AMICUS BRIEF

ON REGULATIONS ON DETENTION CONTAINED IN SECTION 3 OF ARTICLE 14.1 OF THE LAW ON CRIMINAL PROCEDURE AND SECTION 11 AND 12 OF ARTICLE 14.10 SUBMITTED TO THE CONSTITUTIONAL COURT OF MONGOLIA

AMNESTY INTERNATIONAL

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Amnesty International is a global movement of 10 million people in more than 150 countries and territories, who campaign on human rights. Our vision is for every person to enjoy all the rights enshrined in the Universal Declaration of Human Rights and other international human rights instruments. We research, campaign, advocate and mobilize to end abuses of human rights. Amnesty International is independent of any government, political ideology, economic interest or religion. Our work is largely financed by contributions from our membership and donations.

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INTRODUCTION

1. This written submission is provided by Amnesty International pursuant to the request received by Amnesty International Mongolia on 28 January 2025 from the Constitutional Court of Mongolia (hereinafter "the Constitutional Court" or "Court"). Amnesty International Mongolia was invited to submit written responses to questions 4.1 to 4.8 (listed in Annex 1 at the end of this brief) posed by the Constitutional Court as they relate to Section 3 of Article 14.1 of the Law on Criminal Procedure and Section 11 and 12 of Article 14.10[1], which govern the duration of pre-trial detention in the form of court ordered "Preventative Measures" and "Preventative Detention".

2. With this amicus curiae brief, Amnesty International undertakes to assist the Constitutional Court by submitting applicable international human rights law and standards on detention, with a particular focus on the obligations of the state in relation to pre-trial detention and the rights of individuals in such detention.

A. INTEREST OF THE AMICUS CURIAE ORGANIZATION

3. Amnesty International is an international non-governmental human rights organisation. It aims to secure the observance of the Universal Declaration of Human Rights, to advocate for global compliance with international human rights law and standards, the development of human rights norms, and the effective enjoyment of human rights throughout the world. Amnesty is a movement of over 10 million members, activists and supporters in more than 150 countries and territories, including in Mongolia. It is independent of any government, political ideology, economic interest or religion.

4. To achieve its objectives Amnesty monitors states' compliance with international human rights law and engages in research, advocacy, strategic litigation and education to prevent and end human rights violations and to demand justice for those whose rights have been violated.

5. Amnesty International has long worked on the issue of arbitrary detention and fair trial rights, including in the publication of Amnesty's Fair Trial Manual.[2] The manual is a comprehensive guide to international and regional standards for fair trial rights, including those which apply in instances of detention, and explains how these rights have been interpreted by international human rights bodies and courts. As explained in the text of the manual, it seeks to provide a practical guide to the relevant human rights standards for anyone involved in examining how well a criminal trial or a justice system meets international standards of fairness. It is intended for the use of trial observers and others assessing the fairness of an individual case, as well as for anyone seeking to evaluate the extent to which a country's criminal justice system guarantees respect for international standards of fair trial. It may also serve as a guide for lawmakers, judges, prosecutors and defence lawyers or as a training tool.

6. Amnesty International has extensive experience with strategic litigation including submitting amicus curiae briefs and other third-party submissions in international and regional courts to assist them in resolving fundamental questions of international law, including on the right to liberty and security of person and the state obligation to protect against arbitrary deprivation of liberty in all its forms. For example, the organisation has intervened before the European Court of Human Rights[3], the African Commission on Human and Peoples' Rights[4] and the Inter-American Court of Human Rights.[5] In

[1] Contained in Annex 2 of this amicus curiae brief.

[2] Amnesty International, *Fair Trial Manual – Second Edition* (Index: POL 30/002/2014), 9 April 2014, amnesty.org/en/documents/pol30/002/2014/en/.

[3] European Court of Human Rights, *H.M.M and Others v Latvia*, application no. 42165/21.

[4] Angola Submission to the African Commission on Human and Peoples' Rights, 51st Ordinary Session of the African Commission on Human and Peoples' Rights, April 2012 (Index: ADR 12/001/2012).

[5] *Rosendo Radilla Pacheco v. United Mexican States*; claim submitted by the Inter-American Commission on Human Rights on 15 March 2008 in case 12.511.

addition, Amnesty International has also litigated and submitted amicus curiae and other third-party interventions in a number of cases before national courts, including the Constitutional Court of the Republic of Korea[6], the Constitutional Court of Indonesia[7], the National Supreme Court of Justice of Mexico[8], the Supreme Court of the United Kingdom[9], the United States Supreme Court[10] and this Court.[11]

7. Therefore, Amnesty International has a strong and continuing interest in the promotion and protection of human rights and respectfully submits that it is well placed to assist the Constitutional Court with wider international law issues relevant to the adjudication of this matter.

B. APPLICATION OF INTERNATIONAL LAW IN MONGOLIA

8. Mongolia has accepted as authoritative major international human rights instruments starting with the Universal Declaration of Human Rights: it has ratified almost all core UN human rights treaties,[12] including the International Covenant on Civil and Political Rights (ICCPR) and its Second Optional Protocol; the Convention against Torture and Other Cruel, Inhuman or Degrading treatment or Punishment and its Optional Protocol; and the International Convention for the Protection of All persons from Enforced Disappearance and its inquiry procedure.

9. International treaties that Mongolia has ratified or acceded to, as well as customary international law form part of Mongolian law.

10. Specifically, Article 10 of the Constitution of Mongolia provides that:

    10.1. Mongolia adheres to the universally recognized norms and principles of international law and pursues a peaceful foreign policy.
    10.2. Mongolia fulfils in good faith its obligations under international treaties to which it is a Party.
    10.3. The international treaties to which Mongolia is a Party become effective as domestic legislation upon the entry into force of the laws on their ratification or accession.
    10.4. Mongolia may not abide by any international treaty or other instruments incompatible with its Constitution.

11. There is therefore no question that all persons within the jurisdiction of Mongolia should be legally protected against any breaches of relevant state obligations under international law and can rely on the rights and freedoms guaranteed by those international treaties within the domestic courts.

C. ARBITRARY DETENTION IS PROHIBITED UNDER INTERNATIONAL LAW

12. Everyone has the right to personal liberty and security of person, which among others protects against arbitrary arrest or detention. This right is guaranteed in article 9(1) of the ICCPR and is widely recognised in international human rights treaties.[13] The UN Working Group on Arbitrary Detention (UNWGAD), which is a UN entity with the specific mandate to investigate cases of deprivation of liberty imposed

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[6] Case No. 2008HunKa22 and others on Article 88(1)-1 of the Military Service Act.
[7] Case number 140/PUU-VII/2009.
[8] Action of Unconstitutionality 64/2019, October 2019.
[9] *Abd Ali Hameed Ali Al-Wahee v Ministry of Defence*, UKSC 2014/2019.
[10] *Jamal Kiyemba et al v Barack H. Obama et al*, 559 U.S. 131 (2010).
[11] In May 2024, Amnesty International submitted an amicus curiae brief to the Constitutional Court of Mongolia (Tsets) on Article 26 of the Law on Police Service that focused on temporary detention. See amnesty.org/en/documents/asa30/8151/2024/en
[12] The only core UN human rights treaty not accepted in any form is the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families.
[13] See for example, article 3 of the Universal Declaration of Human Rights, article 7(1) of the American Convention on Human Rights, article 5(1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms, article 6 of the African Charter on Human and Peoples Rights; and article 14(1) of the Arab Charter on Human Rights.

arbitrarily or otherwise inconsistently with international law and standards, has affirmed that the prohibition of arbitrary detention constitutes a peremptory norm of international law (*ius cogens*).[14]

13. In addition, the United Nations Human Rights Committee (Human Rights Committee or UNHRCom), which is the body established to monitor states' compliance with the ICCPR, has recognised the profound importance of article 9 of the ICCPR both for individuals and for society as a whole.[15] The UNHRCom has also explained that liberty and security of person are precious for their own sake, and also because the deprivation of liberty and security of person have historically been principle means for impairing the enjoyment of other rights.[16] This means that the legal interests that are protected by this right are both liberty and security of the specific person arrested or detained in an instant case, and also that protecting these rights is important because detention is often a starting point for other rights violations to occur, such as the right to be free from torture and other-ill treatment or the right to a fair trial. This is of concern to society at large.

14. In this regard, the UNHRCom has recognised that continuous systematic review[17] of the methods and practices of interrogation as well as arrangements for the custody and treatment of persons subjected to any form of arrest, detention or imprisonment, is a key step in preventing cases of torture and other ill-treatment as well as ensuring fair trial rights.[18]

15. UNWGAD has adopted specific categorisations for when treatment amounts to arbitrary detention including "when it is clearly impossible to invoke any legal basis justifying the deprivation of liberty (as when a person is kept in detention after the completion of their sentence or despite an amnesty law applicable to them)".[19] In line with these international standards, the UNHRCom has routinely confirmed that cases where there is no lawful basis for arrest will be considered detention that is in violation of article 9(1) ICCPR because of the non-existence of an arrest warrant[20] or summons, and where a person is kept in detention without a court order.[21] Further, where a person was held in detention despite a judicial order for their release, the UNHRCom found this to clearly amount to arbitrary detention.[22]

16. UNWGAD also recognises that conduct amounts to arbitrary detention "when the total or partial non-observance of the international norms relating to the right to a fair trial, spelled out in the Universal Declaration of Human Rights and in the relevant international instruments accepted by the States concerned, is of such gravity as to give the deprivation of liberty an arbitrary character."[23] When the deprivation of liberty constitutes a violation of international law for reasons of discrimination based on birth; national, ethnic or social origin; language; religion; economic condition; political or other opinion; gender; sexual orientation; or disability or other status, and which aims towards or can result in ignoring the equality of human rights, it will also constitute arbitrary detention.[24]

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[14] Working Group on Arbitrary Detention, Report, 24 December 2012, UN Doc. A/HRC/22/44 paras 37-75.
[15] UN Human Rights Committee, General Comment 35, Article 9 (Liberty and Security of Person), 16 December 2014, UN Doc CCPR/C/GC/35, para 2.
[16] UN Human Rights Committee, General Comment 35, Article 9 (Liberty and Security of Person), 16 December 2014, UN Doc CCPR/C/GC/35, para 2.
[17] The wording "systematic review" requires the establishment of a system of regular and independent inspections of all places of detention, and to provide access to non-governmental organisations to such places of detention.
[18] UN Human Rights Committee, General Comment 20, Article 7 (Prohibition of torture and cruel treatment or punishment), reproduced in UN Doc. HRI/GEN/1/Rev.1, para. 11.
[19] Working Group on Arbitrary Detention, "About Arbitrary Detention", ohchr.org/en/about-arbitrary-detention.
[20] UN Human Rights Committee, Communication No. 778/1997, *Coronel et al. v. Colombia*, Views adopted on 24 October 2002, para. 9.4; UN Human Rights Committee, Communication No. 449/1991, *Barbarín Mojica v. Dominican Republic*, Views adopted on 10 August 1994, para. 5.4.
[21] UN Human Rights Committee, Communication No. 90/1981, L. Magana ex-Philibert v. Zaire, Views adopted on 21 July 1983, in UN doc. GAOR, A/38/40, p. 200, paras. 7.2 and 8.
[22] See, for example, Communication No. R.1/5, *M. H. Valentini de Bazzano et al. v. Uruguay*, Views adopted on 15 August 1977, in UN doc. GAOR, A/34/40, para. 10 at p. 129.
[23] Working Group on Arbitrary Detention, "About Arbitrary Detention", ohchr.org/en/about-arbitrary-detention.
[24] Ibid.

17. The right to liberty is not absolute, and international law and standards permit the restriction of this right under narrowly defined circumstances. For example, international law provides that a permissible ground for arrest is to bring someone before the competent legal authorities on reasonable suspicion of having committed an offence.[25] The European Court of Human Rights has ruled that reasonable suspicion justifying an arrest exists when there are "facts or information which would satisfy an objective observer that the person concerned may have committed the offence".[26] Furthermore, the reasonable suspicion must relate to acts that constituted an offence at the time that they were committed.[27] Where individuals are detained under a law permitting preventive detention, allegedly to prevent them from committing a crime, but no investigation was conducted and they were not charged, that same court concluded that the detention violated their right to liberty.[28]

18. Amnesty International opposes all administrative detention carried out on security grounds without an intent to prosecute the individual in a criminal trial, because such detention circumvents fair trial safeguards and places people at risk of torture and other ill-treatment. All legislative, judicial and other relevant safeguards apply to "anyone who is deprived of his liberty by arrest or detention" and therefore apply fully to administrative detainees.[29] Amnesty International submits that states should not detain anyone unless they are promptly charged with one or more recognisable criminal offences: reasons outside of this scope more frequently than not are neither necessary nor proportionate.[30] Recognisable criminal offences in this context mean that the offence is a crime under national law that is defined with sufficient precision as to meet the principle of legality and protect against arbitrariness.[31]

19. Under all circumstances, article 9(1) of the ICCPR requires deprivation of liberty to be carried out with respect for the rule of law.[32] Of particular relevance to this case before the Constitutional Court is that an arrest or detention can be arbitrary even if it has been authorized by domestic law.[33] The European Court of Human Rights has affirmed that article 5(1) of the European Convention of Human Rights, which protects individuals against unreasonable detention, requires any domestic law governing deprivation of liberty to be consistent with the aim of protecting the individual against arbitrariness.[34] In addition, the UNHRCom has affirmed that detention "must not be arbitrary, and must be based on grounds and procedures established by law, information of the reasons must be given and court control of the detention must be available."[35] Plus, detention may be arbitrary if the manner in which the detainees are treated does not relate to the purpose for which they are ostensibly being detained.[36]

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[25] Article 5(1) of the European Convention on Human Rights.

[26] European Court of Human Rights: *Fox, Campbell and Hartley v United Kingdom*, application nos. 12244/86, 12245/86, 12383/86), 30 August 1990, para. 32; *Murray v United Kingdom*, Grand Chamber, application no. 14310/88, 28 October 1994, paras 50-63. See also Guideline VII(1) of the Council of Europe Guidelines on Human Rights and the Fight Against Terrorism, 11 July 2002; European Commission against Racism and Intolerance, General Policy Recommendation No. 11 on Combating Racism and Racial Discrimination in Policing, 29 June 2007, para 3.

[27] European Court of Human Rights: *Wloch v Poland*, application no. 27785/95, 19 October 2000, paras 108-109; *Kandzhov v Bulgaria*, application no. 68294/01, 6 November 2008, paras 52-62.

[28] European Court of Human Rights, *Jėčius v Lithuania,* application no. 4578/97, 2000, paras 47-52.

[29] Article 9(4) of the ICCPR; principle 4 of the UN Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment.

[30] See, for example Inter-American Court of Human Rights, *Fermín Ramírez v Guatemala,* judgment of June 20 2005, Merits, Reparations and Costs, para. 96.

[31] See European Court of Human Rights, *Čonka v Belgium*, application no. 51564/99, 5 May 2002, para 39.

[32] UN Human Rights Committee (HRC), General Comment 35, Article 9 (Liberty and Security of Person), 16 December 2014, UN Doc CCPR/C/GC/35, para 10.

[33] UN Human Rights Committee, General Comment 35, Article 9 (Liberty and Security of Person), 16 December 2014, UN Doc CCPR/C/GC/35, para 12.

[34] European Court of Human Rights, *Case of Gallardo Sanchez v Italy*, application no. 11620/07), 24 June 2015, para 39. See also, among many others, Winterwerp v. the Netherlands, 24 October 1979, § 37, Series A no. 33, *Amuur v. France,* 25 June 1996, para 50, Reports 1996-III, and *Witold Litwa v. Poland*, no. 26629/95, para 78, ECHR 2000-III.

[35] UN Human Rights Committee (HRC), General Comment 8, Article 9 (Liberty and Security of Person), 30 June 1982, UN Doc CCPR/C/GC/35, para 4.

[36] UN Human Rights Committee, General Comment 35, Article 9 (Liberty and Security of Person), 16 December 2014, UN Doc CCPR/C/GC/35, para 14.

20. The UNHRCom has explained that "[t]he notion of "arbitrariness" is not to be equated with 'against the law', but must be interpreted more broadly to include elements of inappropriateness, injustice, lack of predictability and due process of law, as well as elements of reasonableness, necessity and proportionality."[37] The permissible circumstances in which a person may be deprived of their liberty should be interpreted strictly. Domestic laws authorising arrest and detention, and domestic laws setting out procedures for arrest and detention, must conform to international standards.[38]

D. THE PRINCIPLE OF LEGAL CERTAINTY MUST GOVERN DECISIONS ON DETENTION

21. Article 9(1) of the ICCPR states that "no one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and <u>in accordance with procedure as are established by law</u>" (emphasis added). In like manner, principle 2 of the UN Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment makes clear that "arrest, detention or imprisonment shall only be carried out strictly in accordance with the provisions of the law and by competent officials or persons authorized for that purpose."

22. For detention to be considered 'in accordance with the law' the detention must satisfy the principle of legal certainty. Legal certainty requires the law to be set out in a precise manner that is readily understood by those subjected to it so that they can regulate their conduct accordingly.[39] Domestic laws may be arbitrary if they are over-broad;[40] to satisfy the requirement of legal certainty, it must be sufficiently foreseeable for people to understand how the law operates in practice.

23. This is a particularly important consideration when a broad level of discretion is bestowed upon specific state decision-makers as to how the law should be applied and for what duration. It is for this reason that Amnesty International is deeply concerned about criminal procedures regulating detention that enable effectively unfettered discretion on the part of judges to determine the amount of time an individual has to spend in detention, as this would contravene the principle of legal certainty and result in arbitrariness.

24. Detention that does not conform to international law includes holding individuals in custody for longer than the period authorised in national law.[41] Some states have laws setting maximum periods of pre-trial detention. Whether the length of a person's pre-trial detention is less than allowed in national law may be relevant, but it is not decisive in determining its reasonableness under international human rights law.[42] Compliance with time limits governing detention in domestic law cannot be regarded as

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[37] UN Human Rights Committee (HRC), General Comment 8, Article 9 (Liberty and Security of Person), 30 June 1982, UN Doc CCPR/C/GC/35, para 12.

[38] Inter-American Commission on Human Rights, Resolution 1/08, 13 March 2008, Principle IV of the Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas. See also, A v Australia, Human Rights Committee, Decision, UN Doc. CCPR/C/59/D/560/1993 (1997) para 9.5; European Court of Human Rights, *Bozano v France*, Application no. 9990/82, 1986, para 54; European Court of Human Rights, Decision, Lukanov v Bulgaria, Application no. 21915/93, (1997) para 41, European Court of Human Rights, Decision, *Baranowski v Poland*, Application no, 28358/95, 2000, paras 50-52; European Court of Human Rights, *Medvedyev and Others v France*, Grand Chamber decision, Application no, 3394/03, 2010, paras 79-80; Inter-American Court of Human Rights, Decision, *Gangaram-Panday v Suriname*, 1994 paras 46-47; *Alfonso Martin Del Campo Dodd v Mexico* 12.228, Report 117/09, Inter-American Commission on Human Rights, 2009, para 22.

[39] See, for example, European Court of Human Rights, Grand Chamber, *Korbely v Hungary*, application no. 9174/02, Grand Chamber, 19 September 2008, para. 70.

[40] UN Human Rights Committee, Concluding Observations, Ethiopia, UN Doc CCPR/C/ ETH/CO/1 (2011) para 15.

[41] Working Group on Arbitrary Detention, Opinion 10/2009 (Venezuela), UN Doc.A/HRC/13/30/Add.1 (2009) pp172-179 paras 52(b)-53; Alfonso Martin Del Campo Dodd v Mexico (12.228, Report 117/90), Inter-American Commission (2009) paras 22-25.

[42] European Court of Human Rights, *Kalashnikov v Russia*, application no 47095/99, paras 114-120, 15 October 2002; European Court of Human Rights, *Kevin O'Dowd v the United Kingdom,* application no 7390/07, 21 February 2011, paras 68-70.

automatically resulting in the compatibility of detention with international human rights law[43] and standards given that the domestic law must also protect against other forms of arbitrariness.

25. As an overview, and as recognised by the Inter-American Court of Human Rights in a case where a person's prolonged detention without trial was held to be arbitrary even though it was permitted by domestic law,

> "it is not sufficient that any reason for the deprivation or restriction of the right to liberty is embodied in the law, but this law and its application must be compatible with the Convention. In other words, to ensure that this measure is not arbitrary, it must respect the following requirements: (i) that the purpose of the measures that deprive or restrict liberty is legitimate (it is worth noting that the Court has recognized that ensuring that the accused does not impede the development of the proceedings or evade the action of justice are legitimate purposes);[44] (ii) that the measures adopted are appropriate to achieve the intended objective; (iii) that they are necessary, in the sense that they are absolutely essential to attain the desired objective, and that there is no measure that is less onerous in relation to the affected right, among all those that are similarly appropriate to achieve the proposed objective (for this reason, the Court has indicated that the right to personal liberty presupposes that any limitation must be exceptional),[45] and (iv) that the measures are strictly proportionate,[46] so that the sacrifice inherent in the restriction of the right to liberty is not exaggerated or disproportionate compared with the advantages obtained by the use of this restriction and the achievement of the intended objective. Any restriction of liberty that does not include sufficient grounds that allow an assessment to be made of whether it is adapted to these conditions will be arbitrary and, consequently, will violate Article 7(3)[47] of the Convention."[48]

26. In addition, Amnesty International has long documented that unfettered discretion can allow for discriminatory practices to emerge – with a tendency for those in marginalised groups to be disproportionately disadvantaged – which is in itself a form of arbitrariness.

E. PRE-TRIAL DETENTION MUST BE LIMITED IN DURATION

27. Pre-trial detention, also known as on remand detention, must be an exceptional measure and based on an individualised determination that it is reasonable and necessary, specified in law and without vague and expansive provisions. The state has the duty to limit the time that an individual spends in pre-trial detention, and it is unacceptable for a person to be kept in detention if there are no factual or legal grounds that support them being held.

28. In accordance with the right to liberty and the internationally recognized principle of the presumption of innocence until proven guilty, there is a presumption that people charged with a criminal offence will not be detained while awaiting trial.[49] In line with this, the UNHRCom has explained that:

> "detention in custody of persons awaiting trial shall be the exception rather than the rule…It

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[43] European Court of Human Rights, *Auad v. Bulgaria*, application no. 46390/10, 11 October 2011, para 131.
[44] Footnote in original: Inter-American Court of Human Rights, *Acosta Calderón v. Ecuador*, Merits, reparations and costs. Judgment of June 24, 2005. Series C No. 129, para. 111.
[45] Footnote in original: Inter-American Court of Human Rights, *Palamara Iribarne v. Chile*, Merits, reparations and costs. Judgment of November 22 2005. Series C No. 118, para. 50.
[46] Footnote in original: Inter-American Court of Human Rights, *The "Juvenile Re-education Institute" v. Paraguay*. Preliminary objections, merits, reparations and costs. Judgment of September 2, 2004. Series C No. 112, para. 228.
[47] Article 7(3) of the American Convention on Human Rights guarantees that "No one shall be subject ot arbitrary arrest or imprisonment".
[48] Footnote in original: Inter-American Court of Human Rights, *Palamara Iribarne v. Chile*, Merits, reparations and costs. Judgment of November 22 2005. Series C No. 118, para. 128. See also Inter-American Court of Human Rights, Yvon Neptune v Haiti, judgment of May 6 2008, Merits, Reparations and Costs para. 98.
[49] Inter-American Commission on Human Rights, *Peirano Basso v Uruguay* (12.533), 2009, para 69.

should not be the general practice to subject defendants to pretrial detention. Detention pending trial must be based on an individualized determination that it is reasonable and necessary taking into account all the circumstances, for such purposes as to prevent flight, interference with evidence or the recurrence of crime. The relevant factors should be specified in law and should not include vague and expansive standards such as "public security".[50]

29. In line with rule 64 of the United Nations Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders, non-custodial sentences shall be preferred for pregnant women; persons with the capacity to get pregnant, and persons with dependent children.[51] Custodial sentences should be considered "when the offence is serious or violent or the woman represents a continuing danger, and after taking into account the best interests of the child or children, while ensuring that appropriate provision has been made for the care of such children."[52] Alternatives to pre-trial detention should be applied as appropriate and possible for suspected women offenders.[53] As regards young people, pre-trial detention of juveniles should be avoided as a matter of principle.[54]

30. The UNHRCom has affirmed that "…remand in custody pursuant to lawful arrest must not only be lawful but reasonable in the circumstances.[55] The onus is on the state to demonstrate that holding a person in remand is lawful, reasonable and necessary in every case of detention.[56] In other words, as a starting point, because the right to liberty and security of persons and the presumption of innocence underpin any criminal justice process, there is a presumption *against* pre-trial detention and *in favour of* release pending trial, such as on bail, and the state carries the burden to rebut this presumption in the specific case.

31. Considering this, Amnesty International submits that (i) international law warrants the presumption that an accused person should be granted bail, and (ii) in line with the state obligation to hear challenges on the lawfulness of detention, people detained should have the right to request bail. In recognition of this principle, the European Court of Human Rights has long held that to meet the procedural requirement entailed by the right to liberty and in determining release or detention, a state has the "obligations of reviewing the circumstances militating for or against detention, [and] of deciding, by reference to legal criteria, whether there are reasons to justify detention and of ordering release if there are no such reasons."[57]

32. The Inter-American Court of Human Rights strongly denounced a state's continued failure to bring an individual before a qualified judge to hear the charges against him, thereby leaving him in a situation of "absolute juridical uncertainty".[58] In the same case, the state's ongoing failure to provide a fair hearing

[50] UN Human Rights Committee, General Comment 35, Article 9 (Liberty and Security of Person), 16 December 2014, UN Doc CCPR/C/GC/35, para. 38.
[51] The United Nations Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders (the Bangkok Rules), Rule 58. See also: UN Office on Drugs and Crime and the Organisation for Security and Cooperation in Europe (2006) Criminal Justice Assessment Toolkit, Custodial and Non-Custodial Measures: 2 Detention Prior to Adjudication (UN Office on Drugs and Crime and OSCE), p.26; see also Recommendation Rec(2006)13 of the Committee of Ministers of the Council of Europe to member states on the use of remand in custody, the conditions in which it takes places and the provision of safeguards against abuse (adopted 27 September 2006), para 10.
[52] The United Nations Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders (the Bangkok Rules), Rule 64.
[53] The United Nations Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders (the Bangkok Rules), Rule 58.
[54] UN Human Rights Committee, General Comment 35, Article 9 (Liberty and Security of Person), 16 December 2014, UN Doc CCPR/C/GC/35, para. 38; Article 37(b) of the Convention on the Rights of the Child; UN General Assembly, Human rights in the administration of justice, UN Doc. A/RES/65/213, para. 14.
[55] UN Human Rights Committee, Communication No. 458/1991, *A. W. Mukong v. Cameroon* (Views adopted on 21 July 1994), in UN doc. GAOR, A/49/40, para. 9.8.
[56] UN Human Rights Committee, Communication No. 305/1988, *H. van Alphen v. the Netherlands* (Views adopted on 23 July 1990), in UN doc. GAOR, A/45/40 (vol. II), p. 115, para. 5.8
[57] European Court of Human Rights, *Schiesser v. Switzerland*, application no. 7710/76, 4 December 1979, para 31.
[58] Inter-American Court of Human Rights, Yvon Neptune v Haiti, judgment of May 6 2008, Merits, Reparations and Costs, para. 76

amounted to an "unjustified delay in access to justice".[59] In a similar vein, the African Commission on Human and Peoples' rights found that a delay without a hearing or projected trial date constituted a violation of Article 7(1)(d) of the African Charter on Human and Peoples' rights which guarantees the right to be tried within a reasonable time.[60]

33. Less intrusive measures must take precedence over detention: the UNHRCom has indicated the need for the state to establish that any deprivation of liberty is justified in relation to the particular individual's circumstances and that there are "no less invasive means of achieving the same ends."[61]

34. A Council of Europe Recommendation gives examples of 'alternative measures' to pre-trial detention as including:

> "Undertakings to appear before a judicial authority as and when required, not to interfere with the course of justice and not to engage in particular conduct, including that involved in a profession or particular employment; requirements to report on a daily or periodic basis to a judicial authority, the police or other authority; requirements to accept supervision by an agency appointed by the judicial authority; requirements to submit to electronic monitoring; requirements to reside at a specified address, with or without conditions as to the hours to be spent there; requirements not to leave or enter specified places or districts without authorisation; requirements not to meet specified persons without authorisation; requirements to surrender passports or other identification papers; and requirements to provide or secure financial or other forms of guarantees as to conduct pending trial."[62]

35. The burden rests on the state to establish that it is necessary and proportionate to deprive individuals of their liberty pending trial[63] and in any case, pre-trial detention should only be applied for the shortest possible time. Moreover, according to the UNHRCom, if the length of time that the defendant has been held in pre-trial detention "reaches the length of the longest sentence that could be imposed for the crimes charged, the defendant should be released."[64] A period of pre-trial detention that exceeds the penalty that an individual would face if convicted would be disproportionate. In this regard, the Inter-American Court has held that the pre-trial detention of a person for 16 days longer than the sentence subsequently imposed (14 months) exceeded reasonable limits.[65] This is because, among others, once this length of time has been reached, the defendant in effect has served a sentence of imprisonment. Considering this, the period in pre-trial detention should not be longer than the potential sentence a person would face if tried and convicted for the crime, as this would contravene the principle of fairness and would likely amount to arbitrary detention.

36. However, even if the defendant in the end is found guilty and therefore subject to a criminal sanction, lengthy pre-trial detention makes obsolete the judge's discretion to impose a shorter sentence or non-custodial measures [such as a fine or community service], as warranted by the individual case. In other words, if the offender has already served the longest available sentence for the crime, the sentencing judges are curtailed in their duty and authority to impose a punishment that is commensurate with the

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[59] Inter-American Court of Human Rights, Yvon Neptune v Haiti, judgment of May 6 2008, Merits, Reparations and Costs, para. 86

[60] African Commission on Humam and Peoples' Rights, *Annette Pagnoulle (on behalf of Abdoulaye Mazou) v Cameroon* (39/90), 10th Annual Report (1996-1997) pp52-56 at p55.

[61] UN Human Rights Committee, Saed Shams and others v. Australia, Communication Nos. 1255/2004, UN Docs CCPR/C/901D11255,1256,1259, 1260, 1266,1268,1270&1288/2004, 2007, para 7.2.

[62] Committee of Ministers of the Council of Europe, Recommendation Rec(2006)13 to member states on the use of remand in custody, the conditions in which it takes places and the provision of safeguards against abuse (adopted 27 September 2006), para 2(1).

[63] UN Human Rights Committee, *Marinich vs. Belarus*, 19 August 2010, UN Doc. CCPR/C/99/D/1502/2006, para. 10.4

[64] UN Human Rights Committee, General Comment 35, Article 9 (Liberty and Security of Person), 16 December 2014, UN Doc CCPR/C/GC/35, para 38.

[65] Inter-American Court of Human Rights, *Barreto Leiva v Venezuela*, judgment of November 17 2009, Merits, Reparations and Costs, paras 117-123.

gravity of the crime and the circumstances of the offender in the specific case that takes into account their gender, age, humanitarian and other concerns as appropriate.

37. The UN Committee Against Torture has warned that a lengthy period prior to trial may amount to cruel treatment in violation of the Convention Against Torture.[66] The UNHRCom has noted that article 9(3) ICCPR "is intended to bring the detention of a person charged with a criminal offence under judicial control".[67] The Office of the UN High Commissioner for Human Rights/IBA Manual on Human Rights in the Administration of Justice (2003) clarifies that although the term "promptly" must, according to the jurisprudence of the UNHRCom, "be determined on a case-by-case-basis", the delay between the arrest of accused persons and the time before they are brought before a judicial authority "should not exceed a few days".[68] "In the absence of a justification for a delay of four days before bringing the author to a judicial authority", this delay violated the notion of promptness in article 9(3).[69] Furthermore, a one-week delay in a capital case before the author was first brought before a judge "cannot be deemed compatible with" article 9(3).[70] For the avoidance of doubt, where the complainant has been held for two and a half months or more before being brought before a judge, article 9(3) has also been violated.[71] The UNHRCom has also underscored that a lack of adequate resources for the administration of criminal justice does not justify unreasonable delays in the adjudication of criminal cases.[72]

38. In a similar pattern, the African Commission has also notably held that the "right to be tried within a reasonable time by an impartial court or tribunal" as guaranteed by article 7(1)(d) of the African Charter on Human and Peoples' Rights is reinforced by its Resolution on the Right to Recourse and Fair Trial (1992),[73] according to which persons "arrested or detained shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within reasonable time or to be released".[74]

39. As to the legal status of time spent in pre-trial detention, international criminal courts and tribunals as well as regional human rights law recognise that any period of time during which a convicted person is held in detention, including provisional detention, should be taken into account and credited to their

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[66] Committee Against Torture (1998) Report of the Committee Against Torture (A/53/44), para. 68.

[67] UN Human Rights Committee, Communication No. 521/1992, *V. Kulomin v. Hungary*, 22 March 1996, UN doc. GAOR, A/51/40 (vol. II), para. 11.2;

[68] Office of the United Nations High Commissioner for Human Rights, *Human Rights in the Administration of Justice: A Manual on Human Rights for Judges, Prosecutors and Lawyers (part of the Human Rights in the Administration of Justice Training Package)*, 1 March 2003, p.185. See also UN Committee on Human Rights, Communication No. 373/1989, *L. Stephens v. Jamaica*, on 18 October 1995, UN doc. GAOR, A/51/40 (vol. II), p. 9, para. 9.6.

[69] Office of the United Nations High Commissioner for Human Rights, *Human Rights in the Administration of Justice: A Manual on Human Rights for Judges, Prosecutors and Lawyers (part of the Human Rights in the Administration of Justice Training Package)*, 1 March 2003, p.185. See also UN Human Rights Committee, Communication No. 625/1995, *M. Freemantle v. Jamaica*, 24 March 2000, UN doc. GAOR, A/55/40 (vol. II), p. 19, para. 7.4

[70] Office of the United Nations High Commissioner for Human Rights, *Human Rights in the Administration of Justice: A Manual on Human Rights for Judges, Prosecutors and Lawyers (part of the Human Rights in the Administration of Justice Training Package)*, 1 March 2003, p.185. UN Human Rights Committee, Communication No. 702/1996, *C. McLawrence v. Jamaica*,18 July 1997, UN doc. GAOR, A/52/40 (vol. II), p. 231, para. 5.6

[71] UN Human Rights Committee, Communication No. 330/1988, *A. Berry v. Jamaica*, 7 April 1994, UN doc. GAOR, A/49/40 (vol. II), pp. 26-27, para. 11.1.

[72] Office of the United Nations High Commissioner for Human Rights, *Human Rights in the Administration of Justice: A Manual on Human Rights for Judges, Prosecutors and Lawyers (part of the Human Rights in the Administration of Justice Training Package)*, 1 March 2003, p.185. See also UN Human Rights Committee, *N. Fillastre v. Bolivia*, 1991, Communication No. 336/199.

[73] African Commission on Human and Peoples' Rights, Resolution on the Right to Recourse and Fair Trial – ACHPR/Res.4(XI)92, 9 March 1992, achpr.au.int/en/node/562.

[74] Office of the United Nations High Commissioner for Human Rights, *Human Rights in the Administration of Justice: A Manual on Human Rights for Judges, Prosecutors and Lawyers (part of the Human Rights in the Administration of Justice Training Package)*, 1 March 2003, p.186. See also African Commission on Human and Peoples' Rights, *Huri-Laws (on behalf of Civil Liberties Organisation) v. Nigeria*, Communication No. 225/98, decision adopted during the 28th Ord. session, 23 October – 6 November 2000, para. 4.

sentence.[75] For example, Article 78(2) of the Rome Statute of the International Criminal Court states that: "In imposing a sentence of imprisonment, the Court shall deduct the time, if any, previously spent in detention in accordance with an order of the Court. The Court may deduct any time otherwise spent in detention in connection with conduct underlying the crime." Moreover, the Committee of Ministers of the Council of Europe have recommended that:

> "[1] The period of remand in custody prior to conviction, wherever spent, shall be deducted from the length of any sentence of imprisonment subsequently imposed.
>
> [2] Any period of remand in custody could be taken into account in establishing the penalty imposed where it is not one of imprisonment.
>
> [3] The nature and duration of alternative measures previously imposed could equally be taken into account in determining the sentence."[76]

40. According to international criminal procedure, this does not affect the ability of the court to impose the maximum sentence:[77] it ensures that if convicted, all of an individual's time spent in official custody with their movement severely restricted without their consent is ultimately accounted for in the sentence that they are subjected to.

F. INTERNATIONAL LAW REQUIRES STATES TO MEET PROCEDURAL REQUIREMENTS TO ENSURE DETENTION IS NOT ARBITRARY

i. Right to be informed of reasons for arrest, charges and detention

41. Article 9(2) ICCPR provides that anyone who is arrested or detained must be informed of the reasons why they are being deprived of their liberty.[78] This right should apply at all times. A key purpose of this requirement is to enable an individual to challenge their detention if they believe it is unlawful or unfounded. Therefore, the reasons given must be specific. They must include a clear explanation of both the legal provision under which the individual is being held and the essential factual basis for the arrest or detention.[79] The Human Rights Committee concluded that it was not sufficient simply to inform detainees that they were being arrested on security grounds without any indication of the substance of the alleged offence.[80] Further, the UN Special Rapporteur on the promotion and protection of human

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[75] See International Criminal Tribunal for Rwanda, *Prosecutor v. Ferdinand Nahimana, Jean-Bosco Barayagwiza and Hassan Ngeze*, Case No. ICTR-99-52-T, 3 December 2003, para 1107; International Criminal Tribunal for the former Yugoslavia, *Prosecutor v. Dusko Tadic (Judgement in Sentencing Appeals)*, Case No: IT-94-1-A and IT-94-1-Abis, 26 January 2000, para. 38; International Criminal Tribunal for Rwanda, *François Karera v. The Prosecutor* (Appeal Judgment), Case No. ICTR-01-74-A, 2 February 2009, para. 397.

[76] Rule 33 in the Recommendation Rec(2006)13 of the Committee of Ministers to member states on the use of remand in custody, the conditions in which it takes place and the provision of safeguards, 27 September 2006.

[77] International Criminal Tribunal for Rwanda, Rule 101(c); International Criminal Tribunal for the former Yugoslavia, Rule 101(c).

[78] This right is also recognised in Article 7(4) of the American Convention on Human Rights; Article 14(3) of the Arab Charter on Human Rights; Article 5(2) of the European Convention on Human Rights; Principle 10 of the of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment; The African Commission on Human and Peoples' Rights, Section M(2)(a) of the Principles and Guidelines on the Right to Fair Trial and Legal Assistance in Africa; Principle V of the Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas; See Articles 55(2) and 60(1) of the International Criminal Court Statute, Rule 117(1) of the International Criminal Court Rules of Procedure and Evidence, Rule 53 bis of the Rwanda Rules, Rule 59 bis (B) of the Rules of Procedure and Evidence of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committee in the Territory of the Former Yugoslavia since 1991.

[79] European Court of Human Rights: *Shamayev and Others v Georgia*, application no. 36378/02, 12 April 2005 para. 413; *Kortesis v Greece*, application no. 60593/10, 12 September 2012, paras 58-62, *Nechiporuk and Yonkalo v Ukraine* application no. 42310/04, 21 April 2011, paras 209-211; UN Human Rights Committee, Decision, *Kelly v Jamaica*, UN Doc. CCPR/C/41/D/253/1987 (1991) para 5.8.

[80] UN Human Rights Committee, Decision, *Adolfo Drescher Caldas v Uruguay*, UN Doc. A/38/40 Supp. 40 at 192 (1983)

rights and fundamental freedoms while countering terrorism has emphasized that "there is no good reason for failing to inform a person of the reasons for their detention".[81] Equally, the Inter-American Court has clarified that the right to be informed requires both the accused and their lawyer to be informed.[82]

ii. Right to challenge the lawfulness of detention

42. Everyone deprived of their liberty has the right to take proceedings to challenge the lawfulness of their detention before a court. This is sometimes referred to as habeas corpus, which is a judicial remedy designed to protect personal liberty or physical integrity of a detained person.[83]

43. The court must rule on the lawfulness of detention without delay and order release if the detention is unlawful.[84] The right to challenge the lawfulness of detention before a court is a self-standing human right, the absence of which constitutes a human rights violation. It applies to all forms of deprivation of liberty, including temporary and administrative detention.[85] It is a judicial remedy designed to protect against arbitrary arrest, detention, including secret or prolonged incommunicado detention, exile, forced disappearance or risk of torture and other cruel, inhuman or degrading treatment or punishment. It is also a means of determining the whereabouts and state of health of detainees and of identifying the authority ordering or carrying out the deprivation of liberty.[86]

44. However, the availability of habeas corpus or other such procedures does not excuse a state's failure to bring a detainee promptly before a judicial authority.[87] The habeas corpus procedure can be initiated on behalf of the person in detention or by their own accord. Generally, the person detained or their lawyer would bring a challenge to secure judicial protection. However, some standards expressly provide that such challenges may be brought on behalf of the detainee by other people.[88]

45. This right falls within the scope of protection afforded by article 9(4) of the ICCPR, and the UN General Assembly has indicated that article 9(4) is fulfilled by "*amparo, habeas corpus* or other legal remedies

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para 13.2; See also UN Human Rights Committee, Concluding Observations: Sudan, UN Doc. CCPR/C/79/Add.85 (1997) para 13; UN Human Rights Committee, *Nechiporuk and Yonkalo v Ukraine*, Communication no. 42310/04.

[81] Special Rapporteur on human rights and counter-terrorism, Israel and the Occupied Palestinian Territories, UN Doc. A/HRC/6/17/Add.4 (2007) para 22.

[82] Inter-American Court of Human Rights, *Tibi v Ecuador*, Judgment of September 7 2004, Preliminary Objections, Merites, Reparations and Costs, para 109.

[83] See, for example Inter-American Court of Human Rights, Advisory Opinion OC-8/87, para. 33.

[84] Article 9(4) of the International Covenant on Civil and Political Rights, Article 17(2)(f) of the International Convention for the Protection of All Persons from Enforced Disappearance, Article 37(d) of the Convention on the Rights of the Child, Article 16(8) of the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, Article 7(6) of the American Convention on Human Rights, Article 14(6) of the Arab Charter on Human Rights, Article 5(4) of the European Convention on human rights, Principle 32 of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment; Guideline 32 of the Robben Island Guidelines for the Prohibition and Prevention of Torture in Africa; Section M(4) and (5) of the Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa; Article XXV of the American Declaration of the Rights and Duties of Man; Guideline VII(3) of the Council of Europe Guidelines on human rights and counter-terrorism; See Article 8 of the Universal Declaration of Human Rights.

[85] Human Rights Council, Resolution 15/18 on Arbitrary detention, 6 October 2010, paras 4(d)-(e).

[86] Working Group on Arbitrary Detention, Report, United Nations Basic Principles and Guidelines on Remedies and Procedures on the Right of Anyone Deprived of Their Liberty to Bring Proceedings Before a Court, 6 July 2015, UN Doc A/HRC/30/37, para 2.

[87] See UN Human Rights Committee, *Berry v Jamaica*, UN Doc. CCPR/C/50/D/330/1988 (1994) para 11.1; and European Court of Human Rights, *De Jong, Baljet and van den Brink v The Netherlands*, application nos 8805/79; 8806/79; 9242/81, 22 May 1984, para 51, 57.

[88] Article 17(2)(f) of the International Convention for the Protection of All Persons from Enforced Disappearance, Article 7(6) of the American Convention on Human Rights, Section M(5)(b) of Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa; See Principle 32 of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment.

to the same effect."[89] As to the related human rights human rights that habeas corpus protects, the Inter-American Court of Human Rights has recognised that:

> "In situations of deprivation of liberty… among the essential judicial guarantees, habeas corpus represents the appropriate means for guaranteeing the liberty and controlling respect for the life and integrity of the person, and also for protecting the personal integrity of the individual. Obviously the name, procedure, regulation and scope of the domestic recourses that allow the lawfulness of a deprivation of liberty to be reviewed may vary from one State to another."[90]

46. It follows that, whilst the means of ensuring the habeas corpus procedure is up to the state, as a matter of international law, there must be in place a mechanism for individuals to challenge their detention before a judge. Moreover, the procedure must exist and be functioning in practice throughout the entire period of detention.

47. The body reviewing the lawfulness of detention must be a court that is independent of the executive and impartial.[91] The court must have the power to order the release of the detainee if the detention is unlawful.[92] The UNHRCom has found that "the inability of the judiciary to challenge a detention that was, or had become, contrary to article 9, paragraph 1, constitutes a violation of article 9, paragraph 4."[93] Also in line with this position, the European Court of Human Rights concluded that an advisory panel which had no decision-making power, but made non-binding recommendations to a UK government minister, did not qualify as a "court" for this purpose.[94]

iii. Pre-trial detention must be periodically reviewed

48. Guideline 7 of the UNWGAD on the right to bring proceedings before a court to challenge the arbitrariness and lawfulness of detention states that no substantial waiting period shall exist before a detainee can bring a first challenge to the arbitrariness and lawfulness of detention.[95] Governments are required to create procedures which enable individuals to challenge the lawfulness of detention and obtain release if the detention is unlawful. Such procedures must be available throughout the period of detention. In *Ismoilov and Others v. Russia*, the European Court of Human Rights made clear that:

> "A remedy must be made available during a person's detention to allow that person to obtain speedy judicial review of the lawfulness of the detention, capable of leading, where appropriate, to his or her release. The existence of the remedy required by Article 5 (4) must be sufficiently certain, not only in theory but also in practice, failing which it will lack the accessibility and effectiveness required for the purposes of that provision." [96]

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89 UN General Assembly Resolution, Res. 34/178, U.N. Doc. A/RES/34/178 (Dec. 17, 1979).
90 Inter-American Court of Human Rights, *Yvon Neptune v Haiti*, judgment of May 6 2008, Merits, Reparations and Costs, para. 115.
91 Inter-American Commission, Resolution 2/11, Regarding the Situation of the Detainees at Guantanamo Bay, United States MC 259-02, cidh.oas.org/pdf%20files/Resolution%202-11%20Guantanamo.pdf.
92 Article 9(4), International Covenant on Civil and Political Rights.
93 UN Human Rights Committee, *C v. Australia,* Communication no. 90011999, at para. 8.3; UN Human Rights Committee, *Shams v. Australia*, Communication No 1255/2004, at para. 7.3.
94 European Court of Human Rights, Grand Chamber, *Chahal v United Kingdom*, application no. 22414/93, 15 November 1996 para 130.
95 Working Group on Arbitrary Detention, Report, United Nations Basic Principles and Guidelines on Remedies and Procedures on the Right of Anyone Deprived of Their Liberty to Bring Proceedings Before a Court, 6 July 2015, UN Doc A/HRC/30/37, para 61.
96 European Court of Human Rights, *Ismoilov and Others v. Russia*, application no. 2947/06, 24 April 2008, para 145.

International standards also require the procedure to be simple and expeditious[97] and free of charge if the detainee cannot afford to pay.[98]

49. To ensure effective oversight, good international practice requires states to actively monitor breaches. All complaints of arbitrary detention must be promptly, thoroughly and impartially investigated. Legal and institutional frameworks must enable the effective investigation of alleged instances of arbitrary detention, and effective records should be kept about the outcomes and impacts of those investigations.[99] This facilitates guarantees of non-repetition.

iii. The right to effective remedy

50. International law requires that anyone arbitrarily detained has a right to redress.[100] Redress enables individuals to obtain their right to an effective remedy for human rights violations, which is a "core tenet of international human rights law"[101] that is enshrined in customary international law.[102] All victims of human rights violations have a right to an effective remedy,[103] which derives from the general principle of international human rights law that every breach gives rise to a corresponding obligation to provide an effective remedy.[104] Article 2(3) of ICCPR gives particular effect to the general rights of individuals to an effective remedy.

51. International law requires that a person who is arbitrarily detained have access to an effective remedy, procedurally in the form of access to a judicial body, and substantively, through cessation of the unlawful detention. The elements of the right to an effective remedy in any particular case will involve taking the steps necessary to bring the violation of international law to an immediate end (cessation)[105] and to repair the violation either through restitution, compensation, rehabilitation, satisfaction or guarantees of non-repetition; or through an appropriate combination of these forms.[106] In concrete terms, this obligation entails the immediate release of the person from the arbitrary detention and for the state to ensure that its laws, policies and procedures protect against arbitrary detention and are implemented to that effect. This result is required by general principles of international law and in addition is binding on Mongolia through its ratification of the ICCPR and other relevant treaties.

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[97] European Court of Human Rights, Grand Chamber, *Chahal v United Kingdom*, application no. 22414/93, 15 November 1996, para 130.

[98] Principle 32(2), UN Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment.

[99] See for example UN Human Rights Committee, General Comment No. 21: Humane treatment of persons deprived of their liberty (Article 10), UN Doc. HRI/GEN/1/Rev.9 (Vol. I) at pp. 202-203, paras 6-7.

[100] Article 9(5) of the ICCPR provides that "Anyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation."

[101] UN Human Rights Council, Report of the United Nations High Commissioner for Human Rights and reports of the Office of the High Commissioner and the Secretary-General Promotion and protection of all human rights, civil, political, economic, social and cultural rights, including the right to development (10 May 2016), A/HRC/32/19, para. 6.

[102] Prosecutor v. André Rwamakuba, Case No. ICTR-98- 44C, Decision on Appropriate Remedy, para 40 (31 January 2007); Prosecutor v. André Rwamakuba, Case No. ICTR-98-44C-A, Decision on Appeal Against Decision on Appropriate Remedy, paras 23-5 (13 September 2007); and Cantoral-Benavides v. Perú, 2001 Inter-Am. Ct. H.R. (ser.C) No. 88, para 40.

[103] The right to remedy was first enshrined in article 8 of the UN Universal Declaration of Human Rights which guarantees every person the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted them by law.

[104] Permanent Court of International Justice, *Chorzów Factory (Germany v. Poland),* 1928, (series A) No. 17, para 73.

[105] Articles on Responsibility of States for Internationally Wrongful Acts and Commentary, art. 30 at 216-222; Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Advisory Opinion, 1971 I.C.J. 16 at para 54 (1971).

[106] See UN Human Rights Committee, General Comment No. 31 on the nature of the general legal obligation imposed on States Parties to the Covenant, UN Doc CCPR/C/21/Rev.1/Add.13, at para 16; UN Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law ("Basic Principles on the Right to a Remedy"), adopted by consensus and proclaimed by UN General Assembly resolution 60/147 of 16 December 2005, Principles 18-23.

CONCLUSION

52. It is respectfully submitted that the international law and standards provided in this submission should guide the court in deciding the current case before it. International laws and standards binding on the state of Mongolia and enshrined in its domestic law through article 10 of its constitution provide a clear prohibition of arbitrary detention.

53. For detention to be compliant with international law the detaining state must be able to invoke a valid and legitimate basis in its national law for the detention of that person, and that basis must be in compliance with international law and standards – including procedural safeguards. Continuation, or indeed extension of detention initiated in violation of this principle, will never be lawful.

54. Amnesty International hopes that the Constitutional Court will find this amicus curiae brief useful to its adjudication of this matter.

ANNEX 1: QUESTIONS POSED BY THE COURT TO AMNESTY INTERNATIONAL MONGOLIA

The below extract was contained in a letter received on 28 January 2025 from the Constitutional Court of Mongolia to Amnesty International Mongolia.[107] For brevity, the first segment of the letter has been omitted from this annex.

[...I kindly ask you to address the following questions from the perspective of human rights-respecting principles, the best practices of...countries, and international human rights law:

4.1. On what grounds does the court legitimize the detention of the accused and the defendant, whether the grounds for detaining an accused and a defendant are different, whether the grounds specified in Article 14.9 of the Law on Criminal Procedure are consistent with the best practice in this regard, and whether these grounds are sufficiently certain.

4.2. Whether there is a limit on the total duration of detention, and if so, when this period starts and ends, whether this period is determined differently for the accused and the defendant, and whether the provisions specified in Section 12 of Article 14.10 of the Law on Criminal Procedure is consistent with the best practice in this regard;

4.3. Whether there is a limitation on the period of detention for the defendant, or whether the defendant is detained until the case is finally resolved by the court, and the best practices in this regard;

4.4. Whether, during the court proceeding of a criminal case, a higher court (appellate or supervisory court) returns a case to the first-instance court for retrial, or whether the first-instance court refers the case back to the prosecutor; in such cases, whether the legal status of the defendant who was in detention changes to that of an accused, whether the period of detention as a defendant is counted toward the period of detention as an accused, and if the individual was previously detained as an accused, whether that time is added to the calculation; and the best practices in this regard;

4.5. Whether the defendant is detained under a special procedure, and whether the grounds and the procedure for calculating the detention period are regulated differently from those of the accused;

4.6. Whether an accused or defendant of a crime for which imprisonment is not prescribed can be placed in detention, whether there is a special procedures for deciding detention based on the type of crime, and whether an accused or defendant has already been detained for the maximum sentence applicable to the crime in question is released (for example, if the maximum sentence for the crime in question is imprisonment for up to 2 years, can the accused or defendant be detained for a period longer than that period);

4.7. Whether a detained defendant have the right to know the grounds for detention either during detention or within a specified period of time. Are they entitled to review the evidence supporting the detention, present evidence to refute it, notify their family and lawyer, and receive legal assistance. If so, when can these rights be exercised? What are the best practices in other countries regarding the rights of detained defendants;

4.8. Any other additional issues that could be proposed to resolve this dispute.]

[107] Translated from original Mongolian to English by Amnesty International Mongolia.

ANNEX 2: PROVISIONS UNDER REVIEW

**Translated to English by Amnesty International Mongolia*

Article 14.1. Preventative Measures

3. During the investigation process, preventive measures specified in sections 1.2, 1.3, and 1.5 of this Article shall be taken with the court's permission. During the court proceedings, preventive measures specified in sections 1.1, 1.2, 1.3, 1.4, 1.5, and 1.6 of this Article shall be taken by the court.

Article 14.10. Duration of Preventive Detention

11. During the court proceedings, the court may take preventive detention measures against the defendant, considering the proposals made by the prosecutor, participants, in accordance with the objectives of the criminal proceedings. (This section was added by the law on January 17, 2024.)

12. The duration of preventive detention during the court proceedings does not apply to the periods specified in sections 2 and 3 of this Article. (This section was added by the law on January 17, 2024.)

**Original Mongolian*

14.1 дүгээр зүйл.Таслан сэргийлэх арга хэмжээ

3.Мөрдөн байцаалтын явцад энэ зүйлийн 1.2, 1.3, 1.5-д заасан таслан сэргийлэх арга хэмжээг шүүхийн зөвшөөрлөөр, эрүүгийн хэрэг шүүхэд хянан шийдвэрлэх явцад энэ зүйлийн 1.1, 1.2, 1.3, 1.4, 1.5, 1.6-д заасан таслан сэргийлэх арга хэмжээг шүүх авна.

14.10 дугаар зүйл.Цагдан хорих таслан сэргийлэх арга хэмжээ авах хугацаа

11.Эрүүгийн хэргийг шүүхэд хянан шийдвэрлэх явцад прокурор, оролцогчийн гаргасан саналыг харгалзан шүүх эрүүгийн хэрэг хянан шийдвэрлэх ажиллагааны зорилтод нийцүүлэн шүүгдэгчид цагдан хорих таслан сэргийлэх арга хэмжээ авч болно.
/Энэ хэсгийг 2024 оны 01 дүгээр сарын 17-ны өдрийн хуулиар нэмсэн./

12.Эрүүгийн хэргийг шүүхэд хянан шийдвэрлэх явцад шүүгдэгчийг цагдан хорьсон хугацаа нь энэ зүйлийн 2, 3 дахь хэсэгт заасан хугацаанд хамаарахгүй.
/Энэ хэсгийг 2024 оны 01 дүгээр сарын 17-ны өдрийн хуулиар нэмсэн./