





CHAPTER 3

Arrest

Learning objectives for Chapter 3

After completing this chapter you should be able to:

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- *Provide a basic definition of arrest*
 - *Describe the purpose of arrest*
 - *Discuss the manner in which arrest is properly to be administered*
 - *Describe when arrest is allowed*
 - *Discuss the rights of suspects upon arrest*
 - *Provide examples of the responsibilities of police officers upon arrest*
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Chapter 3 Arrest

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3.1. Introduction

Arrest is – at least in the eyes of the public – the single defining ‘police action’. The ability to lawfully arrest is provided for in law because it is critical to the justice process. However, because of the drastic consequences for the liberty of the individual, arrest is also an area where there is scope for infringement of basic rights. These usually relate not to the fact of arrest itself, but to the manner in which the arrest is carried out: someone subject to lawful reasons for arrest has not thereby lost his right to be treated humanely, with minimal force, and with full information about his situation.

3.2. Definitions

Before we continue with the topic of arrest, it is important to provide basic definitions of arrest and detention (see chapter 4) from an international perspective. The following definitions have been drawn from the United Nations-devised *Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment*. Although they may differ from country to country, these definitions may enable understanding of the basic rights during the legal processes that are followed in the course of law enforcement.

‘ARREST’

‘Arrest’ means the act of apprehending a person for the alleged commission of an offence or by the action of a lawful authority. Arrest is a lawful method to secure the attendance of a suspected criminal at his or her trial.

‘DETENTION’

‘Detained person’ means any person deprived of personal liberty except as a result of conviction for an offence. ‘Detention’ means the condition of detained persons as defined.

‘IMPRISONMENT’

‘Imprisoned person’ means any person deprived of personal liberty as a result of conviction for an offence. ‘Imprisonment’ means the condition of imprisoned persons as defined.

3.3. Purpose of arrest

"No one shall be deprived of his [or her] liberty except on such grounds and in accordance with such procedure as are established by law." (ICCPR, Article 9.1)

This provision makes it clear that the reasons for an arrest, as well as the procedures that should be followed during an arrest, must be found in the laws of the State.

In law enforcement, the usual purposes of arrest are to:

- prevent a person from committing, or continuing to commit, an unlawful act;
- enable an investigation to be carried out in relation to alleged unlawful act committed by the person arrested; or
- present a person before a court for consideration of any charges against him or her.

It is very important for law enforcement officials to be fully aware of how the term ‘arrest’ is defined in their domestic legislation, and of the powers of arrest accorded them under that legislation. This principle of legality is violated if somebody is either arrested or detained on



grounds which are not clearly established in, or which are contrary to, domestic law. Arbitrary arrest is, therefore, illegal.

An arrested person is always presumed to be innocent until proven guilty in a recognised court of law. For this reason, every arrested person should be treated humanely and in accordance with the law. Arrest is not a punishment or a method to temporarily remove unwanted persons in society in order to clean up the area. Instead, an arrested person should be brought before a judicial authority for the purpose of having the legality of his arrest or detention reviewed without delay, and shall be released if the detention is found to be unlawful.

3.4. Types of arrest

In general, arrest – like search and seizure (see Chapter 7) – can be effected with a warrant or without a warrant.

● Arrest with a warrant

A warrant is that formal legal document which authorises someone to take arresting action. In this case, any individual magistrate, judge, judicial officer or, in certain instances, a senior police officer (depending on domestic legislation) can issue warrants to a police officer to carry out the arrest of a named individual.

● Arrest without a warrant

Arrest without a warrant normally takes place when a person commits a crime – or attempts to commit a crime – in the presence of a police officer. There are also some specific exceptions depending on domestic legislation.

In terms of using force to effect arrest, it is important to keep the principles of **legality, necessity and proportionality** in account when arresting a suspect without a warrant.

3.5. When is arrest allowed?

Whenever a person is arrested, it must be for the alleged commission of an offence. In law enforcement practice, not every alleged commission of an offence automatically leads, or should lead, to the arrest of the person(s) responsible. There are a number of factors which influence the decision whether to effect an arrest or not. The gravity and consequences of the offence committed, combined with the personality and behaviour, at the time of apprehension, of the suspect(s), will be basic considerations. Inevitably, the quality and experience (that is, competence) of law enforcement officials involved will also have a bearing on the outcome of a particular situation in which the discretion whether or not to arrest is exercised.

Aside from the prohibition on arbitrary arrest, international human rights law does not deal as much with when arrest is allowed, so much as how the arrest process should be conducted if it is decided that it is lawful.

3.6. What are the rights of persons upon arrest?

Every person arrested has certain rights immediately upon arrest and also after arrest. This places an obligation on police officers to respect and protect the basic rights of people who are arrested. These rights are clearly spelled out in the international legal instruments applicable to police, the details of which are included at the end of this manual.

Rights immediately upon arrest

- **Right to liberty/freedom and security of a person, and to freedom of movement**

A person may only be arrested on such grounds and in accordance with such procedure as are established by law. This is the principle of legality. The principle is violated if somebody is either arrested or detained on grounds which are not clearly established in, or which are contrary to, domestic law. A person may not be arrested or detained arbitrarily (without legal grounds).

- **Right to be treated with dignity and respect**

The arrested person has the right to be treated with dignity and respect. Police officers should not, for example, swear or use abusive language towards the arrested person, because this infringes on the person's dignity.

- **Right to be informed of the reasons for arrest**

Every person that is arrested has the right to be informed, at the time of the arrest, of the reasons for his or her arrest.

- **Right to remain silent (this is linked to the right against self-incrimination)**

An arrested person should have the right to remain silent. No one shall be compelled to confess or to testify against himself/herself. Every person has the right not to incriminate himself or herself. This right is affirmed by the fact that police officers may state that a person has the right to remain silent and that everything that they might say may be taken down and used afterwards as evidence in a court of law. This, however, does not mean that the suspect should not provide for example basic details like name, address and reasons for being at a specific place.

- **Right to be informed of the charges against oneself**

An arrested person also has the right to be promptly informed of any charges against him or her. There is no clear definition as to what is meant by 'promptly', and this period may differ according to domestic legislation.

- **The right to be informed of one's rights**

Although suspects have basic rights upon arrest, they also have the right to be informed about such rights by the police officer who arrested him or her. Any person shall, at the moment of arrest and at the commencement of detention or imprisonment, or promptly thereafter, be provided by the authority responsible for his or her arrest, detention or imprisonment, respectively with information on and an explanation of his/her rights and how to avail himself or herself of such rights.

- **The right to be presumed innocent**

Every arrested person has the right to be presumed innocent until proven guilty according to the law in a public trial at which he/she has had all the guarantees necessary for his or her defence. It is for the court to decide if a suspect is guilty. This can only be done after all the evidence has been heard and the person has been proven to be guilty beyond reasonable doubt.





Rights immediately following arrest

See also Chapter 4 on 'Detention'.

- **Right to be brought to a place of custody**

Persons should only be detained in legally accepted places of custody.

- **Right to apply for bail**

Persons have the right to apply for bail when they have been charged for committing an offence that is (under local laws) bailable.

- **Right to be brought promptly before a judge or other officer authorised by law**

Anyone who is arrested shall be brought promptly before a judicial authority. This is a right to be brought to a place of custody and to be brought promptly before a judge or other officer authorised by law to exercise judicial power, who will decide on the lawfulness and the necessity of the arrest (ICCPR, Article 9.3; Body of Principles, Principles 11 and 37). The time period for a person to be brought before a court may differ from country to country. This period is more commonly referred to and known as police custody. The period that follows it is what is known as pre-trial detention.

- **Right not be tortured or treated in a cruel, inhuman or degrading way**

The prohibition against torture applies to persons under any form of arrest, detention or imprisonment. Police officers are explicitly prohibited from taking advantage of the situation of a detained person to obtain by application or threat of force or harm a confession, to incriminate himself or herself or to testify against others.

- **Right to a fair trial within a reasonable time**

A person detained on a criminal charge shall be entitled to fair trial within a reasonable time or to release pending trial.

- **Right to notify family members and other appropriate persons about the detention**

Promptly after arrest and after each transfer from one place of detention or imprisonment to another, a detained or imprisoned person shall be entitled to notify or to require the competent authority to notify members of his or her family or other appropriate persons of his/her choice of their arrest, detention or imprisonment or of the transfer and of the place where he/she is kept in custody.

- **Right to legal assistance and to communicate with legal representative**

An arrested person has a right to the assistance of a legal counsel and must be provided with reasonable facilities to exercise this right. Legal counsel must be provided by a judicial or other authority if the arrested person has no legal counsel of his or her own choice, and free of charge if the arrested person does not have sufficient means to pay.

The following are the rights that support the right to legal representation. Arrested persons and their legal representatives have the following rights:

- to receive prompt and full communication of any order of detention, together with the reasons therefor;

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- to communicate with each other and have adequate time and facilities for consultation in full confidence and without delay or censorship;
 - to communicate with each other within the sight but not within the hearing of a law enforcement official: such communications to be inadmissible as evidence against the detained person unless connected with a continuing or contemplated crime;
 - to have access to the recorded information on the duration of any interrogation, the intervals between interrogations, and the identity of the officials who conducted the interrogations and other persons present;
 - to have effective opportunity to be heard by a judicial or other authority;
 - to take proceedings according to domestic law before a judicial or other authority to challenge the lawfulness of the detention in order to obtain the release of the detainee, if it is unlawful; and
 - to make a request or complaint regarding the treatment of the detainee, particularly in the case of torture or other cruel, inhuman or degrading treatment, to the administrative or higher authorities and, when necessary, to appropriate authorities vested with reviewing or remedial powers.



3.7. What are the duties of police officers upon arrest?

With every right there is an obligation on police officers to respect and fulfil these rights. Therefore, police officers have the following duties during and after arrest:

- **To inform the suspect of his/her rights**

This means that the police officers should inform the arrested person of his/her rights and how to avail himself or herself of such rights. It is especially important for police officers to inform arrested persons of the following rights:

- the right to remain silent and not to admit guilt, and that silence will not be interpreted as an admission;
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- the right to contact a relative or close friend and be visited by such person;
 - the right to contact a legal representative and communicate with him or her confidentially;
 - the right that a legal representative will be appointed if the suspect is unable to pay for a lawyer;
 - the right to be brought before a court within a reasonable time (as stipulated in the law of each country);
 - the right to be questioned in the presence of a legal representative, unless the right is waived; and, if the suspect is a foreign national,
 - the right to contact diplomatic or consular officials of his or her country.

● **To keep a record of relevant data**

Police officers must keep record of the following data:

- the reasons for the arrest;
- the time of the arrest;
- the time transferred to a place of custody;
- the time of appearance before a judicial or other authority;
- the identity of the law enforcement officials concerned;
- precise information concerning the place of custody;
- the details of questioning or interrogation; and
- the property of the detained person kept by the police.

To this should be added:

- the date and time that the individual was brought into custody;
- their medical condition;
- each visit by detention officers, lawyers, doctors and family or friends;
- exercise periods; and
- time and date of transfer to detention facility or release.

● **The arrest record shall be communicated to the detainee, or to his legal counsel.**

● **Where necessary, an interpreter shall be provided during interview.**

3.8. The international guidelines applicable to arrest

From international standards and practice, it is possible to identify the following list of guidelines.

To all police officers:

- Review regularly, for a clear understanding, the extent of their powers of arrest, and of the procedures to adopt upon and following arrest.
- Participate in training to develop and maintain the necessary inter-personal skills, and especially skills of communication, and the necessary technical and tactical skills to enable the officer to effect arrests expertly, discretely and with due respect for human dignity.
- Where resistance is not evident, attempt calm, polite, disarming language when effecting an arrest, resorting to strong, authoritative tones only when necessary.
- Develop and maintain skills in use of handcuffs and other means of restraint.
- Development of self-confidence, including through self-defence skills.
- Seek an arrest order/warrant, whenever possible.
- Carry a small card in the uniform, setting forth the rights of an arrestee, and read those rights, verbatim, to the arrestee once he or she has been secured.
- Study conflict resolution techniques, through in-service training, or in available community educational programmes.
- Keep careful arrest records, with detail as the first rule.

To command and supervisory officials:

- Issue and enforce clear standing orders on arrest procedures.
- Provide continuous training to all officers on procedures for arrest, the rights of the arrested, and techniques for effecting arrest safely and humanely.
- Provide training in inter-personal skills, conflict resolution techniques, self-defence, and the use of restraint mechanisms.
- Develop standard forms for the recording of arrest information, based upon this chapter, and the laws and procedures for arrest in your jurisdiction.
- When arrests can be planned in advance, ensure that a range of options is available, and that planning, preparation, briefing and tactics adopted are appropriate to the circumstances and conditions under which the arrest is to be effected.
- Debrief the involved officers after every arrest, and carefully check the arrest record to be sure it is complete.
- Establish procedures to ensure the unhindered access of legal counsel to arrested persons.





3.9. Summary

Arrest is a serious infringement on the liberty of any person. If conducted in a way that exceeds the power granted by law, or is accompanied by excess force, or failure to advise the arrestee of various rights and afford these to the arrestee, the police officer will be in breach of human rights standards (not to mention his or her own code of conduct and the criminal code).

Issues of public image, professionalism, law and human rights all point to using the minimum of powers available when effecting an arrest, and to police officers being thoroughly acquainted with the standards and rules in question, and the reasons why these are maintained.

3.10. Questions for self-evaluation

- *Provide basic definitions of arrest, detention and imprisonment.*
 - *What is the purpose of arrest?*
 - *How can a person be arrested consistently with human rights standards?*
 - *What are the rights of persons upon arrest?*
 - *Provide five examples of the duties of police officers towards the arrested person.*
 - *What are some of the practical guidelines for arrest procedures that comply with international standards of human rights?*
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