Chapter 8
INTERNATIONAL LEGAL STANDARDS FOR THE PROTECTION OF PERSONS DEPRIVED OF THEIR LIBERTY

Learning Objectives

- *To familiarize participants with some of the most important international legal standards concerning the treatment of persons deprived of their liberty, including the legal duty of States to prevent, punish and remedy violations of these standards;*
- *To illustrate how the many legal rules are enforced in practice in order to protect the rights of persons deprived of their liberty;*
- *To explain what legal steps, measures and/or actions judges, prosecutors and lawyers must take in order to safeguard the rights of persons deprived of their liberty.*

Questions

- *Have you ever encountered persons deprived of their liberty who have complained of ill-treatment?*
- *If so, when was the alleged ill-treatment inflicted and for what purpose?*
- *What measures were taken to remedy the situation, and what effect did they have, if any?*
- *What are the rules in your country with regard to the recognition of places of detention and the registration of persons deprived of their liberty?*
- *What are the rules in your country with regard to recourse to solitary confinement? For example, for what reasons, for how long, and in what conditions can it be imposed?*
- *Is incommunicado detention permitted under the laws of your country, and if so, for how long? What legal remedies are at the disposal of the person subjected to such detention? How do the authorities ensure that no physical or mental abuses occur while the detainee or prisoner is held incommunicado?*

Questions (cont.d)

- *As lawyers, have you ever encountered problems in having free and confidential contacts with your detained clients? If so, what did you do about it?*
- *Are there any special problems in your country with regard to the conditions of detention for children and women?*
- *If so, what are they and what measures, if any, have been taken in order to remedy the situation?*
- *What are the formal complaint procedures in your country for alleged ill-treatment of detainees and prisoners, including women and children?*

Relevant Legal Instruments

Universal Instruments

- International Covenant on Civil and Political Rights, 1966
- Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1984
- The 1949 Geneva Conventions and the two Protocols Additional of 1977
- Statute of the International Criminal Court, 1998
- Universal Declaration of Human Rights, 1948

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- Standard Minimum Rules for the Treatment of Prisoners, 1955
- Basic Principles for the Treatment of Prisoners, 1990
- Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, 1988
- Principles of Medical Ethics relevant to the Role of Health Personnel, particularly Physicians, in the Protection of Prisoners and Detainees against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1982
- Code of Conduct for Law Enforcement Officials, 1979
- Declaration on the Protection of All Persons from Enforced Disappearance, 1992
- Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions, 1989

Relevant Legal Instruments (cont.d)

Regional Instruments

- African Charter on Human and Peoples' Rights, 1981
- American Convention on Human Rights, 1969
- Inter-American Convention to Prevent and Punish Torture, 1985
- Inter-American Convention on the Forced Disappearance of Persons, 1994
- European Convention on Human Rights, 1950
- European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, 1987

Introduction

This chapter explains the principal international legal rules governing the treatment of persons deprived of their liberty and will also provide examples of how these legal rules have been interpreted by the international monitoring organs.

The treatment of all categories of detainees and prisoners remains a major challenge in the area of overall improvement in respect for the human person. Placed in a situation of inferiority and weakness, a person who is arrested, in pre-trial detention or serving a prison sentence upon conviction is to a considerable extent left to the mercy of the police and prison officials. The detainee or prisoner is virtually cut off from outside life, and thus also vulnerable to treatment violating his or her rights. The continuing widespread use of torture and other inhuman or degrading treatment or punishment of these categories of people, whose cries for help in moments of pain can be heard by nobody except fellow inmates, constitutes an intolerable insult to human dignity.

International human rights law does however contain strict rules about the treatment of detainees and prisoners which are applicable at all times, and States are under a legal duty to take the necessary legislative and practical measures to put an end to all practices that violate these rules. In this respect, the task of judges, prosecutors and lawyers is of primordial importance in contributing to an increased respect for the legal rules that will help safeguard the life, security and dignity of people deprived of their liberty. In their daily work, these legal professions, when faced with people suspected or accused of criminal activities, will have to exercise constant vigilance for signs of torture, forced confessions under ill-treatment or duress, and any other kind of physical or mental hardship. Judges, prosecutors and lawyers thus have not just a key role in this regard, but also a professional duty to ensure the effective implementation of the existing domestic and international rules for the protection of the rights of people deprived of their liberty.

This chapter will first deal with the notion of torture, cruel, inhuman and degrading treatment and punishment, and will in particular deal with the problems caused by solitary confinement and, more specifically, incommunicado detention. It will also briefly explain the particular problems to which vulnerable groups such as children and women are subjected while detained. The rights both of children and of women in the administration of justice will, however, also be dealt with in some detail in Chapters 10 and 11 respectively. This chapter will then consider aspects of detention such as accommodation, exercise, the health of detainees and prisoners and their contacts with the outside world through visits and correspondence. Thirdly, the chapter will deal with the complaints procedures which must be available at all times to all persons deprived of their liberty. Lastly, the chapter will provide some advice on how judges, prosecutors, and lawyers may work more effectively for the eradication of torture and other unlawful treatment of detainees and prisoners.

1.1 Use of terms

In this chapter the terms "detainee" and "detained person" mean any person deprived of his or her personal liberty except as a result of conviction for an offence, while the expressions "prisoner" and "imprisoned person" mean any person deprived of his or her personal liberty as a result of conviction for an offence. It should however be noted that in the Standard Minimum Rules for the Treatment of Prisoners, the term "prisoner" is used in a generic sense covering both untried and convicted persons, a fact that must be borne in mind whenever these rules are being quoted or otherwise referred to.

2. The Prohibition of Torture and Cruel, Inhuman or Degrading Treatment or Punishment

2.1 Introductory remarks

Not only are the right to life and the prohibition of torture and other cruel, inhuman or degrading treatment or punishment to be found in all major general human rights treaties and numerous other human rights instruments, but these norms also run like a thread through international humanitarian law. For instance, according to common article 3(I)*(a)* to the 1949 Geneva Conventions, which concerns armed conflicts not of an international character, "violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture" shall remain prohibited at any time and in any place whatsoever with respect to "persons taking no active part in the hostilities". Further, article 75(2)*(a)* of Protocol Additional I and article 4(2)*(a)* of Protocol Additional II to the Geneva Conventions, which respectively relate to international and non-international armed conflicts, similarly proscribe "violence to the

life, health and physical or mental well-being of persons", and, in particular, murder, torture, corporal punishment and mutilation.

The peremptory nature both of the right to life and of the right to freedom from torture and other cruel, inhuman or degrading treatment or punishment is moreover underlined by the fact that these rights cannot be derogated from under international human rights law even in the gravest of crisis situations. This is made clear by article 4(2) of the International Covenant on Civil and Political Rights, article 27(2) of the American Convention on Human Rights and article 15(2) of the European Convention on Human Rights. Article 2(2) of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment also provides that "no exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture". Moreover, article 5 of the Inter-American Convention to Prevent and Punish Torture adds that "neither the dangerous character of the detainee or prisoner, nor the lack of security of the prison establishment or penitentiary shall justify torture".

The fundamental nature of the prohibition of torture is further underlined by the fact that, according to article 7 of the Rome Statute of the International Criminal Court, torture constitutes a ***crime against humanity*** "when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack". "Torture or inhuman treatment, including biological experiments" also constitute ***war crimes*** and ***grave breaches*** of the 1949 Geneva Conventions for the purpose of the same Statute (art. 8(2)(a)(ii)).

In addition to this multitude of international legal rules, recourse to torture is often prohibited at the domestic level. The existence of torture is thus not a legal problem per se, but rather one of implementation of the law, that poses a true challenge to the world community.

2.2 Legal responsibilities of States

Article 7 of the International Covenant on Civil and Political Rights provides that "no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment", and, in particular, that "no one shall be subjected without his free consent to medical or scientific experimentation". In its General Comment No. 20, the Human Rights Committee explained that the aim of this article "is to protect both the dignity and the physical and mental integrity of the individual".[1] It emphasized, furthermore, that "it is the duty of the State party to afford everyone protection through legislative and other measures as may be necessary against the acts prohibited by article 7, whether inflicted by people acting in their official capacity, outside their official capacity or in a private capacity".[2] The prohibition in article 7 "is complemented by the positive requirements of article 10, paragraph 1, of the Covenant, which

[1] *United Nations Compilation of General Comments*, p. 139, para. 2.

[2] Ibid., loc. cit.

stipulates that 'All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person'."[3]

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Article 2 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment provides that "each State Party shall take effective legislative, administrative, judicial or other measures to ***prevent*** acts of torture in any territory under its jurisdiction" (emphasis added). According to article 12 of the Convention, each State party shall moreover "ensure that its competent authorities proceed to ***a prompt and impartial investigation***, wherever there is reasonable ground to believe that an act of torture has been committed in any territory under its jurisdiction" (emphasis added). In making its recommendations to States parties, the Committee against Torture has consistently emphasized that they should "ensure vigorous investigation and, where appropriate, the prosecution of all reported instances of alleged torture and ill-treatment" by their authorities, "whether civil or military".[4] For the purpose of ensuring that perpetrators of torture do not enjoy ***immunity***, the Committee against Torture has further recommended that States parties "ensure that amnesty laws exclude torture from their reach".[5]

Furthermore, it is noteworthy that the Committee against Torture has repeatedly recommended that States parties to the Convention against Torture ***should consider repealing laws which may undermine the independence of the Judiciary***,[6] and, with regard more particularly to the problem of limited-term appointments, bring their legislation into line with the 1985 Basic Principles on the Independence of the Judiciary and the 1990 Guidelines on the Role of Prosecutors.[7]

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In General Comment No. 20, the Human Rights Committee also pointed out that article 7 of the International Covenant on Civil and Political Rights should be read in conjunction with article 2(3) thereof concerning the obligation of the States parties to provide ***effective remedies*** to persons whose rights and freedoms are violated.[8] This means, in particular, that "the ***right to lodge complaints against maltreatment*** prohibited by article 7 must be recognized in the domestic law" and that "complaints must be investigated promptly and impartially by competent authorities so as to make the remedy effective".[9] The Committee against Torture has also emphasized the importance of introducing "an effective and reliable complaint system that will allow the victims of torture and other forms of cruel, inhuman or degrading treatment or punishment to file complaints".[10]

[3]Ibid.

[4]See e.g. as to Peru, UN doc. *GAOR*, A/55/50, p. 15, para. 61(a).

[5]Ibid., p. 17.

[6]See e.g. as to Peru, in UN doc. *GAOR*, A/55/44, p. 15, para. 60; and, as to Azerbaijan, see ibid., p. 17, para. 69(d).

[7]See as to Kyrgyzstan, ibid., p. 19, para. 75(d).

[8]*United Nations Compilation of General Comments*, p. 141, para. 14.

[9]Ibid., loc. cit.; emphasis added.

[10]See e.g. as to Poland, UN doc. *GAOR*, A/55/44, p. 22, para. 94.

Lastly, with regard to the problem of ***impunity***, the Human Rights Committee has stated that "amnesties are generally incompatible with the duty of States to investigate such acts; to guarantee freedom from such acts within their jurisdiction; and to ensure that they do not occur in the future".[11] On the issue of amnesty laws the Human Rights Committee and the Committee against Torture thus concur. In this respect the Human Rights Committee has said that "States may not deprive individuals of the right to an effective remedy, including compensation and such full rehabilitation as may be possible."[12]

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The Inter-American Court of Human Rights has explained States' obligations inter alia under article 1 of the American Convention on Human Rights in some detail. With regard to the obligation to "ensure ... the free and full exercise" of the rights and freedoms guaranteed by the Convention, it has thus stated that it

> "... implies the duty of the States Parties to organize the governmental apparatus and, in general, all the structures through which public power is exercised, so that they are capable of juridically ensuring the free and full enjoyment of human rights. As a consequence of this obligation, the States must prevent, investigate and punish any violation of the rights recognized by the Convention and, moreover, if possible attempt to restore the right violated and provide compensation as warranted for damages resulting from the violation."[13]

The Court added in this respect that

> "The obligation to ensure the free and full exercise of human rights is not fulfilled by the existence of a legal system designed to make it possible to comply with this obligation – it also requires the government to conduct itself so as to effectively ensure the free and full exercise of human rights."[14]

This means, in particular, allowing the Judiciary, the prosecuting authorities and lawyers to pursue their work effectively and independently of the governmental authorities.

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In a case concerning the alleged rape and ill-treatment of a female detainee, the *Aydin* case, the European Court of Human Rights recalled that article 13 of the European Convention on Human Rights "guarantees the availability at the national level of a remedy to enforce the substance of the Convention rights and freedoms in whatever form they might happen to be secured in the domestic legal order".

[11] General Comment No. 20, *United Nations Compilation of General Comments*, p. 141, para. 15.

[12] Ibid., loc. cit.

[13] *I-A Court HR, Velásquez Rodríguez Case, judgment of July 29, 1988, Series C, No. 4*, p. 152, para. 166.

[14] Ibid., para. 167.

> "The effect of this article is thus to require the provision of a domestic remedy allowing the competent national authority both to deal with the substance of the relevant Convention complaint and to grant appropriate relief, although Contracting States are afforded some discretion as to the manner in which they conform to their obligations under this provision."[15]

Although "the scope of the obligation under article 13 varies depending on the nature of the applicant's complaint under the Convention", nevertheless,

> "the remedy required ... must be 'effective' ***in practice as well as in law***, in particular in the sense that its exercise must not be unjustifiably hindered by acts or omissions of the authorities of the respondent State ...".[16]

The European Court added in this case that

> "the nature of the right safeguarded under Article 3 of the Convention has implications for Article 13. Given the fundamental importance of the prohibition of torture and the especially vulnerable position of torture victims, ... Article 13 imposes, without prejudice to any other remedy available under the domestic system, an obligation on States to carry out a thorough and effective investigation of incidents of torture.
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> Accordingly, where an individual has an arguable claim that he or she has been tortured by agents of the State, the notion of an 'effective remedy' entails, in addition to the payment of compensation where appropriate, a thorough and effective investigation capable of leading to the identification and punishment of those responsible and including effective access for the complainant to the investigatory procedure."[17]

Lastly, although, unlike article 12 of the 1984 Convention against Torture, article 13 of the European Convention does not impose, *expressis verbis*, "a duty to proceed to a 'prompt and impartial' investigation whenever there is a reasonable ground to believe that an act of torture has been committed", "such a requirement is implicit in the notion of an 'effective remedy' under article 13".[18] Consequently, in the *Aydin* case there had been a violation of article 13 since "no thorough and effective investigation was conducted into the applicant's allegations and ... this failure undermined the effectiveness of any other remedies which may have existed given the centrality of the public prosecutor's role to the system of remedies as a whole, including the pursuit of compensation".[19]

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For a more detailed analysis of the legal duty of States to prevent, investigate, prosecute, punish and remedy human rights violations see Chapter 15 of this Manual.

[15] *Eur. Court HR, Aydin v. Turkey, judgment (Grand Chamber) of 25 September 1997, Reports 1997-VI*, p. 1895, para. 103.

[16] Ibid., loc. cit.; emphasis added.

[17] Ibid., pp. 1895-1896, para. 103.

[18] Ibid., para. 103 at p. 1896.

[19] Ibid., p. 1898, para. 109.

2.3 The notions of torture and cruel, inhuman or degrading treatment or punishment: definitions and understandings

Article 7 of the International Covenant on Civil and Political Rights contains no definition of the notions covered thereby, nor did the Human Rights Committee "consider it necessary to draw up a list of prohibited acts or to establish sharp distinctions between the different kinds of punishment or treatment", since "the distinctions depend on the nature, purpose and severity of the treatment applied".[20] However, it has made clear that "the prohibition in article 7 relates not only to acts that cause physical pain but also to acts that cause mental suffering to the victim" and, moreover, that it covers "excessive chastisement ordered as punishment for a crime or as an educative or disciplinary measure".[21]

In one case, however, the Human Rights Committee observed that the assessment of what constitutes ***inhuman and degrading treatment*** "depends on all the circumstances of the case, such as the duration and manner of the treatment, its physical or mental effects as well as the sex, age and state of health of the victim".[22]

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For the purposes of the Convention against Torture, the term "torture" means

> "any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions" (art. 1(1)).

Under article 16 of the Convention against Torture, "each State Party shall undertake to prevent ... other acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture as defined in article 1, when such acts are committed by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity."

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[20] See General Comment No. 20, *United Nations Compilation of General Comments,* p. 139, para. 4.

[21] Ibid., para. 5.

[22] Communication No. 265/1987, *A. Vuolanne v. Finland* (Views adopted on 7 April 1989), in UN doc. *GAOR*, A/44/40, p. 256, para. 9.2.

In the *Loayza Tamayo* case, the Inter-American Court of Human Rights explained that

> "the violation of the right to physical and psychological integrity of persons is a category of violation that has several gradations and embraces treatment ranging from torture to other types of humiliation or cruel, inhuman or degrading treatment with varying degrees of physical and psychological effects caused by endogenous and exogenous factors which must be proven in each specific situation."[23]

Referring to the judgments of the European Court of Human Rights in the *Irish* and *Ribitsch* cases, the Inter-American Court added that

> "even in the absence of physical injuries, psychological and moral suffering, accompanied by psychic disturbance during questioning, may be deemed inhuman treatment. The degrading aspect is characterized by the fear, anxiety and inferiority induced for the purpose of humiliating and degrading the victim and breaking his physical and moral resistance. ... That situation is exacerbated by the vulnerability of a person who is unlawfully detained. ... Any use of force that is not strictly necessary to ensure proper behavior on the part of the detainee constitutes an assault on the dignity of the person ... , in violation of Article 5 of the American Convention. The exigencies of the investigation and the undeniable difficulties in the anti-terrorist struggle must not be allowed to restrict the protection of a person's right to physical integrity."[24]

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With regard to the prohibition of "torture or ... inhuman or degrading treatment or punishment" in article 3 of the European Convention on Human Rights, the European Court of Human Rights has stated that the distinction between "torture" and "inhuman or degrading treatment" "derives principally from a difference in the intensity of the suffering inflicted".[25] In the view of the Court, "it appears ... that it was the intention that the Convention, with its distinction between 'torture' and 'inhuman or degrading treatment', should by the first of these terms attach a special stigma to deliberate inhuman treatment causing very serious and cruel suffering".[26]

The Court has consistently emphasized the absolute prohibition under article 3, which shows that it "enshrines one of the fundamental values of the democratic societies making up the Council of Europe".[27] In view of "the object and purpose of

[23] *I-A Court HR, Case of Loayza Tamayo v. Peru, Judgment of September 17, 1997,* in OAS doc. OAS/Ser.L/V/III.39, doc. 5, *Annual Report of the Inter-American Court of Human Rights 1997*, p. 211, para. 57.

[24] Ibid., loc. cit.

[25] *Eur. Court HR, Case of Ireland v. the United Kingdom, judgment of 18 January 1978, Series A, No. 25*, p. 66, para. 167.

[26] Ibid., loc. cit. For a more recent case see *Eur. Court HR, Aydin v. Turkey, judgment (Grand Chamber) of 25 September 1997, Reports 1997-VI*, p. 1891, para. 82.

[27] *Eur. Court HR, Soering v. the United Kingdom, judgment of 7 July 1989, Series A, No. 161*, p. 34, para. 88.

the Convention, as an instrument for the protection of individual human beings", article 3 must, like any other provision thereof, "be interpreted and applied so as to make its safeguards ***practical and effective***".[28]

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Some examples will be given below of behaviour that has been considered to violate the international prohibitions on torture and/or cruel, inhuman and degrading treatment or punishment of people deprived of their liberty, or, exceptionally, in the execution of a punishment.

2.3.1 Rape as torture

In the case of *Aydin*, to which reference was made above, the applicant, a Turkish citizen of Kurdish origin, was only 17 years old when, together with her father and sister-in-law, she was detained by security forces. She was raped and ill-treated during her detention. Accepting the findings of the European Commission of Human Rights as to the facts of the case, the Court held that

> "Rape of a detainee by an official of the State must be considered to be an especially grave and abhorrent form of ill-treatment given the ease with which the offender can exploit the vulnerability and weakened resistence of his victim. Furthermore, rape leaves deep psychological scars on the victim which do not respond to the passage of time as quickly as other forms of physical and mental violence. The applicant also experienced the acute pain of forced penetration, which must have left her feeling debased and violated both physically and emotionally."[29]

The applicant had, moreover, been "subjected to a series of particularly terrifying and humiliating experiences while in custody at the hands of the security forces at Derik gendarmerie headquarters having regard to her sex and youth and the circumstances under which she was held"; she had been

> "... detained over a period of three days during which she must have been bewildered and disoriented by being kept blindfolded, and in a constant state of physical pain and mental anguish brought about by the beatings administered to her during questioning and by the apprehension of what would happen to her next. She was also paraded naked in humiliating circumstances thus adding to her overall sense of vulnerability and on one occasion she was pummelled with high-pressure water while being spun around in a tyre."[30]

[28] Ibid., para. 87; emphasis added.

[29] *Eur. Court HR, Aydin v. Turkey, judgment (Grand Chamber) of 25 September 1997, Reports 1997-VI*, p. 1891, para. 83.

[30] Ibid., para. 84.

The Court was thus

> "... satisfied that the accumulation of acts of physical and mental violence inflicted on the applicant and the especially cruel act of rape to which she was subjected amounted to torture in breach of Article 3 of the Convention".[31]

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In a case against Peru, the Inter-American Commission on Human Rights was also confronted with a case of rape by military personnel. Although the woman was not detained as such, she was helpless in the hands of these individuals who had abducted – and eventually killed – her husband. On the night of her husband's abduction from their home, Ms. Mejía was raped twice by a military officer.[32] The Commission presumed the alleged facts to be true; in its view "the credibility of the version presented by the petitioner" was corroborated by various reports of intergovernmental and non-governmental bodies that had documented "numerous rapes of women in Peru by members of the security forces in emergency areas and in which the specific case of Raquel Mejía" had been mentioned and described.[33] Having thus presumed the responsibility of troops of the Peruvian Army in the commission of the abuses against Ms. Mejía and also the non-existence in Peru of effective domestic remedies, the Commission held that

> "Current international law establishes that sexual abuse committed by members of security forces, whether as a result of a deliberate practice promoted by the State or as a result of failure by the State to prevent the occurrence of this crime, constitutes a violation of the victims' human rights, especially the right to physical and mental integrity."[34]

In support of this view it referred inter alia to articles 27 and 147 of the Fourth Geneva Convention of 1949, common article 3 of the Geneva Conventions, article 76 of Protocol Additional I to the Geneva Conventions, article 4(2) of Protocol Additional II to the Geneva Conventions and article 5 of the 1998 Statute of the International Criminal Court.[35]

The Commission then interpreted the notion of torture in article 5 of the American Convention on Human Rights in the light of the definition thereof contained in the Inter-American Convention to Prevent and Punish Torture; on the basis of this definition, for torture to exist, the following three elements had to be combined:

- "it must be an intentional act through which physical and mental pain and suffering is inflicted on a person";
- "it must be committed with a purpose"; and
- "it must be committed by a public official or by a private person acting at the instigation of the former".[36]

[31] Ibid., p. 1892, para. 86.

[32] *I-A Comm. HR, Report No. 5/96, Case 10.970 v. Peru, March 1, 1996, in* OAS doc. OEA/Ser.L/V/II.91, doc. 7 rev., *Annual Report of the Inter-American Commission on Human Rights 1995*, pp. 158-159.

[33] Ibid., pp. 174-175.

[34] Ibid., p. 182.

[35] Ibid., pp. 182-184.

[36] Ibid., p. 185.

These elements were all fulfilled in the case of Ms. Mejía. As to the ***first*** element, the Commission considered "that rape is a physical and mental abuse that is perpetrated as a result of an act of violence"; it also "causes physical and mental suffering in the victim. In addition to the violence suffered at the time it is committed, the victims are commonly hurt or, in some cases, are even made pregnant. The fact of being made the subject of abuse of this nature also causes a psychological trauma that results, on the one hand, from having been humiliated and victimized, and on the other, from suffering the condemnation of the members of their community if they report what has been done to them."[37] This element was fulfilled in this case, since Ms. Mejía "was a victim of rape, ... in consequence of an act of violence that [caused] her 'physical and mental pain and suffering'."[38] As to the ***second*** element, the rape of Ms. Mejía was committed "with the aim of punishing her personally and intimidating her"; the guilty man had told her that "she, too, was wanted as a subversive, like her husband", and "that her name was on a list of persons connected with terrorism". The man also threatened to come back and rape her again.[39] Lastly, with regard to the ***third*** element, the Commission concluded that the man who raped Ms. Mejía was a member of the security forces who had himself been accompanied by a large group of soldiers.[40]

Considering that the three elements of the definition of torture were all present in this case, the Commission concluded that Peru had violated article 5 of the American Convention on Human Rights.[41] It concluded moreover that the rapes suffered by Ms. Mejía constituted a violation of article 11 of the Convention concerning the right to privacy "in that they affected both her physical and her moral integrity, including her personal dignity"; indeed, as stated by the Commission, besides being a violation of victims' physical and mental integrity, sexual abuse "implies a deliberate outrage to their dignity".[42] Lastly, the Peruvian State had also violated articles 1(1), 8(1) and 25 of the Convention since it had not provided effective remedies with regard to these violations.[43]

2.3.2 Treatment of detainees and prisoners

The prevalence of torture and other unlawful treatment of persons deprived of their liberty is all too evident from the case-law of, inter alia, the Human Rights Committee, which contains numerous examples of violations of articles 7 and 10(1) of the International Covenant following the use of violence for the purpose, among others, of extracting confessions. Whenever the author is able to give a sufficiently detailed account of the beatings and other kinds of ill-treatment and the State party concerned fails to respond thereto, or does not dispute the allegations, the Committee considers that the information before it sustains a violation of articles 7 and 10(1) of the

[37] Ibid., p. 186.

[38] Ibid., loc. cit.

[39] Ibid., pp. 186-187.

[40] Ibid., p. 187.

[41] Ibid., loc. cit.

[42] Ibid., pp. 187-188.

[43] Ibid., p. 193. The same held true with regard to the homicide of her husband, ibid., loc. cit.

Covenant either taken together or separately, depending on the viciousness of the treatment.[44]

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With regard to means of constraint of detained persons, the Committee against Torture has recommended that the United States of America abolish "electro-shock stun belts and restraint chairs as methods of restraining those in custody", since their use almost invariably leads to breaches of article 16 of the Convention against Torture, which outlaws cruel, inhuman or degrading treatment or punishment.[45]

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In a case against Zaire, the African Commission on Human and Peoples' Rights concluded that "beating of detainees with fists, sticks and boots, the keeping of prisoners in chains and subjecting them to electric shock, physical suspension and submersion in water ... offend the human dignity"; such acts, together and separately, constitute a violation of article 5 of the African Charter.[46] Similarly, in a case against Malawi, the Commission concluded that the acts to which Vera and Orton Chirwa were subjected in prison "jointly and separately" clearly constituted a violation of article 5; their ill-treatment and punishment for disciplinary reasons included reduction in diet, chaining for two days of the arms and legs with no access to sanitary facilities, detention in a dark cell without access to natural light, water or food, forced nudity, and beating with sticks and iron bars; these were "examples of torture, cruel and degrading punishment and treatment".[47]

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The Inter-American Court of Human Rights has also had on numerous occasions to deal with cases involving torture and other kinds of ill-treatment, as in the so-called *"Street Children"* case, where the Court found that, after their having been abducted by Guatemalan State security forces and prior to their murder, "the physical and mental integrity" of the four adolescents had been violated and that "they were

[44] See e.g. among many other cases, Communication No. 328/1988, *R. Zelaya Blanco v. Nicaragua* (Views adopted on 20 July 1994), in UN doc. *GAOR*, A/49/40 (vol. II), pp. 15-16, paras. 6.5-6.6 and p. 18, para. 10.5: attempts to extract confession by threats, beatings, assassination of fellow detainees etc. contrary to articles 7 and 10(1) of the Covenant; Communication No. 613/1995, *A. Leehong v. Jamaica* (Views adopted on 13 July 1999), in UN doc. *GAOR*, A/54/40 (vol. II), p. 60, para. 9.2: ill-treatment and conditions were "such as to violate the author's right to be treated with humanity and with respect for the inherent dignity of the human person and the right not to be subjected to ***cruel, inhuman or degrading treatment***" under articles 7 and 10(1) (emphasis added); the author, who was on death row, had been beaten by prison warders and only allowed to see a doctor once although having made other requests to this effect; Communication No. 481/1991, *J. Villacnés Ortega v. Ecuador* (Views adopted on 8 April 1997), in UN doc. A/52/40 (vol. II), p. 4, para. 9.2 as compared with p. 2 para. 2.4: ill-treatment by prison personnel after an escape attempt by author's cell-mates; the author had, inter alia, "multiple round black traces on his abdomen and thorax resulting from the application of electric discharges"; the treatment amounted to "***cruel and inhuman treatment***" contrary to articles 7 and 10(1) of the Covenant (emphasis added); Communication No. 612/1995, *Arhuacos v. Colombia* (Views adopted on 29 July 1997), in UN doc. *GAOR*, A/52/40 (vol. II), p. 181, para. 8.5: ***torture*** of two brothers in violation of article 7, the victims being, inter alia, "blindfolded and dunked in a canal".

[45] UN doc. *GAOR*, A/55/44, p. 32, para. 180(c).

[46] *ACHPR, World Organisation against Torture and Others v. Zaire, Communications Nos. 25/89, 47/90, 56/91 and 100/93, decision adopted during the 19th session, March 1996*, para. 65 of the text of the decision as published at http://www.up.ac.za/chr/.

[47] *ACHPR, Krishna Achuthan and Amnesty International (on behalf of Aleke Banda and Orton and Vera Chirwa) v. Malawi, Communications Nos. 64/92, 68/92 and 78/92, decision adopted during the 16th session, October-November 1994*, para. 33 of the text of the decision as published at http://www.up.ac.za/chr/.

victims of ***ill-treatment and torture***" contrary to article 5(1) and (2) of the American Convention on Human Rights.[48]

In the case of *Castillo-Páez*, involving the abduction and disappearance of the victim, the Inter-American Court of Human Rights concluded that it was contrary to the right to humane treatment guaranteed by article 5 to place Mr. Castillo-Páez in the trunk of an official vehicle, and that "even if no other physical or other maltreatment occurred, that action alone must be clearly considered to contravene the respect due to the inherent dignity of the human person."[49]

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In the *Irish* case, the European Court of Human Rights concluded that the combined use of the five interrogation techniques of people arrested in Northern Ireland in 1971 constituted ***inhuman treatment*** within the meaning of article 3 of the European Convention on Human Rights. The Court found that these techniques, which consisted of wall standing, hooding, subjection to noise, deprivation of sleep, and deprivation of food and drink, "were applied in combination, with premeditation and for hours at a stretch" and that they "caused, if not actual bodily injury, at least intense physical and mental suffering to the persons subjected thereto and also led to acute psychiatric disturbances during interrogation".[50] In the view of the Court, these interrogation techniques were also "***degrading*** since they were such as to arouse in their victims feelings of fear, anguish and inferiority capable of humiliating and debasing them and possibly breaking their physical or moral resistance".[51]

In the case of *Tomasi* versus France, the applicant was subjected to police interrogation for about 40 hours, during which he had been "slapped, kicked, punched and given forearm blows, made to stand for long periods and without support, hands handcuffed behind the back; he had been spat upon, made to stand naked in front of an open window, deprived of food, threatened with a firearm and so on".[52] This constituted "inhuman and degrading treatment" to the European Court of Human Rights, the Court significantly adding that "the requirements of the investigation and the undeniable difficulties inherent in the fight against crime, particularly with regard to terrorism, cannot result in limits being placed on the protection to be afforded in respect of the physical integrity of individuals".[53]

In the later case of *Aksoy*, the Court did however conclude that the applicant had been subjected to ***torture***. In this case, the Court stated that "where an individual is taken into police custody in good health but is found to be injured at the time of release, it is incumbent on the State to provide a plausible explanation as to the causing of the injury, failing which a clear issue arises under Article 3 of the Convention."[54] Relying on

[48] *I-A Court HR, Villagrán Morales et al. case v. Guatemala, judgment of November 19, 1999, Series C, No. 63*, p. 180, para. 177 read in conjunction with p. 176, para. 186; emphasis added.

[49] *I-A Court HR, Castillo-Páez case, judgment of November 3, 1997*, in OAS doc. OAS/Ser.L/V/III.39, doc. 5, *Annual Report Inter-American Court of Human Rights 1997*, p. 264, para. 66.

[50] *Eur. Court HR, Case of Ireland v. the United Kingdom, judgment of 18 January 1978, Series A, No. 25*, p. 66, para. 167.

[51] Ibid., p. 66, para. 167; emphasis added.

[52] *Eur. Court HR, Case of Tomasi v. France, judgment of 27 August 1992, Series A, No. 241-A*, p. 40, para. 108.

[53] Ibid., p. 42, para. 115.

[54] *Eur. Court HR, Case of Aksoy v. Turkey, judgment of 18 December 1996, Reports 1996-VI*, p. 2278, para. 61.

the findings of the European Commission of Human Rights, the Court accepted that Mr. Aksoy had, inter alia, been subjected to "Palestinian hanging", meaning that he had been "stripped naked, with his arms tied together behind his back, and suspended by his arms". In the view of the Court:

> "this treatment could only have been deliberately inflicted; indeed, a certain amount of preparation and exertion would have been required to carry it out. It would appear to have been administered with the aim of obtaining admissions or information from the applicant. In addition to the severe pain which it must have caused at the time, the medical evidence shows that it led to a paralysis of both arms which lasted for some time... . The Court considers that this treatment was of such a serious and cruel nature that it can only be described as torture."[55]

2.3.3 Corporal punishment

As noted above, the Human Rights Committee considers that "corporal punishment, including excessive chastisement ordered as punishment for a crime or as an educative or disciplinary measure", is covered by the prohibition in article 7 of the International Covenant on Civil and Political Rights.[56] This view was confirmed in the *Osbourne* case, where the author had been given a 15-year prison sentence and ordered to receive 10 strokes of the tamarind switch for illegal possession of a firearm, robbery with aggravation and wounding with intent. It was held in this case that "irrespective of the nature of the crime that is to be punished, however brutal it may be, it is the firm opinion of the Committee that corporal punishment constitutes ***cruel, inhuman and degrading treatment or punishment***" contrary to article 7 of the Covenant, which was thus violated.[57] The Committee informed the Government that it was "under an obligation to refrain from carrying out the sentence of whipping upon Mr. Osbourne", and, further, that it "should ensure that similar violations do not occur in the future by repealing the legislative provisions that allow for corporal punishment".[58]

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With regard to Namibia, the Committee against Torture recommended "the prompt abolition of corporal punishment" insofar as it was still legally possible under Namibian law to impose such punishment.[59] This Committee has also expressed concern with regard to the situation in Saudi Arabia, since "sentencing to, and imposition of, corporal punishments by judicial and administrative authorities, including, in particular, flogging and amputation of limbs, ... are not in conformity with" the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment.[60]

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[55] Ibid., p. 2279, para. 64.

[56] See General Comment No. 20, *United Nations Compilation of General Comments*, p. 139, para. 5.

[57] Communication No. 759/1997, *G. Osbourne v. Jamaica* (Views adopted on 15 March 2000), in UN doc. *GAOR*, A/55/40 (vol. II), p. 138, para. 9.1; emphasis added.

[58] Ibid., para. 11.

[59] UN doc. *GAOR*, A/52/44, p. 37, para. 250.

[60] See UN doc. CAT/C/XXVIII/CONCL.6 *Conclusions and Recommendations: Saudia Arabia, adopted on 15 May 2002*, para. 4(b).

In a case where a juvenile court in the Isle of Man had ordered that an adolescent be given three strokes with a cane – a punishment that was in fact executed – the European Court of Human Rights concluded that it neither amounted to "torture", nor to "inhuman treatment" but that it did constitute ***"degrading treatment"*** for the purposes of article 3 of the European Convention on Human Rights.[61] The Court examined in detail whether the punishment could be regarded as "degrading", and considered that the "humiliation or debasement involved must attain a particular level and must in any event be other than that usual element of humiliation" that follows from judicial punishment in general; the assessment was "relative", depending "on all the circumstances of the case and, in particular, on the nature and context of the punishment itself and the manner and method of execution".[62] The Court's description of the nature of corporal punishment was explained in the following words:

> "The very nature of judicial corporal punishment is that it involves one human being inflicting physical violence on another human being. Furthermore, it is institutionalised violence, that is in the present case violence permitted by the law, ordered by the judicial authorities of the State and carried out by the police authorities of the State... . Thus, although the applicant did not suffer any severe or long-lasting physical effects, his punishment – whereby he was treated as an object in the power of the authorities – constituted an assault on precisely that which it is one of the main purposes of Article 3 to protect, namely a person's dignity and physical integrity. Neither can it be excluded that the punishment may have had adverse psychological effects."[63]

In the view of the Court, the institutionalized character of the violence was "further compounded by the whole aura of official procedure attending the punishment and by the fact that those inflicting it were total strangers to the offender". Viewing the circumstances "as a whole", the Court thus concluded that "the element of humiliation attained the level inherent in the notion of 'degrading treatment'".[64]

2.3.4 Medical or scientific experimentation

According to the second sentence of article 7 of the International Covenant on Civil and Political Rights, "no one shall be subjected without his free consent to medical or scientific experimentation." Failing such consent, the experimentation will be considered to constitute a form of "torture" or "cruel, inhuman or degrading treatment". In its General Comment No. 20, the Human Rights Committee observed that "special protection in regard to such experiments is necessary in the case of persons not capable of giving valid consent, and in particular those under any form of detention or imprisonment. Such persons should not be subjected to any medical or scientific experimentation that may be detrimental to their health".[65] This is of course particularly relevant with regard to people held in psychiatric hospitals.

[61] *Eur. Court HR, Tyrer case, judgment of 25 April 1978, Series A, No. 26*, p. 14, para. 29 and p. 17, para. 35; emphasis added.

[62] Ibid., p. 15, para. 30

[63] Ibid., p. 16, para. 33.

[64] Ibid., pp. 16-17, paras. 33 and 35.

[65] *United Nations Compilation of General Comments*, p. 140, para. 7.

On this issue, Principle 22 of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment goes a step further by stipulating that "no detained or imprisoned person shall, ***even with his consent***, be subjected to any medical or scientific experimentation which may be detrimental to his health" (emphasis added).

The question may rightly be asked whether such vulnerable persons should ***ever*** be subjected to any medical or scientific ***experimentation***, given the often difficult task of predicting the possible adverse effect that such experimentation may have.

2.4 Torture and law enforcement officials, health personnel and prosecutors

It follows from what has been said above that every person concerned with the arrest, interrogation or detention and imprisonment of a suspect or convict has the legal duty to treat the person with whom he or she has to deal with respect for human dignity and to refrain from resorting to torture or ill-treatment. With regard to those who exercise ***police powers, such as arrest and detention***, this has also been made explicit in the 1979 Code of Conduct for Law Enforcement Officials, which provides in its article 5 that:

> "No law enforcement official may inflict, instigate or tolerate any act of torture or other cruel, inhuman or degrading treatment or punishment, nor may any law enforcement official invoke superior orders or exceptional circumstances such as a state of war or a threat of war, a threat to national security, internal political instability or any other public emergency as a justification of torture or other cruel, inhuman or degrading treatment or punishment."

As far as ***medical personnel*** are concerned, Principle 2 of the Principles of Medical Ethics relevant to the Role of Health Personnel, particularly Physicians, in the Protection of Prisoners and Detainees against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment stipulates that:

> "It is a gross contravention of medical ethics, as well as an offence under applicable international instruments, for health personnel, particularly physicians, to engage, actively or passively, in acts which constitute participation in, complicity in, incitement to or attempts to commit torture or other cruel, inhuman or degrading treatment or punishment."

Rather, it is the duty of these professional groups to protect the physical and mental health of detainees and prisoners and to provide them with treatment "of the same quality and standard as is afforded to those who are not imprisoned or detained" (Principle 1).

As pointed out by the Human Rights Committee, it is important that the States parties to the Covenant disseminate information to the population regarding the ban on torture, and, as further emphasized by the Committee, "enforcement personnel, medical personnel, police officers and any other persons involved in the custody or

treatment of any individual subjected to any form of arrest, detention or imprisonment ***must receive appropriate instruction and training***."[66]

As indicated above, and as explained in Chapters 4 and 7, confessions may not be obtained by illegal means such as torture or other forms of ill-treatment or human rights violations. Guideline 16 of the Guidelines on the Role of Prosecutors provides that ***prosecutors*** "shall refuse to use such evidence against anyone other than those who used such methods, or inform the Court accordingly, and shall take all necessary steps to ensure that those responsible for using such methods are brought to justice" (for a similar rule, see also art. 15 of the Convention against Torture).

States have a legal duty under international law to take effective legislative, administrative, judicial and other measures to ***prevent*** *acts of torture and other forms of ill-treatment.*

States also have a legal duty to ***investigate promptly and effectively*** *alleged instances of torture and other forms of ill-treatment and to provide* ***effective remedies*** *to alleged victims of such treatment.*

To grant ***immunity*** *to perpetrators of torture or other forms of ill-treatment is* ***incompatible*** *with States' legal duty to* ***prevent***, ***investigate*** *and* ***remedy*** *human rights violations.*

Every person has the right not to be subjected to torture or to cruel, inhuman or degrading treatment or punishment, and this right must be guaranteed ***at all times****, and cannot be derogated from even in public emergencies threatening the life of the nation.*

In general, it can be said that ***torture*** *is a particularly severe form of ill-treatment aimed either at obtaining confessions or information from a person or punishing or intimidating him or her. It is committed by a public official, or at the instigation of or with the consent or acquiescence of such official or other person acting in an official capacity.*

Sexual abuse in the form of ***rape****, committed by public officials, has been considered to constitute a form of torture.*

The right to freedom from ill-treatment comprises the prohibition on corporal punishment and, as a minimum, medical and scientific experimentation that has not been freely consented to.

All persons deprived of their liberty must also be treated with respect for the inherent dignity of the human person.

Law enforcement officials and medical personnel are strictly forbidden to resort to torture and other forms of ill-treatment at any time. Confessions obtained by such treatment must be disregarded by prosecutors and judges.

[66] *United Nations Compilation of General Comments*, p. 140, para. 10; emphasis added.

In order to be able to contribute to ensuring the full exercise of the right to freedom from torture and other forms of ill-treatment, judges, prosecutors and lawyers must be allowed to pursue their work efficiently and independently.

3. Legal Requirements as to Places of Detention and Registration of Detainees and Prisoners

3.1 Official recognition of all places of detention

In order to protect the personal security of persons deprived of their liberty, they must be held exclusively in officially recognized places of detention. The obligation of States to comply with this legal duty is recognized both by the international monitoring organs and in various legal instruments. For instance, in General Comment No. 20 on article 7 of the International Covenant on Civil and Political Rights, the Human Rights Committee stated that:

> "To guarantee the effective protection of detained persons, provisions should be made for detainees to be held in places officially recognized as places of detention and for their names and places of detention, as well as for the names of persons responsible for their detention, to be kept in registers readily available and accessible to those concerned, including relatives and friends."[67]

Article 10 of the Declaration on the Protection of All Persons from Enforced Disappearance and Principle 6 of the Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions contain similar requirements with regard to the holding of detained persons in officially recognized places of detention. Principle 12(1)(d) of the Body of Principles for the Protection of All Persons under any Form of Detention or Imprisonment provides that there shall be duly recorded "precise information concerning the place of custody".

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At the regional level, article XI of the Inter-American Convention on the Forced Disappearance of Persons stipulates, inter alia, that "every person deprived of liberty shall be held in an officially recognized place of detention...". The Inter-American Court of Human Rights has had to deal with numerous cases involving disappeared persons, disappearances that have been made possible because of the failure by the respondent State to comply with the basic guarantees against arbitrary

[67] *United Nations Compilation of General Comments*, p. 140, para. 11.

detention, including the duty only to hold persons deprived of their liberty in officially recognized places of detention. As stressed by the Inter-American Court of Human Rights, the "forced disappearance of human beings is a multiple and continuous violation of many rights under the [Inter-American] Convention [on Human Rights] that the States Parties are obligated to respect and guarantee", such as those contained in articles 7, 5 and 4 in conjunction with article 1(1).[68]

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The European Court of Human Rights has underlined that "the ***unacknowledged detention*** of an individual is a complete negation" of the guarantees against arbitrary detention contained in article 5 of the European Convention on Human Rights and that it "discloses a most grave violation of Article 5"; given the responsibility of the authorities to account for individuals under their control, "Article 5 requires them to take effective measures to safeguard against the risk of disappearance and to conduct a prompt and effective investigation into an arguable claim that a person has been taken into custody and has not been seen since".[69]

3.2 Registration of detainees and prisoners

In addition to the requirement that persons deprived of their liberty must be held in officially recognized places of detention, the Human Rights Committee has held that provision must also be made for "their names and places of detention, as well as for the names of persons responsible for their detention, to be kept in registers readily available and accessible to those concerned, including relatives and friends".[70]

This duty is also spelled out in Rule 7(1) of the Standard Minimum Rules for the Treatment of Prisoners, according to which:

> "(1) In every place where persons are imprisoned there shall be kept a bound registration book with numbered pages in which shall be entered in respect of each prisoner received:
>
> *(a)* Information concerning his identity;
> *(b)* The reasons for his commitment and the authority therefor;
> *(c)* The day and hour of his admission and release."

Principle 12(1) of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment provides that "there shall be duly recorded:

> *(a)* The reasons for the arrest;
> *(b)* The time of the arrest and the taking of the arrested person to a place of custody as well as that of his first appearance before a judicial or other authority;

[68] See e.g. *I-A Court HR, Velásquez Rodríguez case, judgment of July 29, 1998, Series C, No. 4*, p. 147, para. 155 and pp. 162-163, para. 194.

[69] *Eur. Court HR, Case of Çakici v. Turkey, judgment of 8 July 1999, Reports 1999-IV*, p. 615, para. 104; emphasis added.

[70] General Comment No. 20, in *United Nations Compilation of General Comments*, p. 140, para.11.

(c) The identity of the law enforcement officials concerned;
(d) Precise information concerning the place of custody."

Moreover, according to Principle 12(2) of the Body of Principles, "such records shall be communicated to the detained person, or his counsel, if any, in the form prescribed by law."

Article 10 of the Declaration on the Protection of All Persons from Enforced Disappearance goes even further in this respect by stipulating with regard to any person deprived of liberty that:

> "2. Accurate information on the detention of such persons and their place or places of detention, including transfers, shall be made promptly available to their family members, their counsel or to any other persons having a legitimate interest in the information unless a wish to the contrary has been manifested by the persons concerned.
>
> 3. An official up-to-date register of all persons deprived of their liberty shall be maintained in every place of detention. Additionally, each State shall take steps to maintain similar centralized registers. The information contained in these registers shall be made available to the persons mentioned in the preceding paragraph, to any judicial or other competent and independent national authority and to any other competent authority entitled under the law of the State concerned or any international legal instrument to which a State concerned is a party, seeking to trace the whereabouts of a detained person."

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The Inter-American Convention on the Forced Disappearance of Persons was elaborated in response to the tens of thousands of persons who disappeared in the Americas in the 1970s and 1980s. Article XI thereof provides that:

> "The States Parties shall establish and maintain official up-to-date registries of their detainees and, in accordance with their domestic law, shall make them available to relatives, judges, attorneys, any other person having a legitimate interest, and other authorities."

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With regard to the European Convention on Human Rights, the European Court has specified that:

> "The recording of accurate holding data concerning the date, time and location of detainees, as well as the grounds for the detention and the name of the persons effecting it, is necessary for the detention of an individual to be compatible with the requirements of lawfulness for the purposes of Article 5 § 1".[71]

[71] *Eur. Court HR, Case of Çakici v. Turkey, judgment of 8 July 1999, Reports 1999-IV*, para. 105 at p. 616.

In the case of *Çakici*, the lack of records of the applicant – who was held in unacknowledged detention – disclosed "a serious failing", which was aggravated by the "findings as to the general unreliability and inaccuracy" of the custody records in question. The Court found "unacceptable the failure to keep records which enable the location of a detainee to be established at a particular time".[72] Consequently, there was a particularly grave violation of article 5 of the European Convention in this case.

All persons deprived of their liberty must be held exclusively in officially recognized places of detention. Registers must be kept at every place of detention with detailed and reliable information, inter alia as to the name of the detained persons, the reasons for their detention, the time of arrival, departure and transfer, and the names of the persons responsible for their detention and imprisonment. Such registers must at all times be readily available to all persons concerned, such as legal counsel and family members, to whom the relevant records should also be communicated ex officio.

4. Conditions of Detention and Imprisonment

4.1 Basic principles governing detention and imprisonment

The following essential principles regarding the treatment of persons deprived of their liberty condition, among others, all the issues dealt with in this section.

In the first place, and as already indicated above, all persons deprived of their liberty ***"shall be treated with humanity and with respect for the inherent dignity of the human person"*** (art. 10(1) of the International Covenant, and see also art. 5(2) of the American Convention which, however, makes no reference to "humanity"; see further Principle 1 of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment and Principle 1 of the Basic Principles for the Treatment of Prisoners; emphasis added).

With regard to article 10(1) of the International Covenant, the Human Rights Committee has stated that, in addition to the prohibition of ill-treatment and experimentation in article 7, persons deprived of their liberty may not "be subjected to any hardship or constraint other than that resulting from the deprivation of liberty", and that "respect for the dignity of such persons must be guaranteed under the same conditions as for that of free persons". This means that "persons deprived of their

[72] Ibid., loc. cit.

liberty enjoy all the rights set forth in the Covenant, subject to the restrictions that are unavoidable in a closed environment."[73]

Furthermore, the Human Rights Committee has emphasized that "treating all persons deprived of their liberty with humanity and with respect for their dignity is a fundamental and universally applicable rule", which, ***"as a minimum, cannot be dependent on the material resources available in the State party"***, and which must be applied without discrimination.[74] In considering whether the States parties have fulfilled their treaty obligations in this respect, the Committee will have regard to the relevant United Nations standards applicable to the treatment of prisoners to which reference is made throughout this chapter.

Second, the ***prohibition on discrimination*** as found in articles 2(1) and 26 of the International Covenant on Civil and Political Rights, article 2 of the African Charter on Human and Peoples' Rights, articles 1(1) and 24 of the American Convention on Human Rights and article 14 of the European Convention on Human Rights is, of course, fully applicable to ***all*** detained or imprisoned persons. The principle of non-discrimination is also found in article 6(1) of the Standard Minimum Rules for the Treatment of Prisoners, Principle 2 of the Basic Principles for the Treatment of Prisoners, and Principle 5(1) of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment. ***The prohibition on discrimination does not, however, exclude reasonable distinctions made between different detainees and/or prisoners which are objectively justified by their specific needs and status.***

Third, accused persons "shall, save in exceptional circumstances, be segregated from convicted persons and shall be subject to separate treatment appropriate to their status as unconvicted persons" (cf. inter alia art. 10(2)*(a)* of the International Covenant and art. 5(4) of the American Convention). As noted by the Human Rights Committee, "such segregation is required in order to emphasize their status as unconvicted persons who at the same time enjoy the ***right to be presumed innocent***".[75] Consequently, they also have a right to more favourable treatment than convicted prisoners, such differential treatment not being a form of discrimination but a justified distinction made between the two groups of persons. This issue will be further dealt with below, in subsection 4.2.1.

Fourth, as to those persons who are convicted, the penitentiary system shall have as its essential aim the ***reformation and social rehabilitation/re-adaptation of the prisoner concerned*** (art. 10(3) of the International Covenant and art. 5(6) of the American Convention). According to the Human Rights Committee "no penitentiary system should be only retributory", but "should essentially seek the reformation and social rehabilitation of the prisoner".[76] In submitting their periodic reports, the States parties must therefore provide "specific information concerning the measures taken to provide teaching, education and re-education, vocational guidance and training and

[73] See General Comment No. 21, in *United Nations Compilation of General Comments*, para. 3 at p. 142.

[74] Ibid., para. 4; emphasis added.

[75] Ibid., pp. 142-143, para. 9; emphasis added.

[76] Ibid., p. 143, para. 10.

also concerning work programmes for prisoners inside the penitentiary establishment as well as outside".[77]

In this respect, Rule 59 as read in conjunction with Rule 58 of the Standard Minimum Rules for the Treatment of Prisoners provides that in order to enable the prisoners "to lead a law-abiding and self-supporting life" upon discharge,

> "the institution should utilize all the remedial, educational, moral, spiritual and other forces and forms of assistance which are appropriate and available, and should seek to apply them according to the individual treatment needs of the prisoners".

Principle 8 of the Basic Principles for the Treatment of Prisoners also emphasizes the need for "meaningful remunerated employment which will facilitate [prisoners'] reintegration into the country's labour market and permit them to contribute to their own financial support and to that of their families".

According to Rule 89 of the Standard Minimum Rules, "an untried prisoner shall always be offered opportunity to work, but shall not be required to work. If he chooses to work, he shall be paid for it". For further details as to the work of convicted persons, see Rules 71-76 of the Standard Minimum Rules.

All persons deprived of their liberty have the right to be treated with humanity and respect for their dignity. This is a fundamental and universal rule which must be guaranteed at all times and independently of States' available material resources.

Every detained or imprisoned person has the right not be subjected to discrimination.

Except in exceptional circumstances, suspects shall be separated from convicted prisoners; unconvicted detainees have the right to be presumed innocent until proved guilty and therefore also have the right to more favourable treatment than convicted prisoners.

States have the duty to provide convicted prisoners with teaching and training aimed at their reformation and social rehabilitation.

4.2 Accommodation

While the general human rights conventions contain no details of the requirements with regard to the accommodation of detainees and prisoners, Rules 9-14 of the Standard Minimum Rules for the Treatment of Prisoners regulate, in particular, sleeping, working and sanitary conditions.

Thus, Rule 9(1) provides that "where ***sleeping accommodation*** is in ***individual*** cells or rooms, each prisoner shall occupy by night a cell or room by himself. If, for special reasons, such as temporary overcrowding, it becomes necessary for the central prison administration to make an exception to this rule, it is not desirable to have two prisoners in a cell or room" (emphasis added). Where dormitories are used,

they shall only be occupied by prisoners "suitable to associate with one another in those conditions" (Rule 9(2)). ***All*** prison accommodation of persons deprived of their liberty, including in particular the sleeping accommodation, "shall meet all requirements of health, due regard being paid to climatic conditions and particularly to cubic content of air, minimum floor space, lighting, heating and ventilation" (Rule 10).

In ***all living and working places*** within places of detention, "the windows shall be large enough to enable the prisoners to read or work by natural light, and shall ... allow the entrance of fresh air whether or not there is artificial ventilation" (Rule 11*(a)*). "Artificial light shall be provided sufficient for the prisoners to read or work without injury to eyesight" (Rule 11*(b)*).

Lastly, "the ***sanitary installations*** shall be adequate to enable every prisoner to comply with the needs of nature when necessary and in a clean and decent manner" (Rule 12; emphasis added).

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The African Commission on Human and Peoples' Rights concluded that article 5 of the African Charter was violated in the *Ouko* case, where the complainant alleged that the detention facility had a 250-watt electric bulb that had been left on throughout his ten-month-long detention; during this time, he had also been denied bathroom facilities and been subjected both to physical and to mental torture. In the view of the Commission these conditions contravened the complainant's right to respect for his dignity and freedom from inhuman and degrading treatment as guaranteed by article 5 of the Charter.[78] In addition to the specific conditions of Vera and Orton Chirwa, which were considered under subsection 2.3.2 above, the African Commission has also examined general prison conditions in Malawi. It concluded that the following conditions "offend the dignity of the person and violate" article 5 of the African Charter: "the shackling of hands in the cell so that the prisoner is unable to move (sometimes during the night and day), serving of rotten food, solitary confinement or overcrowding such that cells for 70 people are occupied by up to 200". [79]

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In the *Greek* case, the European Commission of Human Rights concluded that accommodation in the Lakki camp violated article 3 of the European Convention on Human Rights because of "the conditions of gross overcrowding and its consequences"; the dormitories could hold 100 to 150 persons.[80]

4.2.1 Separation of categories

[78] *ACHPR, John D. Ouko v. Kenya, Communication No. 232/99, decision adopted during the 28th Ordinary session, 23 October – 6 November 2000*, paras. 22-33 of the text of the decision as published at http://www1.umn.edu/humanrts/africa/comcases/232-99.html.

[79] *ACHPR, Krishna Achuthan and Amnesty International (on behalf of Aleke Banda and Orton and Vera Chirwa) v. Malawi, Communications Nos. 64/92, 68/92 and 78/92, decision adopted during the 16th session, October-November 1994*, para. 34 of the text of the decision as published at http://www.up.ac.za/chr/.

[80] *Eur. Comm. HR, Applications Nos. 3321-3323/67 and 3344/67, Denmark, Norway, Sweden and the Netherlands v. Greece, Report of the Commission adopted on 5 November 1969, 12 Yearbook 1969*, p. 497, para. 21 and p. 494, para. 14.

As noted above, international human rights law requires, in principle, that accused persons be segregated from convicted prisoners and that they be given separate treatment appropriate to their status as unconvicted persons (cf. art. 10(2)*(a)* of the International Covenant on Civil and Political Rights and art. 5(4) of the American Convention; see also in particular art. 8*(b)* of the Standard Minimum Rules).

As to ***accused children/minors***, more specifically, both article 10(2)*(b)* of the International Covenant and article 5(5) of the American Convention provide that they shall be separated from adults and brought to justice as soon as possible. However, according to article 37*(c)* of the Convention on the Rights of the Child, which must be considered as *lex specialis* as compared to the general human rights treaties, "every child deprived of liberty shall be separated from adults ***unless it is considered in the child's best interest not to do so***" (emphasis added). The best interest of the individual child may thus justify a departure from the basic rule that it shall be separated from adults.[81]

Rule 8 of the Standard Minimum Rules for the Treatment of Prisoners is of a more general scope and provides that "the different categories of prisoners shall be kept in separate institutions or parts of institutions taking account of their sex, age, criminal record, the legal reason for their detention and the necessities of their treatment." This means, in particular, that "***men and women*** shall so far as possible be detained in separate institutions; in an institution which receives both men and women the whole of the premises allocated to women shall be entirely separate" (Rule 8*(a)* of the Standard Minimum Rules, emphasis added).

The separation of women from men and children from adults is a first indispensable, albeit not sufficient, measure to ensure the right to security of these particularly vulnerable persons. With regard in particular to children, it is also essential that the relevant places of detention have an adequate infrastructure and specially trained personnel who enable their specific needs and interests to be met.[82] Further details as to detained children and women will be given in Chapters 10 and 11.

In general, the accommodation of detainees and prisoners must be such as to respect their dignity, security and good health, with adequate sleeping, living, working and sanitary conditions.

Children/minors who are deprived of their liberty shall be separated from adults, unless such separation is not in their best interest; they shall be brought to justice promptly.

To the extent possible men and women shall be held in separate institutions.

[81] On the question of separation of detained children from detained adults, see *Implementation Handbook for the Convention on the Rights of the Child* (New York, UNICEF, 1998), pp. 501-502 (hereinafter referred to as *UNICEF Implementation Handbook*).

[82] On the detention of children, see e.g. Eric Sottas and Esther Bron, *Exactions et Enfants*, Geneva, OMCT/SOS Torture, 1993, pp. 26-27.

4.3 Personal hygiene, food, health and medical services

Without examining in detail the rules and case-law regarding the personal hygiene, food, health and medical services of persons deprived of their liberty, the following main principles contained in the United Nations Standard Minimum Rules for the Treatment of Prisoners should be emphasized:

- ***As to personal hygiene:*** "prisoners shall be required to keep their persons clean, and to this end they shall be provided with water and with such toilet articles as are necessary for health and cleanliness" (Rule 15).
- ***As to clothing:*** "every prisoner who is not allowed to wear his own clothing shall be provided with an outfit of clothing suitable for the climate and adequate to keep him in good health. Such clothing shall in no manner be degrading or humiliating" (Rule 17(1)). "All clothing shall be clean and kept in proper condition" (Rule 17(2)); "whenever a prisoner is removed outside the institution for an authorized purpose, he shall be allowed to wear his own clothing or other inconspicuous clothing" (Rule 17(3)).
- ***As to bedding:*** "Every prisoner shall, in accordance with local or national standards, be provided with a separate bed, and with separate and sufficient bedding which shall be clean when issued, kept in good order and changed often enough to ensure its cleanliness" (Rule 19).
- ***As to food:*** "Every prisoner shall be provided by the administration at the usual hours with food of nutritional value adequate for health and strength, of wholesome quality and well prepared and served"; "drinking water shall be available to every prisoner whenever he needs it" (Rule 20(1) and (2)).
- ***As to health and medical services:*** there shall be "at least one qualified medical officer who should have some knowledge of psychiatry" at every place of detention and the medical services "should be organized in close relationship to the general health administration of the community or nation" (Rule 22(1)); "sick prisoners who require specialist treatment shall be transferred to specialized institutions or to civil hospitals", and where hospital facilities exist in the institution concerned, they shall have the equipment and supplies "proper for the medical care and treatment of sick prisoners and ... a staff of suitable trained officers" (Rule 22(2)); every prisoner shall also have at his or her disposal "the services of a qualified dental officer" (Rule 22(3)).

  In institutions for ***women*** there shall inter alia "be special accommodation for all necessary pre-natal and post-natal care and treatment (Rule 23(1)).

  Next, "the medical officer shall see and examine every prisoner as soon as possible after his admission and thereafter as necessary, with a view particularly to the discovery of physical or mental illness and the taking of all necessary measures" (Rule 24); the medical officer shall also "have the care of the physical and mental health of the prisoners and should daily see all sick prisoners, all who complain of illness, and any prisoner to whom his attention is specially directed" (Rule 25(1)); the medical officer shall further "regularly inspect and advise the director" upon such

issues as the quality of the food, the hygiene and cleanliness of the institution and prisoners, the sanitation, clothing and bedding etc. (Rule 26). Furthermore, Principle 24 of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment provides that "a proper medical examination shall be offered to a detained or imprisoned person as promptly as possible after his admission to the place of detention or imprisonment, and thereafter medical care and treatment shall be provided whenever necessary. This care and treatment shall be provided free of charge."

The international monitoring organs have examined numerous cases involving conditions of detention and a few of these cases set out below will illustrate the views of these organs on such issues as lack of food, deficient hygiene and alleged lack of medical care.

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In the case of *Freemantle*, the following conditions of the author's detention amounted to a violation of article 10(1) of the International Covenant: the author was confined to a 2-metre-square cell for 22 hours each day, and remained isolated from other men for most of the day; he spent most of his waking hours in enforced darkness, had little to keep him occupied, and was not permitted to work or to undertake education.[83]

In the case of *Robinson*, the Committee concluded that the following conditions of the author's imprisonment amounted to a violation of article 10(1) of the International Covenant: there was a complete lack of mattresses, other bedding and furniture in the cells, a desperate shortage of soap, toothpaste and toilet paper, the quality of food and drink was very poor, there was no integral sanitation in the cells and there were open sewers and piles of refuse, no doctor was available and the author was "confined to his cell for 22 hours every day in enforced darkness, isolated from other men, without anything to keep him occupied".[84]

Among many other cases, article 10(1) of the International Covenant was also violated in the case of *Elahie*, where the author complained that he only had "a piece of sponge and old newspapers" to sleep on, that he was given "food not fit for human consumption" and then "treated with brutality by the warders whenever complaints were made".[85]

Article 10(1) of the Covenant was further violated in the case of *Michael and Brian Hill,* who were not given any food during the first five days of police detention in Spain,[86] while article 7 was violated in the case of *Tshisekedi wa Mulumba,* who was subjected to "inhuman treatment" after having been "deprived of food and drink for

[83]Communication No. 625/1995, *M. Freemantle v. Jamaica* (Views adopted on 24 March 2000), in UN doc. *GAOR*, A/55/40 (vol. II), p. 19, para. 7.3.

[84]Communication No. 731/1996, *M. Robinson v. Jamaica* (Views adopted on 29 March 2000), in UN doc. *GAOR*, A/55/40 (vol. II), p. 128, paras. 10.1-10.2.

[85]Communication No. 533/1993, *H. Elahie v. Trinidad and Tobago* (Views adopted on 28 July 1997), in UN doc. *GAOR*, A/52/40 (vol. II*),* p. 37, para. 8.3.

[86]Communication No. 526/1993, *M. and B. Hill v. Spain* (Views adopted on 2 April 1997), in UN doc. *GAOR*, A/52/40 (vol. II), pp. 17-18, para. 13.

fours days after his arrest" and "subsequently kept interned under unacceptable sanitary conditions".[87] Article 10(1) was also violated in the case of *Kalenga,* where the author complained, in particular, that he was denied recreational facilities, occasionally deprived of food and not given medical assistance when needed.[88]

In the view of the Committee, articles 7 and 10(1) of the Covenant were violated in the *Linton* case following "the mock execution set up by prison warders and the denial of adequate medical care" to the author for the treatment of injuries sustained in an aborted escape attempt; the treatment was considered to be "cruel and inhuman".[89]

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In the case against Malawi, already dealt with under subsections 2.3.2 and 4.2, the African Commission on Human and Peoples' Rights held, moreover, that "the inability of prisoners to leave their cells for up to 14 hours at a time, lack of organised sports, lack of medical treatment, poor sanitary conditions and lack of access to visitors, post and reading material" were all violations of article 5 of the Charter.[90] The Commission has also decided that to deny a detainee access to doctors while his health is deteriorating is a violation of article 16 of the African Charter, which guarantees to every individual "the right to enjoy the best attainable state of physical and mental health" (art. 16(1)).[91] Article 16 was also violated with regard to Ken Saro-Wiwa, whose health while in custody suffered to the point where his life was endangered; despite requests for hospital treatment made by a qualified prison doctor, such treatment was denied.[92]

The victim's right to respect and dignity and his right to freedom from inhuman and degrading treatment under article 5 were violated in a case where the person concerned had, in addition to having his legs and hands chained to the floor day and night, been refused permission to take a bath during his 147 days of detention; he had also been given food only twice daily and been kept in solitary confinement prior to his trial, in a cell meant for criminals.[93]

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[87] Communications Nos. 241 and 242/1987, *F. Birindwa ci Birhashwirwa and E. Tshisekedi wa Malumba v. Zaire* (Views adopted on 2 November 1989), in UN doc. *GAOR*, A/45/40 (vol. II), p. 84, para. 13(b).

[88] Communication No. 326/1988, *H. Kalenga v. Zambia* (Views adopted on 27 July 1993), in UN doc. *GAOR*, A/48/40 (vol. II), p. 71, para. 6.5.

[89] Communication No. 255/1987, *C. Linton v. Jamaica* (Views adopted on 22 October 1992), in UN doc. *GAOR*, A/48/40 (vol. II), p. 16, para. 8.5.

[90] *ACHPR, Krishna Achuthan and Amnesty International (on behalf of Aleke Banda and Orton and Vera Chirwa) v. Malawi, Communications Nos. 64/92, 68/92 and 78/92, decision adopted during the 16th session, October-November 1994*, para. 34 of the text of the decision as published at http://www.up.ac.za/chr/.

[91] *ACHPR, Media Rights Agenda and Others v. Nigeria, Communications Nos. 105/93, 128/94, 130/94 and 152/96, decision adopted on 31 October 1998*, para. 91 of the text of the decision as published at http://www1.umn.edu/humanrts/africa/comcases/105-93_128-94_130-94_152-96.html.

[92] *ACHPR, International Pen and Others (on behalf of Ken Saro-Wiwa Jr. and Civil Liberties Organisation) v. Nigeria, Communications Nos. 137/94, 139/94, 154/96 and 161/97, decision adopted on 31 October 1998*, para. 112 of the text of the decision as published at http://www1.umn.edu/humanrts/africa/comcases/137-94_139-94_154-96_161-97.html.

[93] *ACHPR, Media Rights Agenda (on behalf of Niran Malaolu) v. Nigeria, Communication No. 224/98, decision adopted during the 28th session, 23 October – 6 November 2000*, paras. 70 and 72 of the text of the decision as published at http://www1.umn.edu/humanrts/africa/comcases/224-98.html.

In the case of *de Varga-Hirsch*, the European Commission of Human Rights held that "it cannot be excluded that detention of a person who is ill may raise issues" under article 3 of the European Convention. In that particular case, the applicant, who was in prolonged detention on remand, suffered from diabetes and cardio-vascular disorders; "[his] state of health was poor throughout his detention ... and it became worse".[94] The Commission pointed out, however, that the authorities had "complied with all the applicant's requests for medical expert opinions" and where "the reports were lacking in precision, the authorities did not fail to appoint new experts"; in all, 10 reports were drawn up, and "none of the expert opinions definitely reached the conclusion that the applicant's state of health was incompatible with detention".[95] When the experts had recommended that the applicant be transferred to a hospital, this had also been done. The Commission further pointed out that the Government had noted that "the applicant had contributed to his bad state of health by refusing, at a certain period, his transfer to a prison hospital, not properly following his diabetic diet and refusing insulin treatment".[96] Given "the special circumstances of the case", the applicant's medical treatment during his detention did not amount to a violation of article 3 of the European Convention on Human Rights.[97]

State Responsibility for Prisoners on Hunger Strike *The Case of* R., S., A. and C. v. Portugal

The responsibilities of the State for the health and well-being of prisoners on hunger strike were inter alia at issue in a case against Portugal, involving four applicants, with applicant R. only being examined by a medical team on the twenty-sixth day of his hunger strike. The European Commission of Human Rights noted that it was "certainly disturbing that such a long time could have elapsed without the applicants being put under medical supervision", but the question to be determined was "the extent to which the national authorities were responsible for this situation".[98] The Commission found it important to note that, as from the moment they began their hunger strike, "the applicants always refused to be examined by the prison doctor", and two of the applicants – including applicant R. – even refused to be examined by a team composed of three doctors from the Lisbon University Hospital, although one of these appeared in a list supplied by the applicants stating the doctors of their choice.[99]

[94] *Eur. Comm. HR, Application No. 9559/81, P. de Varga-Hirsch v. France, decision of 9 May 1983 on the admissibility, 33 DR*, p. 213, para. 6.

[95] Ibid., loc. cit.

[96] Ibid., pp. 213-214, para. 6.

[97] Ibid., para. 6 at p. 214.

[98] *Eur. Comm. HR, Applications Nos. 9911/82 & 9945/82 (joined), R., S., A. and C. v. Portugal*, *36 DR*, p. 207, para. 16.

[99] Ibid., pp. 207-208, para. 16.

State Responsibility for Prisoners on Hunger Strike The Case of R., S., A. and C. v. Portugal *(cont.d)*

The deadlock was resolved on the twenty-sixth day of applicant R.'s hunger strike, "when the prison authorities allowed the applicants to be visited by a team consisting of a doctor appointed by the Medical Council, the prison doctor and a doctor of their choice". The team asked that the applicants be "hospitalised as a matter of urgency", which was done a few days later.[100] The Commission's reasoning in this case deserves to be quoted in full:

> "18. As the Commission has already emphasised, the Convention requires that the prison authorities, with due regard to the ordinary and reasonable requirements of imprisonment, exercise their custodial authority to safeguard the health and well-being of all prisoners, including those engaged in protest, in so far as that may be possible in the circumstances. ... ***In situations of serious deadlock, the public authorities must not entrench themselves in an inflexible approach aimed more at punishing offenders against prison discipline than at exploring ways of resolving the deadlock***... .
>
> 19. In the instant case, regrettable as it may be that the applicants received no medical care for a long period during their hunger strike, the fact remains that they were themselves to a large extent responsible for this situation. In respecting the applicants' refusal to be examined by certain doctors, whose competence could not be disputed, the Government acted in a manner about which the applicants cannot complain. The Commission is unable to conclude from the specific circumstances of these cases that the Portuguese authorities showed inflexibility and allowed the applicants' situation to deteriorate to the extent that they were victims of inhuman treatment or torture violating article 3 of the Convention."[101]

The reasoning in the Portuguese case was based on the *McFeeley* case, which arose in the dramatic context of Northern Ireland. The applicants in this case wanted to be recognized as political prisoners and therefore, inter alia, refused to wear prison clothes and work in prison. In return, they were given multiple punishments including periods of cellular isolation. In that particular case the Commission stated that it

> "... must express its concern at the inflexible approach of the State authorities which has been concerned more to punish offenders against prison discipline than to explore ways of resolving such a serious deadlock. Furthermore, the Commission is of the view that, for humanitarian reasons, efforts should have been made by the authorities to ensure that the applicants could avail of certain facilities such as taking regular exercise

[100] Ibid., p. 208, para. 17.

[101] Ibid., paras. 18-19; emphasis added.

> in the open air with some form of clothing (other than prison clothing) and making greater use of the prison amenities under similar conditions. At the same time, arrangements should have been made to enable the applicants to consult outside medical specialists even though they were not prepared to wear prison uniform or underwear."[102]

Notwithstanding the above, and, "taking into consideration the magnitude of the institutional problem posed by the protest and the supervisory and sanitary precautions" the authorities had adopted to cope with it, their failure could not lead the Commission to conclude, prima facie, that article 3 of the European Convention on Human Rights had been violated in this case.[103]

More About the Need for Medical Examination of Persons in Police Custody

In order to prevent the occurrence of torture and other forms of ill-treatment of persons deprived of their liberty, the Committee against Torture has emphasized "the need to allow suspects ... to be examined by an independent doctor immediately upon their arrest, or after each session of questioning, and before they are brought before an examining magistrate or released".[104]

In its many reports to individual European Governments following visits to places of detention, the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment has recommended

- that a person in police custody shall have the right to be examined by a doctor of his choice;
- that all medical examinations of persons in police custody be conducted out of the hearing of police officers and preferably also out of their sight (unless the doctor concerned requests otherwise); and that
- the results of all medical examinations as well as relevant statements by the detainees and the doctor's conclusions be formally recorded by the doctor and made available to the detainee and his lawyer.[105]

[102] *Eur. Comm HR, Application No. 8317/78, T. McFeeley and Others v. the United Kingdom, decision of 15 May 1980 on the admissibility, 20 DR* , p. 86, para. 64.

[103] Ibid., pp. 86-87, para. 65.

[104] Statement as to Switzerland, in UN doc. *GAOR*, A/53/44, p. 12, para. 96.

[105] See inter alia Council of Europe, docs.: (1) CPT/Inf (92) 4 *Report to the Swedish Government on the Visit to Sweden carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 5 to 14 May 1991*, p. 52; (2) CPT/Inf (93) 13, *Report to the Government of the Federal Republic of Germany on the visit to Germany carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 8 to 20 December 1991*, p. 70; (3) CPT/Inf (93) 8, *Report to the Finnish Government on the visit to Finland carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 10 to 20 May 1992*, p. 56.

Every person deprived of his or her liberty has the right and the duty to keep clean and the right to be warm and in good health. To this end, he or she shall be provided with the necessary hygienic equipment, clothing, bedding, adequate food and medical and dental services.

Every person deprived of his or her liberty has the right to a cell of adequate size and to enjoy daylight.

When dealing with detainees or prisoners staging protests or hunger-strikes, the authorities must take care not to adopt an inflexible, punitive approach but should instead explore avenues of dialogue and be guided by a sense of humanity.

A person in police custody shall be allowed to be examined by a physician of his or her own choice. Medical examinations shall be conducted in private unless the doctor requests otherwise, and the result of the medical examinations shall be recorded by the doctor and made available to the detainee and his or her lawyer.

4.4 Religion

Rule 6(1) of the Standard Minimum Rules for the Treatment of Prisoners, Principle 2 of the Basic Principles for the Treatment of Prisoners and Principle 5(1) of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment prohibit discrimination on the basis of ***religion***. Principle 3 of the Basic Principles adds, furthermore, that it is "desirable to respect the religious beliefs and cultural precepts of the group to which prisoners belong, whenever local conditions so require".

Rules 41 and 42 of the Standard Minimum Rules contain the following more detailed regulations in this respect. In the first place, "if the institution contains a sufficient number of prisoners of the same religion, a qualified representative of that religion shall be appointed or approved. If the number of prisoners justifies it and conditions permit, the arrangement should be on a full-time basis" (Rule 41(1)). A qualified representative so appointed or approved "shall be allowed to hold regular services and to pay pastoral visits in private to prisoners of his religion at proper times" (Rule 41(2)). Furthermore, "access to a qualified representative of any religion shall not be refused to any prisoner", but "if any prisoner should object to a visit of any religious representative, his attitude shall be fully respected" (Rule 41(3)). Lastly, "so far as practicable, every prisoner shall be allowed to satisfy the needs of his religious life by attending the services provided in the institution and having in his possession the books of religious observance and instruction of his denomination" (Rule 42).

Every person deprived of his or her freedom has the right not to be discriminated against on the basis of religion. To the extent possible, the religious convictions and cultural precepts of the detainees and prisoners shall be respected, including the holding of regular services and the organization of pastoral visits.

4.5 Recreational activities

According to Rule 21(1) of the Standard Minimum Rules, "every prisoner who is not employed in outdoor work shall have at least one hour of suitable exercise in the open air daily if the weather permits". As to "young prisoners, and others of suitable age and physique", they "shall receive physical and recreational training during the period of exercise", and, "to this end space, installations and equipment should be provided" (Rule 21(2)).

Principle 6 of the Basic Principles further provides that "all prisoners shall have the right to take part in cultural activities and education aimed at the full development of the human personality."

Lastly, according to Principle 28 of the Body of Principles, "a detained or imprisoned person shall have the right to obtain within the limits of available resources, if from public sources, reasonable quantities of educational, cultural and informational material, subject to reasonable conditions to ensure security and good order in the place of detention or imprisonment."

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With regard to the police prisons in Zürich, Switzerland, the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment recommended that urgent measures be taken in order to ensure that the detained persons be authorized to exercise in the fresh air, at least one hour per day, in conditions permitting them to benefit therefrom fully and by guaranteeing their right to respect for their private life.[106] This recommendation was made in response to the refusal of the detainees to exercise outside since they were afraid of being seen by the public handcuffed and accompanied by a police officer.[107]

Every person deprived of his or her liberty has the right to ***exercise outdoors for a minimum of one hour daily*** *in conditions respecting his or her right to privacy. Certain categories of detainees and prisoners may require special recreational training.*

Detainees and prisoners shall have reasonable access to educational, cultural and informational material.

[106] Council of Europe doc. CPT/Inf (93) 3, *Report to the Swiss Federal Council on the Visit to Switzerland carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 21 to 29 July 1991*, p. 75 in the French text.

[107] Ibid., p. 20, paras. 22-23.

4.6 Solitary confinement

The use of solitary confinement is not, per se, regulated in the international human rights treaties, although numerous complaints relating to isolation during detention and imprisonment have been brought to the attention of the international monitoring organs, which have given some further interpretative guidance with regard to recourse to this particularly serious form of confinement. As a starting point it can be said that the use of solitary confinement does not per se violate international human rights law such as articles 7 and 10(1) of the International Covenant, but that the question of its lawfulness will depend on the ***aim***, ***length*** and ***conditions*** of the confinement in each particular case.

The Human Rights Committee has stated in its General Comment No. 20 that "prolonged solitary confinement of the detained or imprisoned person may amount to acts prohibited by article 7" of the Covenant.[108] It is noteworthy that Principle 7 of the Basic Principles for the Treatment of Prisoners provides, furthermore, that "efforts addressed to the abolition of solitary confinement as a ***punishment***, or to the restriction of its use, should be undertaken and encouraged" (emphasis added).

The Human Rights Committee examined the question of solitary confinement in the *Vuolanne* case, which originated in a complaint from a conscript who had received a sanction of "10 days of close arrest, i.e. confinement in the guardhouse without service duties". The author claimed in particular that "he was locked in a cell of 2 x 3 metres with a tiny window, furnished only with a camp bed, a small table, a chair and a dim electric light" and, further, that "he was only allowed out of his cell for purposes of eating, going to the toilet and to take fresh air for half an hour daily".[109] The Committee concluded, however, that neither article 7 nor article 10(1) had been violated in this case: in the first place, it did not appear that "the solitary confinement to which the author was subjected, having regard to its strictness, duration and the end pursued, produced any adverse physical or mental effects on him", and, in the second place, "it [had] not been established that Mr. Vuolanne suffered any humiliation or that his dignity was interfered with apart from the embarrassment inherent in the disciplinary measure to which he was subjected".[110]

However, the outcome was different in the case of *Antonaccio*, where the Committee concluded that both article 7 and article 10(1) had been violated because the author was held in an underground cell and denied the medical attention his condition required; he had also been tortured for three months.[111] Article 10(1) alone was violated in the case of *Gómez de Voituret* concerning the author's detention in solitary confinement for about seven months "in a cell almost without natural light"; Article 10(1) was violated in this case because, in the view of the Committee, the author "was

[108] *United Nations Compilation of General Comments*, p. 139, para. 6.

[109] Communication No. 265/1987, *A. Vuolanne v. Finland* (Views adopted on 7 April 1989), in UN doc. *GAOR*, A/44/40, p. 249, para. 2.2 and p. 250, para. 2.6.

[110] Ibid., p. 256, para. 9.2.

[111] Communication No. R.14/63, *R. S. Antonaccio v. Uruguay* (Views adopted on 28 October 1981), in UN doc. *GAOR*, A/37/40, p. 120, para. 20 as read in conjunction with p. 119, para. 16.2.

kept in solitary confinement for several months in conditions which failed to respect the inherent dignity of the human person".[112]

The solitary confinement violated both articles 7 and 10(1) in the case of *Espinoza de Polay*, in particular because of the author's "isolation for 23 hours a day in a small cell" and the fact that he could not have more than 10 minutes' sunlight a day.[113]

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With regard inter alia to Norway and Sweden, the Committee against Torture recommended that the use of solitary confinement be abolished, particularly during the period of pre-trial detention, other than in exceptional cases, such as ***when the security or the well-being of persons or property are in danger***. It further recommended that the use of this exceptional measure be "strictly and specifically regulated by law" and subjected to judicial control.[114]

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When examining whether solitary confinement might violate article 3 of the European Convention on Human Rights, the European Commission of Human Rights consistently examined the lawfulness of such a measure in the light of its ***duration***, the ***objective pursued***, and the ***effect that the measure may have on the person concerned***. This approach was applied in the case of *R. v. Denmark*, where the applicant spent no fewer than 17 months in solitary confinement during his detention on remand. The Commission pointed out in this case that "when a measure of solitary confinement is considered, a balance must be struck between the requirements of the investigation and the effect which the isolation will have on the detained person". Although accepting that "the applicant was isolated for an undesirable length of time", the Commission concluded that "having regard to the particular circumstances of the confinement in question, it was not of such severity as to fall within the scope of article 3" of the Convention.[115] The Commission noted in this respect that "the applicant was kept in a cell of approximately six square metres"; that "he was allowed to listen to the radio and watch television"; that throughout the relevant period he was "allowed to exercise in the open air for one hour every day"; that he could borrow books from the prison library; that he was in daily contact with prison staff several times a day and sometimes also with other persons in connection with police interrogations and court hearings; that he was under medical observation; and finally, that although he was subjected to restrictions with regard to visits during this period, "he was allowed to receive controlled visits by his family".[116]

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[112]Communication No. 109/1981, *T. Gómez de Voituret v. Uruguay* (Views adopted on 10 April 1984), in UN doc. *GAOR*, A/39/40, p. 168, paras. 12.2-13.

[113]Communication No. 577/1994, *R. Espinoza de Polay v. Peru* (Views adopted on 6 November 1997), in UN doc. *GAOR*, A/53/40 (vol. II), p. 42, para. 8.7.

[114]UN docs. *GAOR*, A/53/44, p. 17, para. 156 (Norway) and *GAOR*, A/52/44, p. 34, para. 225 (Sweden).

[115]*Eur. Comm. HR, R. v. Denmark, Application No. 10263/83, R. v. Denmark, decision of 11 March 1985 on the admissibility, 41 DR*, p. 154.

[116]Ibid., pp. 153-154.

The European Committee for the Prevention of Torture, which makes very precise recommendations following its on-the-spot investigations, has recommended with regard to a place of detention in Switzerland, for instance, that the instances in which recourse is had to involuntary isolation should be clearly defined and it should be used only in exceptional circumstances; moreover, the isolation must be for "the shortest possible period" and reviewed every three months, if need be on the basis of a socio-medical report.[117] On this occasion the European Committee further recommended that each prisoner who has his isolation prolonged must be informed in writing of the reasons for the measures unless there are imperative reasons of security why this should not be done. If need be, the prisoner should also be allowed to benefit from the assistance of counsel and be permitted to make his views known to the competent authorities in case of prolongation of the isolation.[118]

4.6.1 Incommunicado detention

Incommunicado detention is a particularly severe form of solitary confinement, where the persons deprived of their liberty have no access whatever to the outside world, with the result that they are at increased risk of being subjected to human rights abuses. Innumerable persons have been tortured, made to disappear, and even killed following the extensive use of incommunicado detention. The United Nations Special Rapporteur on the question of torture has pointed out that torture "is most frequently practised during incommunicado detention", and he has therefore proposed that such detention "be made illegal and persons held incommunicado ... be released without delay".[119] As will be seen below, the tendency of other international monitoring organs is also to discourage the use of this form of detention.

In its General Comment No. 20, the Human Rights Committee emphasized that "provisions should also be made against incommunicado detention", adding that "States parties should ensure that any places of detention be free from any equipment liable to be used for inflicting torture or ill-treatment".[120] After having considered the fourth periodic report of Chile, the Committee recommended that "the State party should reconsider its law on this issue with a view to eliminating incommunicado detention altogether".[121] In connection with its consideration of the initial report of Switzerland, the Committee regretted that "in various cantons, detainees may be held incommunicado for periods ranging from 8 to 30 days or even, in some cases, for indefinite periods", and it recommended "that the discussions aimed at harmonizing the various cantonal laws on criminal procedure be intensified, with due respect for the provisions of the Covenant, particularly with regard to fundamental guarantees during police custody or incommunicado detention".[122]

[117] Council of Europe doc. CPT/Inf (93) 3, *Report to the Swiss Federal Council on the Visit to Switzerland carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 21 to 29 July 1991*, p. 77.

[118] Ibid., loc. cit.

[119] UN doc. E/CN.4/1995/34, *Report of the Special Rapporteur on the question of torture,* para. 926(d).

[120] *United Nations Compilation of General Comments*, p. 140, para. 11.

[121] UN doc. *GAOR*, A/54/40 (vol. I), p. 46, para. 209.

[122] UN doc. *GAOR*, A/52/40 (vol. I), p. 20, para. 98 and p. 22, para. 109.

In the case of *El-Megreisi*, the author's brother had been held incommunicado in the Libyan Arab Jamahiriya for more than three years when he was finally allowed a visit by his wife in April 1992; on 23 March 1994, when the Committee adopted its views in the case, Mr. El-Megreisi was still in incommunicado detention. This fact led the Committee to conclude that, "by being subjected to prolonged incommunicado detention in an unknown location, [he was] the victim of ***torture and cruel and inhuman treatment***" contrary to articles 7 and 10(1) of the Covenant.[123] Article 7 was also violated in the case of *Mukong*, where the author "was kept incommunicado, was threatened with torture and death and intimidated, deprived of food, and kept locked in his cell for several days on end without the possibility of recreation". Referring to its above-mentioned General Comment, the Committee also noted that "total isolation of a detained or imprisoned person may amount to acts prohibited by article 7", and it concluded that Mr. Mukong had been subjected to "***cruel, inhuman and degrading treatment***" in this case contrary to that article.[124] In several other cases the Committee considered that incommunicado detention for several weeks or months was contrary to article 10(1) of the Covenant, including in one case where such detention had lasted for 15 days.[125] However, these cases are of earlier date than those of *El-Megreisi* and *Mukong*, and it is therefore possible to conclude that the Committee has now adopted a stricter legal approach to the use of incommunicado detention.

Lastly, articles 7 and 10(1) were both violated in the case of *Espinosa de Polay*, where the author was held incommunicado from 22 July 1992 until 26 April 1993 and then again for one year following his conviction.[126]

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The Committee against Torture recommended that Peru abolish the period of pre-trial incommunicado detention.[127]

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[123]Communication No. 440/1990, *Y. El-Megreisi v. the Libyan Arab Jamahiriya* (Views adopted on 23 March 1994), in UN doc. *GAOR*, A/49/40 (vol. II), p. 130, para. 5.4; emphasis added.

[124]Communication No. 458/1991, *A. W. Mukong v. Cameroon* (Views adopted on 21 July 1994), in UN doc. *GAOR*, A/49/40 (vol. II), p. 180, para. 9.4; emphasis added.

[125]Communication No. 147/1983, *L. Arzuaga Gilboa v. Uruguay* (Views adopted on 1 November 1985), in UN doc. *GAOR,* A/41/40, p. 133, para. 14 (15 days); and e.g. Communication No. 139/1983, *H. Conteris v. Uruguay* (Views adopted on 17 July 1985), in UN doc. *GAOR*, A/40/40, p. 202, para. 10 (over three months).

[126]Communication No. 577/1994, *R. Espinoza de Polay v. Peru* (Views adopted on 6 November 1997), in UN doc. *GAOR*, A/53/40 (vol. II), pp. 41-43, paras 8.4, 8.6 and 9. The conditions of the author's detention and imprisonment also violated articles 7 and 10(1) in various other ways: display of author to the press during transfer from one place of detention to another; conditions of solitary confinement.

[127]UN doc. *GAOR*, A/55/44, p. 15, para. 61(b).

In the case of *Suárez Rosero*, the Inter-American Court of Human Rights stated that

> "51. *Incommunicado* detention is an exceptional measure the purpose of which is to prevent any interference with the investigation of the facts. Such isolation must be limited to the period of time expressly established by law. Even in that case, the State is obliged to ensure that the detainee enjoys the minimum and non-derogable guarantees established in the Convention and, specifically, the right to question the lawfulness of the detention and the guarantee of access to effective defence during his incarceration."[128]

Mr. Suárez Rosero had been held incommunicado for 36 days, although Ecuadoran law establishes that such detention may not exceed 24 hours; consequently, article 7(2) of the American Convention on Human Rights had been violated in this case.[129] The Inter-American Court further explained that:

> "90. One of the reasons that *incommunicado* detention is considered to be an exceptional instrument is the grave effects it has on the detained person. Indeed, isolation from the outside world produces moral and psychological suffering in any person, places him in a particularly vulnerable position, and increases the risk of aggression and arbitrary acts in prisons."[130]

The Inter-American Court concluded that, for the following reasons, the incommunicado detention was ***cruel, inhuman and degrading treatment*** violating article 5(2) of the American Convention, an argument that was not contested by Ecuador:

> "91. The mere fact that the victim was for 36 days deprived of any communication with the outside world, in particular with his family, allows the Court to conclude that Mr. Suárez Rosero was subjected to cruel, inhuman and degrading treatment, all the more so since it has been proven that his *incommunicado* detention was arbitrary and carried out in violation of Ecuador's domestic laws. The victim told the Court of his suffering at being unable to seek legal counsel or communicate with his family. He also testified that during his isolation he was held in a damp underground cell measuring approximately 15 square meters with 16 other prisoners, without the necessary hygiene facilities, and that he was obliged to sleep on newspaper; he also described the beatings and threats he received during his detention. For all those reasons, the treatment to which Mr. Suárez Rosero was subjected may be described as cruel, inhuman and degrading."[131]

[128] *I-A Court HR, Suárez Rosero case v. Ecuador, judgment of November 12, 1997*, in OAS doc. OAS/Ser.L/V/III.39, doc. 5, *Annual Report of the Inter-American Court of Human Rights 1997*, p. 296, para. 51.

[129] Ibid., paras. 48 and 52.

[130] Ibid., p. 301, para. 90.

[131] Ibid., pp. 301-302, para. 91.

In the case of *Velásquez Rodríguez*, which concerned the involuntary disappearance of Mr. Velásquez, the Inter-American Court held that

> "156. ... prolonged isolation and deprivation of communication are ***in themselves*** cruel and inhuman treatment, harmful to the psychological and moral integrity of the person and a violation of the right of any detainee to respect for his inherent dignity as a human being. Such treatment, therefore, violates Article 5 of the Convention, which recognizes the right to integrity of the person...".[132]

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The ***link between lack of prompt judicial intervention, isolation and torture*** was highlighted in the *Aksoy* case, where, as was seen in subsection 2.3.2 above, the applicant had been subjected to torture in violation of article 3 of the European Convention on Human Rights. In this case, the applicant was held incommunicado for at least fourteen days without judicial intervention, and then appeared before the public prosecutor with injuries to his arms. Although the Court accepted that the investigation of terrorist offences "undoubtedly presents the authorities with special problems", it could not accept that it is necessary to hold a suspect for fourteen days without judicial intervention; this period was "exceptionally long, and left the applicant vulnerable not only to arbitrary interference with his right to liberty but also to torture".[133] Prompt judicial intervention to examine the lawfulness of a deprivation of liberty is thus instrumental in ensuring respect for a detained person's physical and mental integrity.

While not unlawful as such, the use of solitary confinement should be limited to exceptional circumstances, in particular during pre-trial detention. The lawfulness of solitary confinement depends on an assessment of its ***purpose***, ***length*** *and* ***conditions****.*

Solitary confinement should only be used when the security or the well-being of persons or property are in danger and should be subject to regular judicial supervision.

Solitary confinement should not be used as a punishment.

Incommunicado detention is a particularly serious form of solitary confinement and should be declared illegal. Prolonged isolation constitutes ***per se*** *torture and cruel and inhuman treatment.*

It is unlawful to prevent people held incommunicado from challenging the legality of their detention or from effectively preparing their defence. Prompt judicial intervention to examine the lawfulness of a deprivation of liberty is instrumental in ensuring respect for a detained person's physical and mental integrity.

[132] *I-A Court HR, Case of Velásquez Rodríguez v. Honduras, judgment of July 29, 1988, Series C, No. 4*, p. 148, para. 156; emphasis added. Cf. also ibid., p. 159, para. 187.

[133] *Eur. Court HR, Aksoy v. Turkey, judgment of 18 December 1996, Reports 1996-VI*, p. 2282, para. 78.

5. Contacts with the Outside World

A fundamental premiss when dealing with the right of detainees and prisoners to maintain contact with the world outside the institutions where they are held is that, like free persons, those deprived of their liberty enjoy all the human rights guaranteed by international law, subject of course to those restrictions that are an unavoidable consequence of the confinement.[134] This means, inter alia, that no detainee or prisoner "shall ... be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence" (art. 17 of the International Covenant on Civil and Political Rights).

5.1 Contact with family members and friends: visits and correspondence

Rule 37 of the Standard Minimum Rules provides that "prisoners shall be allowed under necessary supervision to communicate with their family and reputable friends at regular intervals, both by correspondence and by receiving visits." Prisoners who are foreign nationals "shall be allowed reasonable facilities to communicate with the diplomatic and consular representatives of the State to which they belong", or "with the diplomatic representative of the State which takes charge of their interests or any national or international authority whose task it is to protect such persons" (Rule 38(1) and (2)). Furthermore, according to Rule 92:

> "92. An untried prisoner shall be allowed to inform immediately his family of his detention and shall be given all reasonable facilities for communicating with his family and friends, and for receiving visits from them, subject only to restrictions and supervision as are necessary in the interests of the administration of justice and of the security and good order of the institution."

Principle 15 of the Body of Principles provides that "communication of the detained or imprisoned person with the outside world, and in particular his family or counsel, shall not be denied for more than a matter of days". Further, Principle 16(1) of the Body of Principles stipulates that:

> "1. 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 family or other appropriate persons of his choice of his arrest, detention or imprisonment or of the transfer and of the place where he is kept in custody."

[134] Cf. in particular statement by the Human Rights Committee in its General Comment No. 21 on article 10, in *United Nations Compilation of General Comments*, para. 3 at p. 142.

According to Principle 16(4) such notification "shall be made or permitted to be made ***without delay***" (emphasis added), although "the competent authority may ... delay a notification for a reasonable period where exceptional needs of the investigation so require". The United Nations Special Rapporteur on torture has recommended in this respect that "in all circumstances, a relative of the detainee should be informed of the arrest and place of detention within 18 hours",[135] a time-limit that does however seem to be unduly long, given that many cases of severe torture and involuntary disappearance take place during the very first hours following an arrest.

Lastly, according to Principle 19 of the Body of Principles:

> "A detained or imprisoned person shall have the right to be visited by and to correspond with, in particular, members of his family and shall be given adequate opportunity to communicate with the outside world, subject to reasonable conditions and restrictions as specified by law or lawful regulations."

The refusal of the prison authorities to allow a detainee or prisoner to write to, and receive visits by, family members, may violate both article 7 and article 10(1) of the International Covenant on Civil and Political Rights. For instance, in the case of *Espinoza de Polay* referred to above, the author was not only refused visits by his family during the year following his conviction, but was also unable either to receive from, or to send correspondence to, his family. These facts constituted ***inhuman treatment*** contrary to article 7 of the Covenant and also violated article 10(1).[136] However, it is not clear exactly when, and how frequently, in the Committee's view, a prisoner should be allowed to see or communicate with his family.

In the case of *Estrella*, article 17 read in conjunction with article 10(1) was violated because of the extent to which the author's correspondence was censored and restricted at Libertad prison in Uruguay.[137] Mr. Estrella claimed that prison officials arbitrarily deleted sentences and refused to dispatch letters; during his entire detention of two years and four months he was allegedly given only 35 letters and during a seven-month-long period he was given none.[138] With regard to the censorship of Mr. Estrella's correspondence, the Committee accepted

> "... that it is normal for prison authorities to exercise measures of control and censorship over prisoners' correspondence. Nevertheless, article 17 of the Covenant provides that 'no one shall be subjected to arbitrary or unlawful interference with his correspondence'. This requires that any such measures of control or censorship shall be subject to satisfactory legal safeguards against arbitrary application... . Furthermore, the degree of restriction must be consistent with the standards of humane treatment of detained persons required by article 10 (1) of the Covenant. In particular, prisoners should be allowed under necessary supervision to communicate with their family and reputable friends at regular intervals, by

[135]UN doc. E/CN.4/1995/34, *Report of the Special Rapporteur on torture,* para. 926(d).

[136]Communication No. 577/1994, *R. Espinoza de Polay v. Peru* (Views adopted on 6 November 1997), in UN doc. *GAOR*, A/53/40 (vol. II), p. 42, para. 8.6.

[137]Communication No. 74/1980, *M. A. Estrella v. Uruguay* (Views adopted on 29 March 1983), in UN doc. *GAOR*, A/38/40, p. 159, para. 10.

[138]Ibid., p. 154, para. 1.13.

> correspondence as well as by receiving visits. On the basis of the information before it, the Committee finds that Miguel Angel Estrella's correspondence was censored and restricted at Libertad prison to an extent which the State party has not justified as compatible with article 17 read in conjunction with article 10 (1)of the Covenant."[139]

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The most detailed arguments relating to prisoners' correspondence have been made by the European Court of Human Rights, and the relevant complaints have been examined under articles 6(1) and 8 of the European Convention on Human Rights, these articles respectively guaranteeing, among others, the right of access to a court and the right to respect for one's correspondence. As far as article 6(1) is concerned, it will be considered below under section 5.2.

While article 8(1) of the European Convention provides that "everyone has the right to respect for his private and family life, his home and his correspondence", paragraph 2 allows for the following restrictions on the exercise of this right:

> "2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

Whenever a detainee's or a prisoner's correspondence has been stopped or delayed, such measures must consequently, in order to be lawful, be taken "in accordance with the law" for one or more of the legitimate aims enumerated therein and be "necessary in a democratic society" for such aim or aims. However, most problems raised before the international monitoring organs have concerned the interference with correspondence to lawyers rather than family members, and it is that particular aspect that will be emphasized below.

5.1.1 The rights of visitors to detainees and prisoners

The rights of ***visitors*** to people deprived of their liberty arose under the American Convention on Human Rights in a case against Argentina. The complaint concerned the situation of a woman and her thirteen-year-old daughter, both of whom were required to undergo a vaginal inspection before each personal-contact visit with the man who was their husband and father respectively. The petitioners alleged before the Inter-American Commission on Human Rights that these inspections constituted an illegitimate interference with the exercise of their right to family, as well as their right to privacy, honour and dignity and their right to physical integrity, contrary to articles 17, 11 and 5 of the American Convention on Human Rights.[140]

[139] Ibid., pp. 158-159, para. 9.2.

[140] *I-A Comm. HR, Report No. 38/96, Case 10.506 v. Argentina, October 15, 1996*, in OAS doc. OEA/Ser.L/V/II.95, doc. 7 rev., *Annual Report of the Inter-American Commission on Human Rights 1996*, pp. 58-59, para. 48.

In examining these allegations, the Commission held, ***in the first place***, that "a measure as extreme as the vaginal search or inspection of visitors, that involves a threat of violation to a number of the rights guaranteed under the Convention, must be prescribed by law which clearly specifies the circumstances when such a measure may be imposed and sets forth what conditions must be obeyed by those applying this procedure so that all persons subjected to it are granted as full a guarantee as possible from its arbitrary and abusive application."[141] ***Second***, the Commission did not question the need for general searches prior to entry into prisons; in its view, however, "vaginal searches or inspections are nevertheless an exceptional and very intrusive type of search"; although "the measure in question may be exceptionally adopted to guarantee security in certain specific cases, it cannot be maintained that its systematic application to all visitors is a necessary measure in order to ensure public safety".[142]

The Commission then explained, ***thirdly***, that, for a vaginal search or inspection to be lawful in a particular case, it would have to comply with the following four conditions:

- "it must be absolutely necessary to achieve the security objective in the particular case";
- "there must not exist an alternative option";
- "it should be determined by judicial order"; and, lastly,
- "it must be carried out by an appropriate health professional".[143]

Applying these principles to the case under examination, the Commission found that:

- the measure might "have been justifiable immediately after Mr. X was found to be in possession of explosives", but the same could not be said of "the numerous times the measure was applied prior to that occasion";[144]
- there were "other more reasonable options ... available to the authorities in order to ensure security in the prison";[145]
- the State had a legal duty under the American Convention "to request a judicial order to execute the search", which was not done;[146]
- the petitioners' rights were interfered with since the intrusive measure was not accompanied by "appropriate guarantees". The Commission insisted "that any type of corporal probing ... must be performed by a medical practitioner with the strictest observance of safety and hygiene, given the potential of physical and moral injury to individuals."[147]

[141] Ibid., pp. 63-64, para. 64.

[142] Ibid., p. 64, para. 68.

[143] Ibid., p. 65, para. 72.

[144] Ibid., pp. 65-66, para. 73.

[145] Ibid., p. 67, para. 80.

[146] Ibid., p. 68, para. 83.

[147] Ibid., paras. 84-85.

In conclusion the Commission found that "when the prison authorities ... systematically performed vaginal inspections on Ms. X and [Ms.] Y they violated their rights to physical and moral integrity, in contravention of Article 5 of the Convention."[148] These searches also violated "the petitioners' rights to honour and dignity, protected by Article 11 of the Convention".[149] The requirement that the petitioners undergo such inspections each time they wished to have a personal-contact visit with Mr. X further "interfered unduly with" their family rights as guaranteed by article 17 of the Convention.[150] Lastly, as to the daughter, the searches violated the rights of the child as protected by article 19 of the Convention.[151] In organizing family visits in places of detention, the authorities must, in other words, take care to do so in a manner that also respects the rights and freedoms of the visitors.

5.2 Contact with lawyers: visits and correspondence

Contacts between a lawyer and his clients are privileged and confidential and this basic rule also continues to apply when the clients are deprived of their liberty. Rule 93 of the Standard Minimum Rules stipulates in this respect that:

> "93. For the purposes of his defence, an untried prisoner shall be allowed to apply for free legal aid where such aid is available, and to receive visits from his legal adviser with a view to his defence and to prepare and hand to him confidential instructions. For these purposes, he shall if he so desires be supplied with writing material. Interviews between the prisoner and his legal adviser may be within sight but not within the hearing of a police or institution official."

This same issue is also covered by Principle 18 of the Body of Principles, which reads as follows:

> "1. A detained or imprisoned person shall be entitled to communicate and consult with his legal counsel.
>
> 2. A detained or imprisoned person shall be allowed adequate time and facilities for consultation with his legal counsel.
>
> 3. The right of a detained or imprisoned person to be visited by and to consult and communicate, without delay or censorship and in full confidentiality, with his legal counsel may not be suspended or restricted save in exceptional circumstances, to be specified by law or lawful regulations, when it is considered indispensable by a judicial or other authority in order to maintain security and good order.

[148] Ibid., p. 69, para. 89.

[149] Ibid., p. 70, para. 94.

[150] Ibid., p. 72, para. 100.

[151] Ibid., p. 73, para. 105.

> 4. Interviews between a detained or imprisoned person and his legal counsel may be within sight, but not within the hearing, of a law enforcement official.
>
> 5. Communications between a detained or imprisoned person and his legal counsel mentioned in the present principle shall be inadmissible as evidence against the detained or imprisoned person unless they are connected with a continuing or contemplated crime."

Apart from the importance of seeking legal advice for purposes of preparing a criminal defence, the Human Rights Committee has also emphasized, in connection with the risk of ill-treatment of persons deprived of their liberty, that "the protection of the detainee ... requires that prompt and regular access be given to doctors and lawyers and, under appropriate supervision when the investigation so requires, to family members".[152] The cases referred to above in connection with incommunicado detention illustrate the imperative need for this rule to be effectively applied at all times.

For examples of cases concerning a suspect's right of access to a lawyer in order to defend himself, see above, Chapter 5, section 7, Chapter 6, subsection 6.4 and Chapter 7, subsection 3.5.

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The case of *Tomlin* brought under the International Covenant on Civil and Political Rights concerned the alleged interference with a letter from a prisoner to his lawyer. The author submitted that a letter he wrote to his lawyer on 22 April 1991 concerning his petition for special leave to appeal to the Judicial Committee of the Privy Council was not mailed by the prison authorities until 10 July 1991; the Government denied this, affirming that there was "no evidence whatsoever of any arbitrary or unlawful interference with the author's correspondence".[153] The Human Rights Committee accepted that the material before it "did not reveal that the State party's authorities, in particular the prison administration, withheld the author's letter for a period exceeding two months". It could not therefore conclude that there had been an "arbitrary" interference with the author's right to privacy under article 17(1) of the Covenant.[154] It added nonetheless that it considered that such long delay "could raise an issue in respect of article 14, paragraph 3 (b) of the Covenant inasmuch as it could constitute a breach of the author's right to freely communicate with his counsel. Nevertheless, as this delay did not adversely affect the author's right to prepare adequately his defence", it could not be considered to violate article 14(3)(b).[155]

[152]General Comment No. 20, *United Nations Compilation of General Comments*, p. 140, para. 11.

[153]Communication No. 589/1994, *C. Tomlin v. Jamaica* (Views adopted on 16 July 1996), in UN doc. *GAOR*, A/51/40 (vol. II), p. 193, paras. 3.7 and 4.5.

[154]Ibid., p. 195, para. 8.3.

[155]Ibid., loc. cit.

Questions regarding the Tomlin *case:*

- Should it matter that a delay in sending on a letter from a client-prisoner to his lawyer did not ***in fact*** have any adverse consequences for his legal defence?
- Why did the Human Rights Committee continue to examine the case under article 14 of the Covenant, although it had found that there was no evidence of the authorities having withheld the letter and interfered arbitrarily with the author's right to privacy under article 17(1)?
- Compare the Committee's reasoning with that of the European Court of Human Rights below. What are the differences? Are those differences legally justified?
- Should the Committee in your view uphold its ruling in the *Tomlin* case in future communications?

*****

The question of prisoners' correspondence has been considered on numerous occasions by the European Court of Human Rights, the opinions of which provide important clarifications as to the right of a detainee or prisoner to communicate with his or her lawyer either for defence purposes or in order to complain about prison conditions and treatment. Although the European Court has in principle accepted that it may be necessary to interfere with a prisoner's correspondence for "the prevention of disorder or crime" under article 8(2) of the European Convention on Human Rights, such measures must be proportionate to the legitimate aim pursued in a democratic society and regard must in this respect be had to the Government's margin of appreciation.[156] On the extent of the control of correspondence, the Court has stated:

> "45. It has also been recognised that some measure of control over prisoners' correspondence is called for and is not of itself incompatible with the Convention, regard being paid to the ordinary and reasonable requirements of imprisonment ... . In assessing the permissible extent of such control in general, the fact that the opportunity to write and to receive letters is sometimes the prisoner's only link with the outside world should , however, not be overlooked.
>
> 46. It is clearly in the general interest that any person who wishes to consult a lawyer should be free to do so under conditions which favour full and uninhibited discussion. It is for this reason that the lawyer-client relationship is, in principle, privileged. Indeed, in its *S. v. Switzerland* judgment of 28 November 1991 the Court stressed the importance of a prisoner's right to communicate with counsel out of earshot of the prison authorities. It was considered, in the context of Article 6, that if a lawyer were unable to confer with his client without such surveillance, and receive confidential instructions from him his assistance would lose much of its usefulness, whereas the Convention is intended to guarantee rights that are practical and effective... .

[156] *Eur. Court HR, Case of Campbell v. the United Kingdom, judgment of 25 March 1992, Series A, No. 233*, p. 18, para. 44.

> 47. In the Court's view, similar considerations apply to a prisoner's correspondence with a lawyer concerning contemplated or pending proceedings where the need for confidentiality is equally pressing, particularly where such correspondence relates ... to claims and complaints against the prison authorities. That such correspondence be susceptible to routine scrutiny, particularly by individuals or authorities who may have a direct interest in the subject matter contained therein is not in keeping with the principles of confidentiality and professional privilege attaching to relations between a lawyer and his client.
>
> 48. Admittedly, ... the borderline between mail concerning contemplated litigation and that of a general nature is especially difficult to draw and correspondence with a lawyer may concern matters which have little or nothing to do with litigation. Nevertheless, the Court sees no reason to distinguish between the different categories of correspondence with lawyers which, whatever their purpose, concern matters of a private and confidential character. In principle, such letters are privileged under Article 8.
>
> This means that the prison authorities may open a letter from a lawyer to a prisoner when they have reasonable cause to believe that it contains an illicit enclosure which the normal means of detection have failed to disclose. The letter should, however, only be opened and should not be read. Suitable guarantees preventing the reading of the letter should be provided, e.g. opening the letter in the presence of the prisoner. The reading of a prisoner's mail to and from a lawyer, on the other hand, should only be permitted in exceptional circumstances when the authorities have reasonable cause to believe that the privilege is being abused in that the contents of the letter endanger prison security or the safety of others or are otherwise of a criminal nature. What may be regarded as 'reasonable cause' will depend on all the circumstances but it presupposes the existence of facts or information which would satisfy an objective observer that the privileged channel of communication was being abused... ."[157]

In the case of *Campbell*, the European Court stated furthermore with regard to the ***automatic control of correspondence*** that "the right to respect for correspondence is of special importance in a prison context where it may be more difficult for a legal adviser to visit his client in person because ... of the distant location of the prison", and that "the objective of confidential communication with a lawyer could not be achieved if this means of communication were the subject of automatic control".[158] Finally, "the mere possibility of abuse" by solicitors who might not comply with the rules of their profession "is outweighed by the need to respect the confidentiality attached to the lawyer-client relationship".[159] Considering that there was "no pressing social need" for the opening and reading of Mr. Campbell's correspondence with his solicitor, it constituted a violation of article 8 of the European Convention.[160]

[157] Ibid., pp. 18-19, paras. 45-48.

[158] Ibid., p. 20, para. 50.

[159] Ibid., para. 52 at p. 21.

[160] Ibid., p. 21, paras. 53-54.

In the *Golder* case, the applicant complained about the refusal of the Home Secretary to grant him permission to bring a civil action for libel against a prison officer. The Court concluded that it "was not for the Home Secretary himself to appraise the prospects of the action contemplated" by Mr. Golder, but that it was "for an independent and impartial court to rule on any claim that might be brought. In declining to accord the leave which had been requested, the Home Secretary failed to respect, in the person of Golder, the right to go before a court as guaranteed by Article 6 § 1".[161] In the view of the European Court, the refusal to let Mr. Golder correspond with his lawyer for the purpose of seeking legal advice with regard to the libel action also violated article 8 of the European Convention in that it was not an interference with his right to respect for his correspondence that could be justified as being necessary in a democratic society for any of the legitimate purposes enumerated therein.[162]

The case of *Silver and Others* raised numerous instances of interference with prisoners' correspondence, and article 8 of the European Convention had inter alia been ***violated*** where the stopping of letters was based on the following principal or subsidiary grounds: (1) restriction on communication in connection with any legal or other business, including a letter to the National Council for Civil Liberties; (2) prohibition on complaints calculated to hold the authorities up to contempt; and (3) prohibition on the inclusion in letters to legal advisers and Members of Parliament of complaints that had not yet been through the prior internal prison ventilation system.[163] The stopping of the letters concerned was not considered to be necessary in a democratic society for the various purposes indicated by the United Kingdom Government.

Article 8 of the European Convention was also violated in the case of *McCallum* insofar as, for instance, the applicant's letters to his solicitor and Member of Parliament had been stopped because they contained complaints about prison treatment that should first have been addressed to the competent prison authorities (prior internal ventilation rule); the fact that the Prison Visiting Committee had imposed on the applicant a disciplinary award which included ***an absolute prohibition for 28 days on all correspondence***, also violated article 8 of the Convention.[164]

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Lastly, it should be noted in this respect that while the African Charter on Human and Peoples' Rights does not guarantee the right to respect for one's private life, family life and correspondence, this right is contained in article 11 of the American Convention on Human Rights.

[161] *Eur. Court HR, Golder Case v. the United Kingdom, judgment of 21 February 1975, Series A, No. 18*, para. 40 at p. 20.

[162] Ibid., pp. 21-22, para. 45.

[163] *Eur. Court HR, Case of Silver and Others v. the United Kingdom, judgment of 25 March 1983, Series A, No. 61*, pp. 38-38, para. 99.

[164] *Eur. Court HR, McCallum Case v. the United Kingdom, judgment of 30 August 1990, Series A, No. 183*, p. 15, para. 31.

Persons deprived of their liberty have the right to enjoy the same human rights as persons at liberty, subject only to those restrictions that are an unavoidable consequence of the confinement.

***First**, detainees and prisoners have the right to contact their families or friends without delay upon arrest or detention. Further, throughout their deprivation of liberty they have a right to maintain contact with families and friends through visits and correspondence at regular intervals. Any interference with this right must not be arbitrary (International Covenant on Civil and Political Rights) and must be based on law, imposed for legitimate purposes, and necessary in a democratic society for such purposes (European Convention on Human Rights).*

***Second**, persons deprived of their liberty have a right to be regularly visited by, and consult and communicate with, their lawyers through correspondence that shall be transmitted without delay and preserving the full confidentiality of the lawyer-client relationship. During visits by their lawyers, detainees and prisoners shall be able to confer within sight but not within the hearing of law enforcement officials.*

In order to help ensure their right to personal security, all persons deprived of their liberty have a right to unhindered communication for the purpose of bringing complaints concerning, in particular, allegedly unsatisfactory conditions of detention, torture and other forms of ill-treatment.

In organizing family visits, prison authorities must ensure that the rights and freedoms of the visiting persons are respected.

6. Inspection of Places of Detention and Complaints Procedures

6.1 Inspection of places of detention

As pointed out by the United Nations Special Rapporteur on the question of torture, "regular inspection of places of detention, especially when carried out as part of a system of periodic visits, constitutes one of the most effective preventive measures against torture. Inspections of all places of detention, including police lock-ups, pre-trial detention centres, security service premises, administrative detention areas and prisons, should be conducted by teams of *independent* experts", whose members "should be afforded an opportunity to speak privately with detainees" and should also report publicly on their findings.[165] Given the importance of the regular inspection of penal institutions, the Human Rights Committee has expressed concern "at the lack of an

[165]UN doc. E/CN.4/1995/34, *Report of the Special Rapporteur on torture,* para. 926(c).

independent system of supervision of: (a) abuses of human rights by police officers; (b) the conditions in penal institutions, including those for juvenile offenders; and (c) complaints of violence or other abuse by members of the Prison Service".[166]

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The Committee against Torture has also recommended that "independent governmental bodies consisting of persons of high moral standing should be appointed to take over the inspection of detention centres and places of imprisonment."[167]

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Similarly, the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment has recommended that the Swedish authorities "explore the possibility of establishing a system under which each prison establishment would be visited on a regular basis by an independent body, which would possess powers to inspect the prison's premises and hear complaints from inmates about their treatment in the establishment".[168]

6.2 Complaints procedures (See also above, section 2.2, "Legal responsibilities of States")

In General Comment No. 20, the Human Rights Committee emphasized that "the right to lodge complaints against maltreatment prohibited by article 7 must be recognized in the domestic law", and that "complaints must be investigated promptly and impartially by competent authorities so as to make the remedy effective".[169] This is simply a logical consequence of the twin duties the States parties have undertaken under article 2(1) and (3) of the Covenant, "to respect and to ensure" the rights recognized therein and to provide alleged victims of violations with an "effective remedy". The Human Rights Committee has emphasized that "the need to make effective remedies available to any person whose rights are violated is particularly urgent in respect of the obligations embodied in articles 7, 9 and 10 of the Covenant."[170] On another occasion, it recommended that the State party "establish an independent body with authority to receive and investigate all complaints of excessive use of force and other abuses of power by the police and other security forces".[171]

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[166] See as to Japan, UN doc. *GAOR*, A/54/40 (vol. I), p. 67, para. 350. See also as to Mexico, insofar as there was no independent body to investigate the substantial number of complaints regarding acts of torture and other forms of ill-treatment, ibid., p. 62, para. 318.

[167] See with regard to Namibia, UN doc. *GAOR*, A/52/44, p. 37, para. 244.

[168] Council of Europe doc. CPT/Inf (92) 4, *Report to the Swedish Government on the Visit to Sweden Carried out by the European Committee for the Prevention or Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 5 to 14 May 1991*, p. 57, para. 5(a).

[169] *United Nations Compilation of General Comments*, p. 141, para. 14.

[170] As to Latvia, see UN doc. *GAOR*, A/50/40, p. 63, para. 344.

[171] As to Chile, see UN doc. *GAOR*, A/54/40 (vol. I), p. 45, para. 206.

The Committee against Torture has also recommended that the States parties to the Convention against Torture "introduce an effective and reliable complaint system that will allow the victims of torture and other forms of cruel, inhuman or degrading treatment or punishment to file complaints",[172] such as against members of the police department.[173] The Committee has further suggested "the establishment of a central register containing adequate statistical data about complaints of torture and other inhuman or degrading treatment or punishment, investigation of such complaints, the time within which the investigation is conducted and any prosecution mounted thereafter and its outcome."[174]

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Article 25(1) of the American Convention on Human Rights guarantees the right to judicial protection in that "everyone has the right to simple and prompt recourse, or any other effective recourse, to a competent court or tribunal for protection against acts that violate his fundamental rights recognized by the constitution or laws of the State concerned or by this Convention."

Inherently linked to this right to an effective recourse for alleged human rights violations is, of course, the duty of the States parties to investigate and punish the allegations concerned, a duty that is based on article 1(1) of the American Convention.[175] The obligation to investigate "must be undertaken in a serious manner and not as a mere formality preordained to be ineffective", and it "must have an objective and be assumed by the State as its own legal duty".[176]

It follows that all complaints as to torture and other forms of ill-treatment of persons deprived of their liberty or complaints regarding any other aspect of detention and imprisonment that might violate human rights standards must be investigated in such manner, that "appropriate punishment" must be imposed on those responsible for the human rights violations concerned, and that the victims must in turn be ensured "adequate compensation".[177] It is recalled that the duty to investigate is an essential element in the obligation of the States parties to "take reasonable steps to ***prevent*** human rights violations";[178] if the perpetrators of such violations know there will be no serious investigations of their acts, they will have no motivation to stop committing them, with the likely result that a climate of ***impunity*** will take hold in the society in question.

[172]See with regard to Poland, UN doc. *GAOR*, A/55/44, p. 22, para. 94.

[173]See with regard to Namibia, UN doc. *GAOR*, A/52/44, p. 37, para. 244.

[174]See with regard to Cuba, UN doc. *GAOR*, A/53/44, p. 14, para. 118(g).

[175]*I-A Court HR, Villagrán Morales et al. Case (The "Street Children" Case), judgment of November 19, 1999, Series C, No. 63*, pp. 194-195, para. 225.

[176]*I-A Court HR, Velásquez Rodríguez Case, judgment of July 29, 1988, Series C, No. 4*, p. 156, para. 177.

[177]Ibid., p. 155, para. 174.

[178]Ibid., loc. cit.; emphasis added.

The Inter-American Court has thus found violations of the States parties' legal duties to investigate and punish in several cases where people have disappeared or been found dead after having been abducted, held illegally and tortured.[179]

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Article 13 of the European Convention on Human Rights also provides the right to "an effective remedy" and, in the words of the European Court of Human Rights, this means that there must be available at the national level "a remedy to enforce the substance of the Convention rights and freedoms in whatever form they might happen to be secured in the domestic legal order". Although "the Contracting States are afforded some discretion as to the manner in which they conform to their Convention obligations under this provision", the remedy required thereby "must be 'effective' in practice as well as in law, in particular in the sense that its exercise must not be unjustifiably hindered by the acts or omissions of the authorities of the respondent State".[180] In the case of *Çakici*, which concerned the disappearance of the applicant's brother, the Court held furthermore that:

> "Given the fundamental importance of the rights in issue, the right to protection of life and freedom from torture and ill-treatment, Article 13 imposes, without prejudice to any other remedy available under the domestic system, an obligation on States to carry out a thorough and effective investigation apt to lead to those responsible being identified and punished and in which the complainant has effective access to the investigative proceedings."[181]

Article 13 was thus violated in the case of *Çakici* because the Turkish Government had failed to comply with its obligation "to carry out an effective investigation into the disappearance of the applicant's brother", a failure that also "undermined the effectiveness of any other remedies which might have existed".[182]

In this respect, the legal obligations of the Contracting States are thus twofold, in that they have an obligation both effectively to investigate alleged human rights abuses and to provide effective remedies to the actual victims.

The regular inspection of all places of detention by independent teams is an effective measure to prevent the occurrence of torture and other forms of ill-treatment and should be organized systematically in all countries. To maximize the effect of such visits, the team members must have uninhibited and confidential access to all detainees and prisoners and make a public report on their findings.

[179] See e.g. *I-A Court HR, Velásquez Rodríguez Case, judgment of July 29, 1988, Series C, No. 4* and *I-A Court HR, Villagrán Morales et al. Case (The "Street Children" Case), judgment of November 19, 1999, Series C, No. 63.*

[180] *Eur. Court HR, Case of Çakici, judgment of 8 July 1999, Reports 1999-IV*, p. 617, para. 112.

[181] Ibid., p. 618, para. 113.

[182] Ibid., para. 114.

Persons deprived of their liberty have a right to an effective remedy for alleged violations of their human rights, including, in particular, the right to freedom from torture and other forms of ill-treatment, and must to this effect have unhindered access to effective complaints procedures which should result in prompt, serious and objective investigations of the complaints by the authorities.

Proven torture or other forms of ill-treatment must be adequately punished and appropriate compensation granted to the victim.

The existence of efficient complaints procedures and the consistent and vigorous investigation and prosecution of grievances of persons deprived of their liberty have a strong dissuasive effect on the incidence of all forms of torture and cruel, inhuman or degrading treatment and punishment.

7. The Role of Judges, Prosecutors and Lawyers in Preventing and Remedying Unlawful Treatment of Persons Deprived of their Liberty

As shown in this chapter, States also have a legal duty to guarantee human rights to persons deprived of their liberty, and to provide independent, impartial and effective complaints procedures which can process alleged violations of their rights and provide adequate remedies whenever a person's rights are found to have been violated. Much remains to be done in this field, given that torture and other forms of ill-treatment of detainees and prisoners, including the unlawful admission of confessions given under duress, continue to be commonplace in many countries. The role of judges, prosecutors and lawyers in ensuring ***both*** the true enjoyment of these rights ***and*** the effective functioning of the complaints system is therefore indispensable and multifaceted.

Lawyers will at all times have to protect and defend their clients' interests, and must remain vigilant to any signs of torture or other forms of ill-treatment and vigorously pursue any avenues open to them to complain against such treatment. If the domestic avenues of appeal are not functioning, a remedy of last resort may be to pursue the complaints before a competent body at the international level.

As shown throughout this Manual, ***prosecutors*** have a special obligation to take all necessary steps to bring to justice those who are suspected of having committed human rights violations such as torture or cruel, inhuman or degrading treatment. Their work is a key both to the remedying of past human rights violations and to the prevention of future violations. The effective work of prosecutors does of course

presuppose that they are able to work in an independent and impartial manner, without interference by the Executive (cf. Chapter 4). Prosecutors are not allowed to rely on evidence obtained by unlawful means involving human rights violations.

Lastly, ***judges*** too must be able to decide independently and impartially all cases of alleged human rights violations. They must at all times refuse to accept confessions that have been obtained from suspects by means of torture or any form of duress. Further, as lawyers and prosecutors, in particular in countries where torture and other forms of ill-treatment are known to exist, they must constantly be on the watch for any signs of such treatment being administered, and take the necessary legal steps to remedy and put an end to such situations.

Where the Government is unwilling or unable to act forcefully to eradicate torture, judges, prosecutors and lawyers have a professional responsibility to do their utmost to provide help to the victims and to prevent future occurrences of such treatment, as explained in this chapter. To this end, they will also have to keep themselves continuously informed about the meaning of the international human rights standards applied by the international monitoring organs.

Judges, prosecutors and lawyers have a key role to play in the protection of the human rights of persons deprived of their liberty and must be allowed to carry out their respective legal duties in true independence and impartiality.

8. Concluding Remarks

This chapter has provided an overview of some fundamental human rights which persons deprived of their liberty continue to enjoy throughout their confinement, including, in particular, their right to personal integrity and security and the consequential right to freedom from torture and other forms of ill-treatment. While States have a legal duty under international human rights law to guarantee these rights and to provide complaints procedures including effective remedies, such procedures and remedies require the full participation of the legal professions in order to become a true reality. Where the legal professions are unwilling to assume this role, individuals will live in a legal vacuum and be an easy prey to injustice. It is the legal duty of States under international human rights law to ensure that judges, prosecutors and lawyers are able to carry out these duties in a spirit of true independence and impartiality.