e); GUY. CONST. pt. II, tit. I, art. 144(2)(e); JAM. CONST. ch. III, § 20 (6)(d); JAPAN CONST. ch. III, art. 37; KENYA CONST. ch. V, § 77(2)(e); KIRIBATI CONST. ch. II, § 10(2)(e); MALTA CONST. ch. IV, § 39(6)(d); MAURITIUS CONST. ch. II, § 10(2)(e); NAURU CONST. pt. II, § 10(3)(f); NIG. CONST. ch. IV, § 35(5)(d); PAPUA N.G. CONST. pt. III(3)(B), § 37(4)(f); ST. CHRIS.-NEVIS CONST. ch. II, § 10(2)(e); SIERRA LEONE CONST. ch. III, § 23(5)(D); SOLOM. IS. CONST. ch. II, § 10(2)(e); SWAZ. CONST. ch. II, §§ 10(2)(c, e); TUVALU CONST. pt. II(3)(A), § 22(3)(f)(ii); UGANDA CONST. ch. III, § 15(2)(e); ZAMBIA CONST. pt. III, § 20(2)(e); ZIMB. CONST. ch. II, § 18(3)(e).

209. See, e.g., ANT. & BARB. CONST. ch. II, § 15(2)(e); ECUADOR CONST. pt. I, tit. II, § 1, art. 19(17)(e); JAPAN CONST. ch. III, art. 37; LIBER. CONST. ch. III, art. 21(h); MEX. CONST. tit. I, ch. I, art. 20(V); NAMIB. CONST. ch. 3, art. 12(1)(e); PHIL. CONST. art. IV, § 19; U.S. CONST. amend. VI.

witnesses and the production of other evidence, and as such is integrally related to the concept of equality of arms. This right is protected in three of the human rights instruments examined<sup>210</sup> and in at least thirty-four national constitutions.<sup>211</sup> However, this right is largely neglected even though its importance to a defense is immeasurable. This is particularly so in cases where the evidence may be located in foreign countries. Governments have the benefit of mutual legal assistance treaties,<sup>212</sup> but individuals do not. Private citizens are thus unable to secure evidence needed for their defense<sup>213</sup> and are placed in a position which clearly violates the concept of equality of arms as discussed above.

j. *The right to be tried in one's own presence.* The right to be present at one's own trial is an important element of the right to defend oneself against criminal charges. It is also related to the assumption that the ability of the accused to face his or her judge and accusers adds a dimension of credibility to the proceedings and enhances the ascertainment of the truth. Of the instruments surveyed, the right is guaranteed only by the ICCPR.<sup>214</sup> Although nearly twenty-five national constitutions guarantee the right,<sup>215</sup> there are

210. ICCPR, *supra* note 4, pt. III, art. 14(3)(c), at 54; *Fundamental Freedoms*, *supra* note 22, § 1, art. 6(3)(d), 213 U.N.T.S. at 228; AMCHR, *supra* note 22, pt. I, ch. II, art. 8(2)(f), at 4.

211. The subsection of each of the twenty-seven constitutions which guarantees equality of arms also guarantees the right of compulsory process. See *supra* note 208. Seven additional constitutions guarantee this right separately. ECUADOR CONST. pt. I, tit. II, § 1, art. 19(17)(e); JAPAN CONST. ch. III, art. 37; LIBER. CONST. ch. III, art. 21(h); MEX. CONST. tit. I, ch. I, art. 20(V); NAMIB. CONST. ch. III, art. 12(1)(d) (guaranteeing only opportunity to call witnesses); PHIL. CONST. art. IV, § 19; U.S. CONST. amend. VI.

212. See 2 EUROPEAN INTER-STATE CO-OPERATION IN CRIMINAL MATTERS 7-149 (Ekkehart Müller-Rappard & M. Cherif Bassiouni eds., 2d ed. 1991); M. Cherif Bassiouni, *Policy Considerations on Inter-state Cooperation in Criminal Matters*, in PRINCIPLES AND PROCEDURES FOR A NEW TRANSNATIONAL CRIMINAL LAW (Albin Esser & Otto Lagodny eds., 1992).

213. For the European system, see Ekkehart Müller-Rappard, *The European State*, in 2 INTERNATIONAL CRIMINAL LAW 95 (M. Cherif Bassiouni ed., 1986). For the United States system, see Alan Ellis and Robert L. Pisani, *The United States Treaties on Mutual Assistance in Criminal Matters*, in 2 INTERNATIONAL CRIMINAL LAW, *supra*, at 151.

214. ICCPR, *supra* note 4, pt. III, art. 14(3)(d), at 54.

215. ALB. CONST. pt. I, ch. II, art. 56; ANT. & BARB. CONST. ch. II, § 15(2); BAH. CONST. ch. III, § 20(2); BARB. CONST. ch. III, § 18(2); BELIZE CONST. ch. II, § 6(3); BOTS. CONST. ch. 11, § 10(2); DOMINICA CONST. ch. I, § 8(2); EQ. GUINEA CONST. tit. III, ch. IV, art. 38; FIJI CONST. ch. II, § 11(2); GAM. CONST. ch. III, § 20(2); GREN. CONST. ch. I, § 8(2); GUY. CONST. pt. 2, tit. 1, art. 144(2); KENYA CONST. ch. V, § 77(2); KIRIBATI CONST. ch. II, § 10(2); MALTA CONST. ch. IV, § 39(6); MAURITIUS CONST. ch. II, § 10(2); NAURU CONST. pt. II, art. 10(3); PAPUA N.G. CONST. pt. III, div. 3(B), art. 37(5); ST. CHRIS.-NEVIS CONST. ch. II, § 10(2); SOLOM. IS. CONST. ch. II, § 10(2); SWAZ. CONST. ch. II, § 10(2); TUVALU CONST. pt. II, div. 3(A), § 22(4);

exceptions for when the accused flees the jurisdiction during trial or after having been given notice of the charge,<sup>216</sup> or when the conduct of the accused renders the continuance of the proceedings in his or her presence impossible.<sup>217</sup> This right is also designed in part to avoid trial *in absentia* which is, in many respects, inherently unfair because it does not allow a defendant to effectively participate in the trial and present an adequate defense. Trials *in absentia* are prohibited by the ICCPR.<sup>218</sup> Some countries have found a way around the prohibition by having the *in absentia* conviction be subject to a trial *de novo* on the facts whenever an accused found guilty *in absentia* has been apprehended.

7. *The Right to Assistance of Counsel.* Representation by counsel at each important stage of criminal proceedings is a fundamental right of the defense and is paramount to the concept of due process. One of the assumptions on which this right is based is that the presence of effective counsel will deter and prevent abuses against the person arrested, charged, or prosecuted. Furthermore, having counsel present ensures that due process shall be followed. The general right to the assistance of counsel contains several components which are surveyed separately in this section. It is important to note that merely guaranteeing the right to counsel does not ensure that this right will be afforded at all stages of the criminal process, from detention through appeal.<sup>219</sup> The right to counsel is guaranteed in six of the instruments examined.<sup>220</sup> In addition, the ICCPR and the BOP require that an accused be informed of the right to counsel.<sup>221</sup>

More than sixty-five national constitutions guarantee the right to counsel in criminal proceedings. In some the right only exists with respect to trial proceedings, while in other constitutions the right to

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UGANDA CONST. ch. III, art. 15(2); ZAMBIA CONST. pt. III, art. 20(2); ZIMB. CONST. ch. III, § 18(3).

216. See, e.g., ANT. & BARB. CONST. ch. II, § 15(2)(i).

217. See, e.g., *id.* § 15(2)(ii); BAH. CONST. ch. III, § 20(2).

218. ICCPR, *supra* note 4, pt. III, art. 14(d), at 54.

219. See *infra* text accompanying notes 237-44.

220. ICCPR, *supra* note 4, pt. III, art. 14(3)(b), at 54; *Fundamental Freedoms*, *supra* note 22, § 1, art. 6(3)(c), 213 U.N.T.S. at 228; BOP, *supra* note 22, princ. 17, at 299; SMRTP, *supra* note 22, pt. II, art. 93, at 73; Banjul, *supra* note 22, pt. I, ch. I, art. 7(1)(c), at 60; AMCHR, *supra* note 22, pt. I, ch. II, art. 8(2)(d), at 4.

221. ICCPR, *supra* note 4, pt. III, art. 14(3)(d), at 54; BOP, *supra* note 22, princ. 17(1), at 299.

counsel exists at both detention and trial.<sup>222</sup> As stated above, the general right to a defense, when enunciated in a given constitution, may not explicitly guarantee the assistance of counsel at all stages of the trial and to all persons, particularly indigents, although in some constitutions the right to assistance of counsel is implicit in the right to a defense.<sup>223</sup> Indeed, the wording of Article 7(1)(c) of the Banjul Charter, which provides for "the right to defense, including the right to be defended by counsel . . ." is evocative of just such an interpretation.<sup>224</sup>

a. *The right to counsel of one's choice.* The ICCPR, the Fundamental Freedoms, the AMCHR, and the Banjul Charter extend the guarantee of counsel to include the right to counsel of one's own choosing.<sup>225</sup> Such a choice presumably allows an effective defense by

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222. ANT. & BARB. CONST. ch. II, §§ 15(2)(d), 5(3); BAH. CONST. ch. III, §§ 19(2), 19(5)(a), 20(2)(d); BANGL. CONST. pt. III, § 33(1); BARB. CONST. ch. III, §§ 13(2), (6)(e); BELIZE CONST. ch. II, § 5(2)(f); BOL. CONST. pt. I, tit. 2, art. 16; BOTS. CONST. ch. II, § 10(2)(d); BRAZ. CONST. art. 5 (LXIII); BULG. CONST. ch. 2, arts. 30(4), 56; CAN. CONST. pt. I, § 10(6); CHILE CONST. ch. III, § 19(3); ECUADOR CONST. pt. I, tit. II, § I, art. 19 (17)(e) (only at trial); EGYPT CONST. pt. IV, art. 67 (only at trial); ETH. CONST. pt. II, ch. VII, art. 45(3); FIJI CONST. ch. II, §§ 6(3), 11(2)(d); GAM. CONST. ch. III, § 20(2)(d); GREN. CONST. ch. I, § 8(2)(d); GUAT. CONST. tit. II, ch. I, arts. 14, 19(c); GUY. CONST. pt. II, tit. 1, arts. 139(3), 144(2)(d); HUNG. CONST. ch. XII, § 57(3); INDIA CONST. pt. III, art. 22(1); ITALY CONST. art. 24; JAM. CONST. ch. III, § 20(6)(c); JAPAN CONST. ch. II, art. 34; KENYA CONST. ch. IV, pt. 3, § 77(2)(d); KIRIBATI CONST. ch. II, § 10(2)(d); KOREA (REPUBLIC OF) CONST. ch. II, art. 12(4); LIBER. CONST. ch. III, art. 21(h)(i); MALAY. CONST. pt. II, art. 5(3); MALTA CONST. ch. IV, § 39(6)(c); MARITIUS CONST. ch. II, § 10(2)(d); MEX. CONST. ch. I, art. 20(IX); NAMIB. CONST. ch. III, art. 12(1)(e); NAURU CONST. pt. II, § 10(3)(e); NEPAL CONST. pt. II, § 14(5); NETH. CONST. ch. I, art. 18(1); NICAR. CONST. tit. IV, ch. I, art. 34(4); NIG. CONST. ch. IV, §§ 34(2), 35(5)(c) (before interrogation and trial); PAK. CONST. pt. II, ch. I, art. 10(1); PAPUA N.G. CONST. pt. III, div. 3, arts. 37(4)(e), 42(2)(b); PERU CONST. tit. I, ch. I, art. 2(20)(h); PHIL. CONST. art. IV, § 19; POL. CONST. ch. 7, art. 63(2); PORT. CONST. pt. I, § II, ch. I, art. 32(3); QATAR CONST. pt. III, art. 11 (only at trial); ROM. CONST. ch. II, art. 24(1)(2) (only at trial); ST. CHRIST-NEVIS CONST. ch. II, §§ 5(2), 10(2)(d); SÃO TOMÉ & PRÍNCIPE CONST. ch. III, art. 45; SIERRA LEONE CONST. ch. III, § 17(2)(b); SING. CONST. pt. IV, § 9(3); SOLOM. IS. CONST. ch. II, § 10(2)(d); SOMAL. CONST. ch. II, art. 32(2) (only at trial); SPAIN CONST. ch. II, arts. 17(3), 24(2); SRI LANKA CONST. ch. III, art. 13(3) (only at trial); SUDAN CONST. pt. III, § 28 (only at trial); SURIN. CONST. ch. V, art. 12(1) (only at trial); SWAZ. CONST. ch. II, § 10(2)(d); TRIN. & TOBAGO CONST. ch. I, pt. I, § 5(2)(c)(ii); TUVALU CONST. pt. II, div. 3, § 22(3)(e) (only at trial); UGANDA CONST. ch. III, § 15(2)(d) (only at trial); U.A.E. CONST. pt. 1, art. 28; U.S. CONST. amend. VI; ZAIRE CONST. tit. II, art. 16; ZAMBIA CONST. pt. III, art. 20(2)(d); ZIMB. CONST. ch. III, §§ 13(3), 18(3)(d).

223. See *supra* text accompanying notes 145-60. Note that some constitutions guarantee both the right to counsel and to a defense. See, e.g., NICAR. CONST. tit. IV, ch. I, art. 34(4), (5).

224. Banjul, *supra* note 22, pt. I, ch. I, art. 7(1)(c), at 60.

225. ICCPR, *supra* note 4, pt. III, art. 14(3)(d), at 54; *Fundamental Freedoms*, *supra* note 22, § I, art. 6(3)(c), 213 U.N.T.S. at 228; Banjul, *supra* note 22, pt. I, ch. I, art. 7(1)(c), at 60; AMCHR, *supra* note 22, pt. I, ch. II, art. 8(2)(d), at 4.

the accused, increases fairness in the proceedings, and promotes the public's confidence in the criminal justice system. Of the constitutions surveyed, forty-three guarantee the right to counsel of one's choosing.<sup>226</sup> Some extend the right to allow suspects to choose counsel immediately after detention.<sup>227</sup> This right has only been partially extended to indigents who are financially unable to retain their own counsel.<sup>228</sup> Many legal systems place the duty of assistance of counsel on the legal profession as a whole. Consequently, indigent defendants are represented by counsel appointed by the bar or by the bench, resulting in weak legal representation. In addition, this method certainly does not afford a person counsel of his or her own choosing.

b. *The right to appointment of counsel in case of indigency.* While an indigent accused may not have recourse to the counsel of his or her choice, the appointment of counsel is, at a minimum, necessary under the right to defense, the right to counsel, the right to a fair trial, and the right to equal protection under the law. This necessity is highlighted by the overwhelming number of criminal defendants who are unable to afford counsel. The ICCPR, the Fundamental Freedoms, the AMCHR, and the BOP all guarantee appointed counsel for the indigent,<sup>229</sup> as do twenty-four national constitutions.<sup>230</sup>

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226. ANT. & BARB. CONST. ch. II, §§ 5(3), 15(2)(d); BAH. CONST. ch. III, §§ 19(2), 20(2)(d); BANGL. CONST. pt. III, § 33(1); BARB. CONST. ch. III, §§ 13(2), 13(6)(e), 18(2)(d); BELIZE CONST. ch. II, §§ 5(2)(b), 6(3)(d); BOTS. CONST. ch. II, § 10(2)(d); DOMINICA CONST. ch. I, § 8(2)(d); FILI CONST. ch. II, §§ 6(3), 11(2)(d); GAM. CONST. ch. III, § 20(2)(d); GREN. CONST. ch. I, § 8(2)(d); GUY. CONST. pt. 2, tit. 1, arts. 139(3), 144(2)(d); INDIA CONST. pt. III, art. 22(1); JAM. CONST. ch. III, § 20(6)(c); KENYA CONST. ch. IV, pt. 3, § 77(2)(d); KIRIBATI CONST. ch. II, § 10(2)(d); KOREA (REPUBLIC OF) CONST. ch. II, art. 12(4); LIBER. CONST. ch. III, art. 21(c), (h), (i); MALAY. CONST. pt. II, art. 5(3); MALTA CONST. ch. IV, § 39(6)(c); MAURITIUS CONST. ch. II, §§ 5(3), 5(4)(d), 10(2)(d); MEX. CONST. tit. I, ch. I, art. 20(IX); NAMIB. CONST. ch. 3, art. 12(1)(e); NAURU CONST. pt. II, § 10(3)(e); NEPAL CONST. pt. 3, § 14(5); NIG. CONST. ch. IV, § 34(2); PAK. CONST. pt. II, ch. 1, art. 10(1); PAPUA N.G. CONST. pt. III, div. 3(c), arts. 37(4)(e), 42(2)(b); PERU CONST. tit. I, ch. I, art. 2(20)(h); PHIL. CONST. art. IV, § 19; PORT. CONST. pt. I, § II, ch. I, art. 32(3); ROM. CONST. tit. II, ch. II, art. 24(1), (2); ST. CHRIST-NEVIS ch. II, §§ 5(2), 10(2)(d); SIERRA LEONE CONST. ch. III, § 17(2)(b); SING. CONST. pt. IV, § 9(3); SOLOM. IS. CONST. ch. II, § 10(2)(d); SUDAN CONST. pt. III, § 28; TRIN. & TOBAGO CONST. ch. I, pt. I, § 5(2)(c)(ii); TUVALU CONST. pt. II, div. 3(A), § 22(3)(e); UGANDA CONST. ch. III, § 15(2)(d); U.A.E. CONST. pt. III, art. 28; ZAIRE CONST. tit. II, art. 16; ZAMBIA CONST. pt. III, art. 20(2)(d); ZIMB. CONST. ch. III, §§ 13(3), 18(3)(d).

227. See, e.g., GUY. CONST. pt. 2, tit. 1, art. 139(1) ("[A]ny person who is arrested or detained . . . shall be permitted . . . to retain and instruct without delay a legal adviser of his own choice . . .").

228. See *infra* text accompanying notes 229-30.

229. ICCPR, *supra* note 4, pt. III, art. 14(3)(d), at 54; *Fundamental Freedoms*, *supra* note 22, § 1, art. 6(3)(c), 213 U.N.T.S. at 228; BOP, *supra* note 22, princ. 17(2), at 299; AMCHR, *supra*



c. *The right to self-representation.* The right to self-representation complements the right to counsel and is not meant as a substitute thereof. This right assures the accused of the right to participate in his or her defense, including directing the defense, rejecting appointed counsel, and conducting his or her own defense under certain circumstances. The right to self-representation is guaranteed by the ICCPR, the Fundamental Freedoms, the AMCHR,<sup>231</sup> and possibly the Banjul Charter.<sup>232</sup> This right is also guaranteed in thirty-three of the national constitutions surveyed.<sup>233</sup> In addition, more than sixty-five constitutions contain language pertaining to the right of defense which may also be intended to encompass the right to self-representation.<sup>234</sup> Because representation of counsel is not only a matter of interest to the accused, but is also paramount to due process of the law and to the integrity of the judicial process, the court must ensure that self-representation is adequate and effective. Thus the court should appoint professional counsel to supplement self-representation; conversely, whenever it is in the best interest of justice and in the interest of adequate and effective representation of the accused, the

note 22, pt. I, ch. II, art. 8(2)(e), at 4.

230. CHILE CONST. ch. III, art. 19(3); ECUADOR CONST. pt. II, tit. III, § III, art. 107; EGYPT CONST. pt. IV, art. 69; ETH. CONST. pt. II, ch. VII, art. 45(3); FIJI CONST. ch. II, § 11(2)(d); INDIA CONST. pt. IV, art. 39A; ITALY CONST. pt. I, tit. I, art. 24; JAPAN CONST. ch. III, art. 37; KOREA CONST. ch. II, art. 12(4); LIBER. CONST. ch. III, art. 21(i); MAURITIUS CONST. ch. II, § 10(2)(d); NAURU CONST. pt. II, § 10(3)(e); NICAR. CONST. tit. IV, ch. I, art. 34(5); PAPUA N.G. CONST. pt. III, div. 3, § C, arts. 37(4)(e), 42(2)(b); PARA. CONST. ch. IX, art. 204; PERU CONST. tit. IV, ch. IX, art. 233(9); PHIL. CONST. art. IV, § 23; POL. CONST. ch. VII, art. 63; PORT. CONST. pt. I, § I, art. 20(1); ROM. CONST. tit. II, ch. II, art. 24(2); SOMAL. CONST. ch. 2, art. 32(3); SPAIN CONST. ch. II, art. 24(2); SURIN. CONST. ch. V, art. 12(2); THAIL. CONST. ch. III, § 29.

231. ICCPR, *supra* note 4, pt. III, art. 14(3)(d), at 54; *Fundamental Freedoms*, *supra* note 22, § I, art. 6(3)(c), 213 U.N.T.S. at 228; AMCHR, *supra* note 22, pt. I, ch. II, art. 8(2)(d), at 4.

232. Banjul, *supra* note 22, pt. 1, ch. 1, art. 7(1)(c), at 60.

233. ANT. & BARB. CONST. ch. II, § 15(2)(d); BAH. CONST. ch. III, § 20(2)(d); BARB. CONST. ch. III, § 18(2)(d); BELIZE CONST. ch. II, § 6(3)(d); BOTS. CONST. ch. II, § 10(2)(d); CAMBODIA CONST. ch. III, art. 35; DOMINICA CONST. ch. I, § 8(2)(d); ETH. CONST. pt. II, ch. VII, art. 45(3); FIJI CONST. ch. II, § 11(2)(d); GAM. CONST. ch. III, § 20(2)(d); GREN. CONST. ch. I, § 8(2)(d); JAM. CONST. ch. III, § 20(6)(c); KENYA CONST. ch. IV, pt. 3, § 77(2)(d); KIRIBATI CONST. ch. II, § 10(2)(d); MALTA CONST. ch. IV, § 39(6)(c); MAURITIUS CONST. ch. II, § 10(2)(d); MEX. CONST. tit. I, ch. I, art. 20(IX); NAURU CONST. pt. II, § 10(3)(e); NIG. CONST. ch. IV, § 35(5)(c); PAPUA N.G. CONST. pt. III, div. 3(c), art. 37(4)(e); PHIL. CONST. art. IV, § 19; QATAR CONST. pt. III, art. 11; ST. CHRIST-NEVIS CONST. ch. II, § 10(2)(d); SOLOM. IS. CONST. ch. II, § 10(2)(d); SRI LANKA CONST. ch. III, art. 13(3); SUDAN CONST. pt. III, § 28; SWAZ. CONST. ch. II, § 10(2)(d); TUVALU CONST. pt. II, div. 3(A), § 22(3)(A); UGANDA CONST. ch. III, § 15(2)(d); VIETNAM CONST. ch. 10, art. 133; ZAIRE CONST. tit. II, art. 16; ZAMBIA CONST. pt. III, art. 20(2)(d); ZIMB. CONST. ch. III, § 18(3)(d).

234. See *supra* text accompanying notes 145–58 (discussing the right to a fair trial); *supra* text accompanying notes 219–24 (discussing the right to assistance of counsel).

court should disallow self-representation and appoint professional counsel.

d. *The right to assistance of an interpreter.* The right to assistance of an interpreter assures the effectiveness of the right to a fair trial and the right to counsel. Assistance is often necessary to ensure comprehension of proceedings and accusatory documents. The right to an interpreter paid by the court is guaranteed by four of the instruments examined,<sup>235</sup> and is guaranteed in no less than thirty-two national constitutions.<sup>236</sup>

e. *The right to the presence of counsel during all stages of the proceedings.* None of the instruments examined specifically guarantee the right to counsel at all stages of the proceedings. The ICCPR guarantees the accused the right to counsel "in the determination of any criminal charge against him."<sup>237</sup> The Fundamental Freedoms provides counsel to "everyone charged with a criminal offense,"<sup>238</sup> and the AMCHR guarantees counsel "during the proceedings" to those "accused of a serious crime."<sup>239</sup> The right to counsel in the Banjul Charter is comprised within the "right to have his cause heard."<sup>240</sup> The BOP guarantees the right to counsel during the preliminary investigation period.<sup>241</sup> The phraseology in each of the

235. ICCPR, *supra* note 4, pt. III, art. 14(3)(f), at 54; *Fundamental Freedoms*, *supra* note 22, § I, art. 6(3)(e), 213 U.N.T.S. at 228; SMRTP, *supra* note 22, pt. I, art. 30(3), at 69; AMCHR, *supra* note 22, pt. I, ch. II, art. 8(2)(a), at 4.

236. ANT. & BARB. CONST. ch. II, § 15(2)(f); BAH. CONST. ch. III, § 20(2)(f); BARB. CONST. ch. III, § 18(2)(f); BELIZE CONST. ch. II, § 6(3)(f); BOTS. CONST. ch. II, § 10(2)(f); CAN. CONST. pt. I, § 14; DOMINICA CONST. ch. I, § 8(2)(f); ETH. CONST. pt. III, ch. XIV, art. 105; FIJI CONST. ch. II, § 11(2)(f); GAM. CONST. ch. III, § 20(2)(f); GREN. CONST. ch. I, § 8(2)(f); GUY. CONST. pt. 2, tit. 1, art. 144(2)(f); JAM. CONST. ch. III, § 20(6)(e); KENYA CONST. ch. IV, pt. 3, § 77(2)(f); KIRIBATI CONST. ch. II, § 10(2)(f); MALTA CONST. ch. IV, § 39(6)(e); MAURITIUS CONST. ch. II, § 10(2)(f); NAURU CONST. pt. II, § 10(3)(d); NICAR. CONST. tit. IV, ch. I, art. 34(6); NIG. CONST. ch. IV, § 35(5)(e); PAPUA N.G. CONST. pt. III, div. 3(C), art. 37(4)(d); PERU CONST. tit. IV, ch. IX, art. 233(15); ROM. CONST. tit. III, ch. VI, § I, art. 127(2); ST. CHRIST-NEVIS CONST. ch. II, § 10(2)(f); SIERRA LEONE CONST. ch. III, § 23(5)(e); SOLOM. IS. CONST. ch. II, § 10(2)(f); SWAZ. CONST. ch. II, § 10(2)(f); TRIN. & TOBAGO CONST. ch. I, pt. I, § 5(2)(g); TUVALU CONST. pt. II, div. 3(A), § 22(3)(g); UGANDA CONST. ch. III, § 15(2)(f); ZAMBIA CONST. pt. III, art. 20(2)(f); ZIMB. CONST. ch. III, § 18(3)(f).

237. ICCPR, *supra* note 4, pt. III, art. 14(3)(d), at 54.

238. *Fundamental Freedoms*, *supra* note 22, § I, art. 6(3)(c), 213 U.N.T.S. at 228.

239. AMCHR, *supra* note 22, pt. I, ch. II, art. 8(2)(e), at 4.

240. Banjul, *supra* note 22, pt. I, ch. I, art. 7(1)(c), at 60.

241. BOP, *supra* note 22, princ. 17(1), at 299.

instruments is consistent with the application of the right to procedures other than the actual trial.

The right to counsel at all stages of the proceedings is explicitly granted in at least eleven national constitutions.<sup>242</sup> It can be implied as well in the ten constitutions which provide for the right to defense at all stages of the proceedings.<sup>243</sup> The constitutions which guarantee the right to counsel at the time of detention, as well as at trial,<sup>244</sup> come close to the protections guaranteed under this right.

8. *The Right to a Speedy Trial.* The right to a speedy trial is intended to limit infringements on personal freedom caused by pretrial and trial detention. It is also crucial to the guarantee of a fair trial because undue delays may cause the loss of evidence or the fading of the memories of the witnesses. In addition, the right seeks to minimize the emotional strain on the accused caused by pending criminal proceedings.

The ICCPR, the Fundamental Freedoms, the AMCHR, and the BOP all guarantee the right to release from detention if the accused is not brought to trial within a reasonable time.<sup>245</sup> All of these instruments and the Banjul Charter guarantee the right to a trial within a reasonable time regardless of the custodial status of the accused.<sup>246</sup>

The right to a speedy trial is guaranteed in forty-three of the national constitutions surveyed.<sup>247</sup> As in the ICCPR, the Fundamen-

242. BULG. CONST. ch. 2, art. 30(4); GUAT. CONST. tit. II, ch. I, art. 19(c); HUNG. CONST. ch. XII, § 57(3); ITALY CONST. pt. I, tit. I, art. 24; JAPAN CONST. ch. III, art. 37; LIBER. CONST. ch. III, art. 21(i); MEX. CONST. tit. I, ch. I, art. 20(IX); NICAR. CONST. tit. IV, ch. I, art. 34(4); PERU CONST. tit. I, ch. I, art. 2(20)(h); PORT. CONST. pt. I, § II, ch. I, art. 32(3); ROM. CONST. ch. II, art. 24(2).

243. See *supra* text accompanying note 154.

244. See *supra* text accompanying note 222.

245. ICCPR, *supra* note 4, pt. III, art. 9(3), at 54; *Fundamental Freedoms*, *supra* note 22, § I, art. 5(3), 213 U.N.T.S. at 226; BOP, *supra* note 22, princ. 38, at 300; AMCHR, *supra* note 22, pt. I, ch. II, art. 7(5), at 5.

246. ICCPR, *supra* note 4, pt. III, art. 14(3)(c), at 54; *Fundamental Freedoms*, *supra* note 22, § 1, art. 6(1), 213 U.N.T.S. at 228; BOP, *supra* note 22, princ. 38, at 300; Banjul, *supra* note 22, pt. I, ch. I, art. 7(1)(d), at 60; AMCHR, *supra* note 22, pt. I, ch. II, art. 8(1), at 4.

247. ANT. & BARB. CONST. ch. II, § 5(6); BAH. CONST. ch. III, § 19(3); BANGL. CONST. pt. III, § 35(3); BARB. CONST. ch. III, §§ 13(3)(b), 18(1); BELIZE CONST. ch. II, §§ 5(5), 6(2); BOTS. CONST. ch. II, §§ 5(3), 10(1); CAN. CONST. pt. I, § 11(b); DOMINICA CONST. ch. I, § 8(1); FIJI CONST. ch. II, §§ 6(5), 11(1); GAM. CONST. ch. III, §§ 15(5), 20(1); GREN. CONST. ch. I, §§ 3(5), 8(1); GUY. CONST. pt. 2, tit. 1, art. 144(1); JAM. CONST. ch. III, §§ 15(3), 20(1); JAPAN CONST. ch. II, art. 37; KENYA CONST. ch. V, § 72(3), (5); KIRIBATI CONST. ch. II, §§ 5(3), 10(1); KOREA (REPUBLIC OF) CONST. art. 27(3); LIBER. CONST. arts. 21(f), (h); MALTA CONST. ch. III, §§ 34(3), 39(1); MAURITIUS CONST. ch. II, §§ 5(3), 10(1); MEX. CONST. tit. I, ch. I, art. 20(VIII); NAMIB. CONST. ch. 3, arts. 11(3), 12(1)(b); NAURU CONST. pt. II, § 10(2); NETH. CONST. ch. I, art. 15(3);

tal Freedoms, and the AMCHR, many constitutions contain language relating to both the detention of an accused and the right to a speedy trial in general. In some constitutions, the right is articulated only in relation to detained persons.<sup>248</sup> In such cases, the right to a speedy trial may only guarantee release from detention and not necessarily an expeditious resolution of the case. The right to a speedy trial, however, is qualified by the threat of expedited proceedings which jeopardize a fair trial.<sup>249</sup> The counterbalance to this right, then, is the accused's right to adequate time and facilities for the preparation of his or her defense.<sup>250</sup>

This right varies in its application and in penalties for its violation. It may apply to each or all stages of the proceedings (i.e., pretrial, trial, post-trial, appeal). Specific time limits may be set for each stage or multiple stages. Exceeding the required time limits may result in dismissal of the charges or reversal of the conviction. In such cases, some systems will hold that the same charge may be barred from future adjudication, thus having a *res judicata* or jeopardy effect.

9. *The Right to Appeal.* To err is human; thus protection against error is necessary. The right to appeal judicial rulings, including a criminal conviction, to a higher court or tribunal fulfills this need. What elements of the proceedings can be appealed, and how that can be done varies throughout the legal systems. Some allow reversal of the law, others of both the facts and the law. Some systems allow interlocutory appeals of nonfinal judicial rulings. The review or appeal process may be one- or two-tiered (i.e., an appellate court and a supreme court). For example, Article 14 of the ICCPR requires the right to at least one higher appellate level in criminal matters.<sup>251</sup> An

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NICAR. CONST. tit. IV, ch. I, art. 34(2); NIG. CONST. ch. IV, §§ 34(4), 35(3); PAPUA N.G. CONST. pt. III, div. 3, subdiv. B(37)(3); PHIL. CONST. art. IV, § 17; PORT. CONST. pt. I, § II, ch. I, art. 28(1), (4); ROM. CONST. tit. II, ch. II, art. 23(3); ST. CHRIS.-NEVIS CONST. ch. II, §§ 5(5), 10(1); SIERRA LEONE CONST. ch. III, §§ 17 (3), 23(1); SOLOM. IS. CONST. ch. II, §§ 5(3), 10(1); SPAIN CONST. tit. I, ch. II, § 1, arts. 17(2), 24(2); SUDAN CONST. pt. III, § 28; SWAZ. CONST. ch. II, §§ 5(3), 5(5), 10(1); SWED. CONST. ch. II, art. 9; TURK. CONST. pt. II, ch. II(1), art. 19, paras. 4, 6; TUVALU CONST. pt. II, div. 3, subdiv. A, §§ 17(5), 22(2); UGANDA CONST. ch. III, §§ 10(3), 15(1); U.S. CONST. amend. VI; ZAMBIA CONST. pt. III, §§ 15(3), 20(1); ZIMB. CONST. ch. III, §§ 13(4), 18(2).

248. See, e.g., NETH. CONST. ch. I, art. 15(3) ("The trial of a person who has been deprived of his liberty pending trial shall take place within a reasonable period.").

249. See *supra* text accompanying notes 173–88 (discussing the right to have procedures established by law).

250. See *supra* text accompanying notes 202–09 (concerning the right to equality of arms).

251. ICCPR, *supra* note 4, pt. III, art. 14(5), at 54.

appeal is considered a continuation of the criminal justice process and as such implicates rights previously discussed, including the right to an impartial and independent tribunal, procedures established by law,<sup>252</sup> speedy trial, public hearing, equality of arms, and assistance of counsel. However, constitutional guarantees to appeal do not always provide for the same rights at appeal as are available at the trial. One of the rights necessary for an effective right of appeal by indigents is the right to obtain a free transcript, but in practice this right is seldom recognized.

The right to appeal is guaranteed in four of the instruments surveyed.<sup>253</sup> As contemplated in these instruments, the right does not encompass a *de novo* review of the facts of a case with a reevaluation of the evidence. Instead, the appellate court or tribunal<sup>254</sup> serves as a forum to challenge violations of any of the rights discussed in this Article which have adversely impacted the fairness of the verdict or instances where violations of domestic law may have rendered the judgment flawed.

At least forty-five national constitutions contain guarantees which are tantamount to a right to appeal a criminal conviction to a higher court.<sup>255</sup> In many of these documents the guarantee refers to "consti-

252. The ICCPR specifies that the appeal must be "according to law." *Id.* The *Fundamental Freedoms* indicates that an appeal "shall be governed by law." *Protocol No. 7 to the Convention for the Protection of Human Rights and Fundamental Freedoms, opened for signature Nov. 22, 1984*, art. 2(1), 24 I.L.M. 435, 435 [hereinafter *Protocol No. 7*].

253. *Protocol No. 7*, *supra* note 252, art. 2(1), at 435; ICCPR, *supra* note 4, pt. III, art. 14(5), at 54; Banjul, *supra* note 22, pt. I, ch. I, art. 7(1)(a), at 60; AMCHR, *supra* note 22, pt. I, ch. II, art. 8(2)(h), at 4.

254. The ICCPR and the *Fundamental Freedoms* guarantee the right of appeal to a "higher tribunal." *Protocol No. 7*, *supra* note 252, art. 2(1), at 435; ICCPR, *supra* note 4, pt. III, art. 14(5), at 54. The AMCHR uses the term "higher court." AMCHR, *supra* note 22, pt. I, ch. II, art. 8(2)(h), at 4. The Banjul Charter guarantees a "right to an appeal to competent national organs against acts . . . violating . . . fundamental rights. . . ." Banjul, *supra* note 22, pt. I, ch. I, art. 7(1)(a), at 60.

255. ANT. & BARB. CONST. ch. IX, §§ 121(a), 122(1); BAH. CONST. ch. VII, pt. 3, § 104(1); BARB. CONST. ch. VII, § 87; BELIZE CONST. ch. II, § 20(4); BOTS. CONST. ch. VI, pt. IV, § 106; DOMINICA CONST. ch. VII, § 105(1)(a); FIJI CONST. ch. VII, pt. 4, §§ 115, 117; GAM. CONST. ch. VII, pt. III, § 95(1); GREN. CONST. ch. VII, §§ 103, 104(c); GUAT. CONST. tit. IV, ch. II, arts. 265, 266; GUY. CONST. pt. I, ch. IX, § 133(a), (b); HOND. CONST. tit. IV, ch. II, arts. 183, 185; HUNG. CONST. ch. XII, § 57(5); INDIA CONST. pt. V, § 134(1); ITALY CONST. tit. IV, § II, art. 111; JAM. CONST. ch. VII, pt. 3, § 110(1)(c); LIBER. CONST. arts. 20(b), 26; LIECH. CONST. art. 43; MALAWI CONST. arts. 68, 69; MALDIVES CONST. § 18; MALTA CONST. ch. IV, § 46 (4); MAURITIUS CONST. ch. VII, §§ 81(1), 82(2); MEX. CONST. tit. III, ch. III, art. 107(VII), (XII); MYANMAR CONST. ch. VII, art. 101(g); NAMIB. CONST. ch. 9, art. 80(2); NAURU CONST. pt. V, § 57; NEPAL CONST. pt. II, § 88(3); NICAR. CONST. chap. V, art. 164(2); NIG. CONST. ch. VII, pt. I, §§ 239(1), 231(2); PAPUA N.G. CONST. pt. III, div. 3, subdiv. B, § 37(15), (16); PORT. CONST. pt. I, § II, ch. I, art.

tutional violations" in criminal proceedings and often includes recourse to more than one appellate tribunal, particularly where the judicial systems bifurcate the adjudication of questions of law and constitutionality, with the latter being handled exclusively in specialized constitutional courts. Many legal systems provide special remedies for appellate review, such as *habeas corpus* in the common law system and *amparo* (the counterpart of *habeas corpus*) in Latin American countries.

10. *The Right to be Protected from Double Jeopardy.* This right is designed to prevent the state from repeatedly subjecting a person to prosecution for offenses arising out of the same event until the desired results are achieved. It derives from a sense of fairness, and can be analogized to the civil law concept of *res judicata*. The noncommon law countries refer to it as *non bis in idem*.

The concept of double jeopardy is interpreted differently by different world legal systems. In some states an acquittal on the facts is final and gives rise to double jeopardy.<sup>256</sup> In most continental European nations, however, the state may appeal an acquittal due to errors of law or questions of fact. A conviction may be reversed on appeal and a new trial ordered, or the judgment may be revised without remand for a new trial. Double jeopardy and *non bis in idem* vary as to their scope and application. Double jeopardy is usually held to apply within a given legal system and not as between different legal systems or separate sovereignties.<sup>257</sup> *Non bis in idem* is a right that protects the person from repeated prosecution or punishment for the same conduct, irrespective of the prosecuting system. Note, however,

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29(6); ST. CHRIS.-NEVIS CONST. ch. IX, §§ 98(a), 99(1); SIERRA LEONE CONST. ch. VII, pt. II, §§ 122(1), 123(1), (6); *id.* ch. VII, pt. III, § 129(1); SOLOM. IS. CONST. ch. VII, pt. II(a), § 83; SPAIN CONST. tit. I, ch. II, § 1, art. 17(4); SRI LANKA CONST. ch. XVI, § 128 (1); SUDAN CONST. pt. III, § 32(1); SURIN. CONST. ch. V, art. 10; SWAZ. CONST. ch. IX, pt. I, § 104(1)(b); TONGA CONST. pt. II, § 91(1); TRIN. & TOBAGO CONST. ch. VII, pt. I, § 108; *id.* at ch. VII, pt. II, § 109; TUVALU CONST. pt. II, div. 5, §§ 38, 41; *id.* at pt. VII, div. 4, § 136; UGANDA CONST. ch. III, § 22; ZAMBIA CONST. pt. III, § 29; ZIMB. CONST. ch. II, § 24.

256. The Fifth Amendment guarantee, enforceable against states through the Fourteenth Amendment, protects against a second prosecution for the same offense after acquittal or conviction, and against multiple punishments for the same offense. *See* U.S. CONST. amends. V, XIV, §1; *see also* *Benton v. Maryland*, 395 U.S. 784 (1969) (applying the double jeopardy clause of the Fifth Amendment to the states through the Fourteenth Amendment).

257. *See Blockburger v. United States*, 284 U.S. 299, 304 (1932) (double jeopardy clause of the Fifth Amendment prohibits successive prosecutions for the same criminal act under two criminal statutes whenever each statute does not "requir[e] proof of a fact which the other does not.").

that *non bis in idem* under the Fundamental Freedoms applies as between the member states. Furthermore, legal systems differ as to when jeopardy attaches. Constitutional and treaty provisions do not go into such specificity. It should be noted that some approaches to double jeopardy are limited to the nonapplicability of double punishment, but do not exclude repeated prosecution.

Protection from double jeopardy and *non bis in idem* are found in four of the surveyed instruments.<sup>258</sup> The ICCPR and the Fundamental Freedoms prohibit retrials of both acquittals and convictions, as well as double punishment, but make allowances for differences in domestic legal systems.<sup>259</sup> The Fundamental Freedoms also includes a specific exception: "if there is evidence of new or newly discovered facts, or if there has been a fundamental defect in the previous proceedings, which could affect the outcome of the case."<sup>260</sup> The AMCHR guarantees protection against double jeopardy without qualification, but only after an acquittal.<sup>261</sup> The right to protection from double jeopardy and *non bis in idem* are found in over fifty national constitutions.<sup>262</sup>

258. *Protocol No. 7*, *supra* note 252, art. 4(1), at 436; ICCPR, *supra* note 4, pt. III, art. 14(7), at 55; SMRTP, *supra* note 22, pt. I, art. 30(1), at 69; AMCHR, *supra* note 22, pt. I, ch. II, art. 8(4), at 4; *see also* U.S. CONST. amend. V.

259. Both the ICCPR and the Fundamental Freedoms specify "in accordance with the law and penal procedure . . ." of each country. *Protocol No. 7*, *supra* note 252, art. 4(1), at 436; ICCPR, *supra* note 4, pt. III, art. 14(7), at 55.

260. *Protocol No. 7*, *supra* note 252, art. 4(2), at 436.

261. AMCHR, *supra* note 22, pt. I, ch. II, art. 8(4), at 4.

262. ANT. & BARB. ch. II, § 15(5); BAH. CONST. ch. III, § 20(5); BANGL. CONST. pt. III, § 35(2); BARB. CONST. ch. III, § 18(5); BELIZE CONST. ch. II, § 6(5); BOTS. CONST. ch. II, § 10(5); CAN. CONST. pt. I, § 11(h); COSTA RICA CONST. tit. IV, art. 42; DOMINICA CONST. ch. I, § 8(5); DOM. REP. CONST. tit. II, § I, art. 8(2)(h); EQ. GUINEA CONST. tit. III, art. 20(19); FIJI CONST. pt. 1, ch. 2, § 11(5); GAM. CONST. ch. III, § 20(5); F.R.G. CONST. tit. IX, art. 103(3); GREN. CONST. ch. I, § 8(5); GUY. CONST. pt. II, tit. I, § 144(5); HOND. CONST. tit. III, ch. II, art. 95; INDIA CONST. pt. III, § 20(2); JAM. CONST. ch. III, § 20(8); JAPAN CONST. ch. III, art. 39; KENYA CONST. ch. V, § 77(5); KIRIBATI CONST. ch. II, § 10(5); KOREA (REPUBLIC OF) CONST. ch. II, art. 13(1); LIBER. CONST. ch. III, art. 21(h); MADAG. CONST. tit. II, art. 42; MALAY. CONST. pt. II, § 7(2); MALTA CONST. ch. IV, § 39(9); MAURITIUS CONST. ch. II, § 10(5); MEX. CONST. tit. I, ch. I, art. 23; NAMIB. CONST. ch. 3, art. 12(2); NAURU CONST. pt. II, § 10(5); NEPAL CONST. pt. III, § 14(2); NICAR. CONST. tit. IV, art. 34(9); NIG. CONST. ch. IV, § 35(8); PAK. CONST. pt. II, ch. I, § 13(a); PAPUA N. G. CONST. pt. III, div. 3, subdiv. B, § 37(8); PARA. CONST. ch. V., art. 64; PERU CONST. ch. IX, art. 233(11); PHIL. CONST. art. IV(22); PORT. CONST. pt. I, § II, ch. I, art. 29(5); ST. CHRIS.-NEVIS CONST. ch. II, § 10(5); SIERRA LEONE CONST. ch. III, § 23(9); SING. CONST. pt. IV, § 11(2); SOLOM. IS. CONST. ch. II, § 10(5); SWAZ. CONST. ch. II, § 10(5); TONGA CONST. pt. I, cls. 12, 22(8); UGANDA CONST. ch. III, § 15(5); U.S. CONST. amend. V; VENEZ. CONST. tit. III, ch. III, § 60(8); ZAMBIA CONST. pt. III, § 20(5); ZIMB. CONST. ch. III, § 18(6).

11. *The Right to be Protected From Ex Post Facto Laws.* Protection from *ex post facto* laws is one of the fundamental principles of legality, which also include *nulla poena sine lege* and *nullum crimen sine lege*.<sup>263</sup> This right guarantees that crimes and punishments will not be created *ad hoc* to apply retroactively to particular cases or persons. The basis of this fundamental right is that it provides people with prospective notice of a criminal violation and avoids the arbitrary criminalization of conduct after the fact, which would allow those in power to convict and punish at will anyone so targeted. It is, therefore, not only a fairness right but also a fundamental right against unbridled abuse of power. An extension of this prohibition in certain legal systems is the prohibition of interpreting criminal laws by analogy.<sup>264</sup>

The right was guaranteed as early as the American Constitution of 1787<sup>265</sup> and the French Declaration of the Rights of Man of 1789;<sup>266</sup> it is now included in five of the instruments surveyed.<sup>267</sup> These instruments prohibit the conviction of any person "on account of any act or omission which did not constitute a criminal offense . . . at the time it was committed,"<sup>268</sup> and proscribe the imposition of punishments in excess of those prescribed by law at the time of the commission of the offense. The Universal Declaration, the ICCPR, the Fundamental Freedoms, and the AMCHR allow conviction and punishment for acts or omissions which constituted crimes under national or international law at the time of commission.<sup>269</sup> If, after

263. See JEROME HALL, *GENERAL PRINCIPLES OF CRIMINAL LAW* 27, 35 (1960). *Nulla poena sine lege* means no punishment without a law. *Nulla crimen sine lege* means no crime without a law.

264. For a comparative study of principles of legality, see BASSIOUNI, *supra* note 5. In the Soviet Union prior to 1958 judges could find a person guilty by analogy, even though the particular conduct before the court did not constitute a crime at the time of its commission. See HAROLD J. BERMAN, *SOVIET CRIMINAL LAW AND PROCEDURE: THE RSFSR CODES* 22 (Harold J. Berman & James W. Spindler trans., 2d ed. 1972); see also *THE CRIMINAL JUSTICE SYSTEM OF THE USSR*, *supra* note 188.

265. U.S. CONST. art. I, § 9.

266. THE DECLARATION OF THE RIGHTS OF MAN AND THE CITIZEN, *supra* note 109, para. 8, at 744-45.

267. ICCPR, *supra* note 4, pt. III, art. 15(1), at 55; *Fundamental Freedoms*, *supra* note 22, § 1, art. 7(1), 213 U.N.T.S. at 228; *Universal Declaration*, *supra* note 4, art. 11(2), at 73; Banjul, *supra* note 22, pt. I, ch. I, art. 7(2), at 60; AMCHR, *supra* note 22, pt. I, ch. II, art. 9, at 4.

268. ICCPR, *supra* note 4, pt. III, art. 15(1), at 55; *Fundamental Freedoms*, *supra* note 22, § 1, art. 7(1), 213 U.N.T.S. at 228; *Universal Declaration*, *supra* note 4, art. 11(2), at 73; Banjul, *supra* note 22, pt. I, ch. I, art. 7(2), at 60; AMCHR, *supra* note 22, pt. I, ch. II, art. 9, at 4.

269. ICCPR, *supra* note 4, pt. III, art. 15(1), (2), at 55; *Fundamental Freedoms*, *supra* note 22, § 1, art. 7(1), (2), 213 U.N.T.S. at 228-29; *Universal Declaration*, *supra* note 4, art. 11(2), at



the commission of an offense, the law is changed to provide for lighter sentences for the proscribed conduct, both the ICCPR and the AMCHR allow the charged or convicted person to benefit from the change.<sup>270</sup>

The right to be protected from *ex post facto* laws is guaranteed in at least ninety-six national constitutions.<sup>271</sup> Many of these constitutions also specify that the prohibition against retroactivity does not apply to laws which benefit the accused or convicted person.<sup>272</sup>

73; AMCHR, *supra* note 22, pt. I, ch. II, art. 9, at 4.

270. ICCPR, *supra* note 4, pt. III, art. 15(1), at 55; AMCHR, *supra* note 22, pt. I, ch. II, art. 9, at 4.

271. ALB. CONST. pt. I, ch. II, art. 56; ALG. CONST. tit. I, ch. 4, art. 43; ANT. & BARB. CONST. ch. II, § 15(4); ARG. CONST. pt. I, art. 18; BAH. CONST. ch. III, § 20(4); BANGL. CONST. pt. III, § 35(1); BARB. CONST. ch. III, § 18(4); BELIZE CONST. ch. II, § 6(4); BOTS. CONST. ch. II, § 10(4); BRAZ. CONST. tit. II, ch. I, art. 5(XXXIX), (XL); BULG. CONST. ch. X, art. 5(3); CAN. CONST. pt. I, § 11(g); CAPE VERDE CONST. tit. II, art. 32; CHILE CONST. ch. III, art. 19(3); COLOM. CONST. tit. II, ch. I, arts. 28, 29; COMOROS CONST. tit. VI, art. 43; CONGO CONST. tit. II, art. 7; COSTA RICA CONST. tit. IV, arts. 34, 39; CUBA CONST. ch. VI, art. 58; DOMINICA CONST. ch. I, § 8(4); DOM. REP. CONST. tit. IV, § VI, art. 47; ECUADOR CONST. pt. I, tit. II, § I, art. 19(17)(c); EGYPT CONST. pt. IV, art. 66; EQ. GUINEA CONST. tit. III, ch. I, art. 20(21); ETH. CONST. pt. II, ch. 7, art. 45(2); FIJI CONST. pt. 1, ch. 2, § 11(4); F.R.G. CONST. tit. IX, art. 103(2); GAM. CONST. ch. III, § 20(4); GREECE CONST. pt. II, art. 7(1); GREN. CONST. ch. I, § 8(4); GUAT. CONST. tit. II, ch. I, arts. 15, 17; GUY. CONST. pt. 2, tit. I, § 144(4); HOND. CONST. tit. III, ch. II, arts. 95, 96; HUNG. CONST. ch. XII, § 57(4); INDIA CONST. pt. III, § 20(1); IRAQ CONST. ch. III, art. 21(b); ITALY CONST. pt. I, tit. I, art. 25; JAM. CONST. ch. III, § 20(7); JAPAN CONST. ch. III, art. 39; KENYA CONST. ch. V, § 77(4); KIRIBATI CONST. ch. II, § 10(4); KOREA CONST. ch. II, art. 13(1); KUWAIT CONST. pt. III, art. 32; LIBER. CONST. ch. III, art. 21(a); MADAG. CONST. tit. II, art. 42; MALAY. CONST. pt. II, § 7(1); MALI CONST. tit. II, art. 8; MALTA CONST. ch. IV, § 39(8); MAURITIUS CONST. ch. II, § 10(4); MEX. CONST. tit. I, ch. I, art. 14; MOROCCO CONST. art. 4; MYANMAR CONST. ch. III, art. 23; NAMIB. CONST. ch. 3, art. 12(3); NAURU CONST. pt. II, § 10(4); NEPAL CONST. pt. 3, § 14(1); NETH. CONST. ch. I, art. 16; NICAR. CONST. tit. IV, ch. I, arts. 35(10), 38; NIGER CONST. tit. XII, art. 82; NIG. CONST. ch. IV, § 35(7); NOR. CONST. art. 97; PAK. CONST. pt. II, § 12(1); PAPUA N.G. CONST. pt. III, div. 3, subdiv. B, § 37(7); PARA. CONST. ch. V, tit. I, arts. 61, 67; PERU CONST. ch. III, art. 20(d); PHIL. CONST. art. IV, § 12; PORT. CONST. pt. I, § 2, ch. I, art. 29(1); QATAR CONST. pt. III, art. 10; ROM. CONST. ch. II, art. 23(9); ST. CHRIS.-NEVIS CONST. ch. II, § 10(4); SÃO TOMÉ & PRÍNCIPE CONST. ch. II, art. 15; SEN. CONST. tit. II, art. 6; SIERRA LEONE CONST. ch. III, § 23(7); SING. CONST. pt. IV, § 11(1); SOLOM. IS. CONST. ch. II, § 10(4); SOMAL. CONST. ch. 2, art. 34; SPAIN CONST. tit. I, ch. II, § 1, art. 25(1); SRI LANKA CONST. ch. III, § 13(6); SUDAN CONST. pt. III, § 27; SURIN. CONST. ch. XV, § 1, art. 131(2); SWAZ. CONST. ch. II, § 10(4); SWED. CONST. ch. II, art. 10; SYRIA CONST. pt. 4, art. 30; TANZ. CONST. § 13(6)(c); THAIL. CONST. ch. III, § 26; TONGA CONST. pt. 1, cl. 20; TUNIS. CONST. ch. I, art. 13; TURK. CONST. ch. II, art. 38(1); TUVALU CONST. pt. II, div. 3, § 22(6); UGANDA CONST. ch. III, § 15(4); U.A.E. CONST. pt. 3, art. 27; U.S. CONST. art. I, § 9; VENEZ. CONST. tit. III, ch. I, art. 44; YEMEN CONST. tit. II, art. 31; ZAIRE CONST. tit. II, art. 15; ZAMBIA CONST. pt. III, § 20(4); ZIMB. CONST. ch. III, § 18(5).

272. See, e.g., ETH. CONST. pt. II, ch. 7, art. 45(2); MEX. CONST. tit. I, ch. I, art. 14; NICAR. CONST. tit. IV, ch. I, arts. 34(10), 38; PARA. CONST. ch. V, arts. 61, 67.

## B. A Summation of Rights

This study has investigated 139 constitutions which enumerate some protections of human rights and procedural safeguards for persons in the criminal justice process. However, many constitutions predate the human rights instruments surveyed, although that does not necessarily reduce the depth and breadth of the protections and guarantees included therein. It is important to note that post-1946 constitutions contain terminology substantially similar to that found in contemporary human rights instruments. Indeed, at times there seems to be an uncanny resemblance between the terminology of more recent constitutions and that of the Universal Declaration and the ICCPR. The migration of ideas, coupled with commonly shared values, necessarily leads to similarity of terms.

The analysis of these 139 constitutions has revealed an overwhelming affirmation of such core rights as the right to life, liberty, and security of the person (fifty-one countries), the right to recognition before the law and equal protection of the laws (108 countries), the right to be free from arbitrary detentions (119 countries), the right to be free from torture and other cruel, inhuman, or degrading treatment or punishment (eighty-one countries), the right to be presumed innocent (sixty-seven countries), the right to a fair trial (thirty-eight countries), the right to assistance of counsel (sixty-five countries), the right to a speedy trial (forty-three countries), the right to an appeal (forty-six countries), the right to be protected from double jeopardy (fifty-one countries), and the protection against *ex post facto* laws (ninety-six countries). If the right to a fair trial (thirty-nine countries) is considered in conjunction with the right to a defense (forty-five countries), there exists an strong affirmation of the right to general fairness in criminal proceedings.

The relatively high number of constitutions which guarantee the right to notice (fifty-one), to counsel of choice (forty-seven), to a speedy trial (forty-seven), to appeal (fifty-nine), and to protection against double jeopardy (fifty-nine) also indicates that there is broad international acceptance of these more concrete aspects of the right to a fair trial.

## VI. CONCLUSION

The human rights guarantees investigated in this Article were derived by the concordance of protected rights in national constitutions and international instruments, which is a valid method of demonstrating the existence of "general principles of law" in international law.

National laws and codes of criminal procedure, as well as court decisions, further expand upon these rights. There are, however, divergences between the enunciation of principles and their application. Nonetheless, the principle purpose of this Article is to establish the existence of certain general principles of human rights protection for persons in national criminal justice processes. Human rights activists should not shrink from asserting fundamental human rights protection as "general principles of law," and should carry out further inductive investigations of national law to strengthen the validity of this contention.

## APPENDIX I: INTERNATIONAL INSTRUMENTS SURVEYED

1. *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, 39 U.N. GAOR, 39th Sess., Supp. No. 51, at 197, U.N. Doc A/RES/39/46 (1984) (referred to as *Convention Against Torture*).
2. *International Convention on the Elimination of All Forms of Racial Discrimination*, opened for signature Mar. 7, 1966, 660 U.N.T.S. 195 (referred to as *Convention on Racial Discrimination*).
3. *International Convention on Civil and Political Rights*, G.A. Res. 2200 (XXI), U.N. GAOR, 21st Sess., Supp. No. 16, at 52, U.N. Doc A/6316 (1966) (referred to as ICCPR).
4. *Convention for the Protection of Human Rights and Fundamental Freedoms* (and accompanying Protocols), Nov. 4, 1950, 213 U.N.T.S. 221 (referred to as *Fundamental Freedoms*).
5. *Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment*, G.A. Res. 43/173, U.N. GAOR, 43rd Sess., Supp. No. 49, at 297, U.N. Doc. A/43/173 (1988) (referred to as BOP).
6. *Universal Declaration on Human Rights*, G.A. Res. 217A (III), U.N. GAOR, 3d Sess., at 71, U.N. Doc A/810 (1948) (referred to as *Universal Declaration*).
7. *United Nations Standard Minimum Rules for the Treatment of Prisoners* at 67, U.N. Doc. A/CONF/6/1, Annex I, A, U.N. Sales No. 1956.IV.4 (1956) (referred to as SMRTP).
8. *European Convention on the Protection of Detainees from Torture and from Cruel, Inhuman or Degrading Treatment or Punishment*, signed Nov. 26, 1987, reprinted in 27 I.L.M. 1152 (referred to as *European Convention on Protection of Detainees*).
9. *African Charter on Human and Peoples' Rights*, adopted June 27, 1981, O.A.U. Doc. CAB/LEG/67/3/Rev. 5 (1981) reprinted in 21 I.L.M. 58 (1982) (referred to as Banjul).
10. *American Convention on Human Rights*, Nov. 22, 1969, O.A.S. Treaty Series No. 36, at 1, O.A.S. Off. Rec. OEA/Ser. A/16 (referred to as AMCHR).

## APPENDIX II: RIGHTS SURVEYED

1. The right to life, liberty, and security of the person
2. The right to recognition before the law and equal protection of the law
3. The right to be free from arbitrary arrest and detention
4. The right to freedom from torture and cruel, inhuman, and degrading treatment or punishment
5. The right to be presumed innocent
6. The right to a fair trial
  - a. The right to the inadmissibility of certain evidence
  - b. The right to an impartial and independent tribunal
  - c. The right to have procedures established by law
  - d. The right to a speedy trial
  - e. The right to a public hearing
  - f. The right to be informed of the charges
  - g. The right to equality of arms
  - h. The right to assistance of counsel
  - i. The right to compulsory process
  - j. The right to be tried in one's own presence
7. The right to assistance of counsel
  - a. The right to counsel of one's own choice
  - b. The right to appointment of counsel in case of indigency
  - c. The right to self-representation
  - d. The right to assistance of an interpreter
  - e. The right to the presence of counsel at all stages of the proceedings
8. The right to a speedy trial
9. The right to appeal
10. The right to be protected from double jeopardy
11. The right to be protected from *ex post facto* laws

APPENDIX III: CONSTITUTIONS SURVEYED<sup>273</sup>

Afghanistan (1990), Albania (1976), Algeria (1986), Angola (1981), Antigua and Barbuda+ (1981), Argentina (1853), Australia (1986), Austria (1929), Bahamas (1973), Bahrain (\*), Bangladesh (1972), Barbados (1966), Belgium (1831), Belize (1981), Benin (1977), Bolivia+ (1967), Botswana (1966), Brazil (1988), Bulgaria (1991), Cambodia (1989), Cameroon (1961), Canada (1867), Cape Verde (1982), Central African Republic (1986), Chad (1982), Chile (1980), People's Republic of China (1982), Colombia (1886), Comores (1978), Congo (1979), Costa Rica (1949), Côte d'Ivoire (1960), Cuba (1976), Cyprus (1960), Denmark (1953), Djibouti (1977), Dominica (1978), Dominican Republic (1966), Ecuador (1978), Egypt (1980), Equatorial Guinea (1973), Ethiopia (1987), Fiji (1990), Finland (1919), France (1958), Gabon (1975), Gambia (1970), Germany (1949), Greece+ (1975), Grenada (1973), Guatemala (1985), Guinea (1958), Guyana (1980), Honduras (1982), Hungary (1949), Iceland (1944), India (1989), Indonesia (1945), Iraq (1970), Ireland (1937), Italy (1947), Jamaica (1962), Japan (1946), Jordan (1952), Kenya (1962), Kiribati (1979), Korea (Democratic People's Republic of) (1972), Korea (Republic of) (1987), Kuwait (1962), Liberia (1984), Libya+ (1969), Liechtenstein (1921), Luxembourg (1868), Madagascar (1975), Malawi (1966), Malaysia (1957), Maldives (1968), Mali (1974), Malta (1964), Mauritius (1968), Mexico (1917), Monaco (1962), Mongolia+ (\*), Morocco+ (1992), Mozambique (1975), Myanmar (1974), Namibia (1990), Nauru (1968), Nepal (1962), Netherlands (1987), Nicaragua (1987), Niger (1989), Nigeria (1989), Norway+ (1814), Pakistan (1973), Panama (\*), Papua-New Guinea (1984), Paraguay (1967), Peru (1979), Philippines (1973), Poland (\*), Portugal (1989), Qatar (1970), Romania (1991), Rwanda (1978), St. Christopher-Nevis (1983), Sao Tomé and Príncipe (1975), Senegal (1963), Seychelles (1979), Sierra Leone (1991), Singapore (1963), Solomon Islands (1978), Somalia (1979), Spain (1978), Sri Lanka (1972), Sudan (1985), Suriname (1982), Swaziland (1968), Sweden (1976), Switzerland (1874), Syria (1973), Taiwan

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273. The research for this study was based on the texts of the constitutions as found in *CONSTITUTIONS OF THE COUNTRIES OF THE WORLD* (Albert P. Blaustein & Gisbert H. Flanz eds., 1991). Constitutions which were not included in this edition of *CONSTITUTIONS OF THE WORLD* were obtained separately from embassies; they are marked with a +. The dates shown reflect the first version of the constitution; dates for subsequent amendments are not included. Constitutions which are not dated are marked with a \*. The constitutions of some countries have been suspended because of civil unrest, and others are effectively inaccessible outside of that country, e.g., El Salvador, Haiti, Iran.

(1946), Tanzania (1977), Thailand (1978), Togo (\*), Tonga (1967), Trinidad and Tobago (1976), Tunisia (1957), Turkey (1982), Tuvalu (1986), Uganda (1985), United Arab Emirates+ (1971), United States (1789), Venezuela (1973), Vietnam (1980), Yemen (1980), 'Zaire (1990), Zambia (1973), Zimbabwe (1979).

